



Bava Basra Daf 80

ACQUIRING BIRDS FROM A DOVECOTE

בבבא בתרא דף פ'. במשנה, הלוקח פירות שובך מהבירו, מפריה בריכה ראשונה. פירות כוורת, נוטל ג' נחילים, ומסרס.

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Acquiring the dovecote for its birds

*Why this isn't classified as a *davar shelo ba l'olam*/When one transfers the "fruits" of his dovecote it is as if he is transferring the dovecote for the "fruits"/Whether this must be stated explicitly/The difference between "fruits" of a dovecote versus fruits of a tree/Profits of wine/Rent money*

-רמב"ם, מגיד משנה, ראב"ד, כסף משנה, רבי עקיבא איגר-

א. Concerning these *Halachos* (that when one buys the "fruits" of a dovecote, he must leave the first group born, and when buying the "fruits" of a beehive, he takes the first 3 groups), the *Rishonim* are bothered, for the *Mishnah* discusses one purchasing birds that haven't yet been born, where the *din* is to

set aside the first group, and similar *Halachos* apply to a beehive, yet the general rule is that one cannot transfer ownership of a *davar she'lo ba l'olam* (something that hasn't yet come into existence). As such, it is questionable how a sale of unborn birds can take effect. To answer, several approaches are offered. [1]

Indeed, the *Rambam*¹ writes that when one sells the "fruits" of a dovecote or beehive, it takes effect, and there isn't an issue of *davar she'lo ba l'olam*. Concerning why, he continues that the seller isn't transferring the birds or honey itself. Instead, he is

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[1] The *Nemukei Yosef*¹ answers the question, asserting that the *Mishnah* is referring to the *din* of one (selling birds) who doesn't care to back out of the deal because it is a *davar she'lo ba l'olam*, with both parties agreeing regardless.

However, there is what to consider (about his words), for being that a *kinyan* is ineffective when it comes to a *davar she'lo ba l'olam*, their decision to do make the deal anyway shouldn't be of significance to be mentioned in the *Mishnah* with the relevant *Halachos*, for it has nothing to do with the power of the initial *kinyan*. Perhaps though it is possible his intention is to refer to the *Tosafos* in *Bava Metzia*¹², where they relate that although one can back out of a *kinyan* involving a *davar she'lo ba l'olam*, he should refrain from doing so, to remain trustworthy. As such, there are practical applications for how to do so.

The *Yad Ramah* also asks this question (of how one can sell birds that aren't *ba l'olam*). In his initial approach, he writes that our *Mishnah* is in accordance with *Rebbi Meir*, who holds that one can transfer ownership of a *davar she'lo ba l'olam*.

However, the *Beis Yitzchok*¹³ comments how several times in *Shas*, *Rebbi Yochanan* asserts that the *Halacha* follows an anonymous *Mishnah*. As such, if our anonymous *Mishnah* follows *Rebbi Meir's* opinion that one can transfer ownership of a *davar she'lo ba l'olam*, it becomes questionable how *Rebbi Yochanan* in *Kiddushin*¹⁴ can *pasken* that one cannot transfer ownership of a *davar she'lo ba l'olam*, for to him the *Halacha* follows an anonymous *Mishnah*. To answer, he writes that there is another anonymous *Mishnah* in *Kiddushin* asserting that one cannot transfer ownership of a *davar she'lo ba l'olam*, and *Rebbi Yochanan* chooses to *pasken* like that anonymous *Mishnah*.

selling the dovecote for its birds, or the beehive for its honey. It is like where one sells a channel of water to his friend, where the purpose is for him to benefit from anything he can trap in the channel. So too here, the dovecote is sold for its birds, something comparable to a tree being sold for its fruits. In truth, these *dinnim* are all comparable to one who rents a house, where the renter acquires it for all benefits he can get out of the house.

On his words, the *Maggid Mishnah* (there) relates that the *Rambam* is coming to explain our *Mishnah's* assertion that when one buys the “fruits” of a dovecote, he must leave aside the first group, practically meaning that the sale does take effect. The *Rambam* comes to shed light on why this doesn't fall into the category of *davar she'lo ba l'olam*, asserting that when one sells the “fruits” of his dovecote, it is akin to selling a tree for the purpose of taking its fruits, where the *kinyan* is effective because the tree itself is already in existence. So too here, although the wording “fruits of the dovecote” is used, it is as if the seller said, “the dovecote for its fruits”.

On the other hand, the *Ra'aved* (there) disagrees with the *Rambam*, writing that when the sale of “fruits” of a dovecote takes effect, without there being an issue of *davar she'lo ba l'olam*, the *din* applies specifically where the seller explicitly states that he is selling the dovecote for its “fruits”. Similarly, the *Yad Ramah* also wonders why the *Mishnah* doesn't fall into the category of *davar she'lo ba l'olam*, and in his second answer, he writes that we are discussing where the seller states that he is selling the dovecote for its “fruits”. His words mimic the *Ra'aved* who holds that an explicit statement is necessary, thereby causing the *din* to be comparable to one who sells a tree to make use of it for its fruits.

To deal with this question of how the *Rambam*

can say it is as if the seller said he was transferring the dovecote for its “fruits” even though this concept works by a tree only where an explicit statement is made (that he is selling the tree for its fruits), the *Kesef Mishnah* (there) offers 2 approaches. He first writes that when one sells the fruits of his tree, the implication is that he is merely selling fruits that will grow in the future, not the tree itself for the sake of its fruits. As for the proof to this, it lies in the fact that the buyer has no right to access the tree without the permission of the seller, as most don't need regular maintenance, with the fruits growing without intervention. Therefore, there isn't any inherent revelation that he was selling the tree for its fruits. Conversely, when one buys the “fruits” of a dovecote, there is a daily need to access the dovecote to feed the birds and collect the “fruits”. Similarly, when one buys the “fruits” of a beehive, there is a daily need to remove that day's batch of honey. As such, even without an explicit statement, it is automatically understood that the dovecote (or beehive) is being sold for its “fruits”. [However, the *Bach*² comments that he doesn't know of any support from the *Gemara* or *Poskim* for this approach.]

The *Kesef Mishnah* then offers a second approach, writing that a dovecote and beehive are subservient to their “fruits”, for they don't inherently have significant value. As such, in all scenarios, it is automatically assumed that they are being sold for the sake of their “fruits”. Conversely, when it comes to a tree, the fruits are subservient to the tree, which is why an explicit statement is necessary to show that the tree is being sold for the sake of its fruits. [2]

*Rebbi Akiva Eigar*³ also raises the *Kesef Mishnah's* second approach, writing that the difference between “fruits” of a dovecote versus fruits of a tree lies in the fact that a dovecote is subservient to its “fruits”, which is why it is automatically assumed a seller's

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[2] The *Meromei Sadeh* offers an alternative approach in the *Rambam*. He writes that when the *Rambam* says we see it as if the seller said the dovecote for its “fruits”, this works because *Chazal* made a decree that when it comes to normal forms of commerce, they work even for *davar she'lo ba l'olam*. We find this concept by prices in the market, an area

comparable to a *davar she'lo ba l'olam*. As such, when it comes to birds of a dovecote, being that it is normal to acquire birds and honey in such a fashion, *Chazal* arranged one can sell a dovecote or beehive for their “fruits”, even though an explicit statement wasn't made.

intention is to sell the dovecote for its “fruits”. Conversely, when one sells fruits of a tree, being that the fruits are subservient to the tree, we cannot assume that although the seller said the fruits of the tree, he meant the tree for its fruits.

He then adds some depth to the concept, asserting that when we say “fruits” of a dovecote is synonymous with a dovecote for its fruits, this isn’t only because the dovecote is subservient to its “fruits”. Instead, even if the dovecote and its fruits would have equal value, we would still be able to make this assumption. Only when one sells the fruits of a tree, there we say that since fruits are subservient to the tree, it is why we cannot assume the tree was being sold for its fruits. Once the seller says he is selling the fruits of the tree, we cannot assume he is selling the main thing for the sake of the subservient fruits (unless he says so explicitly).

Using this approach, he explains the words of *Tosafos* in *Gittin*⁴. *Tosafos* there relate that when one offers the profits of his wine to his friend, the gift takes effect, and there isn’t an issue of *davar she’lo ba l’olam*. Although the wine hasn’t been sold yet and the profits don’t exist, it is considered as if he said he was selling the wine for its profits, making the *din*

akin to one who sells a tree for its fruits. *Rebbi Akiva Eigar* comments that when selling the profits of the wine, we see we can assume the wine was being sold for the sake of its profits even though this isn’t the case by a tree. When it comes to a tree, we don’t automatically say it was being sold for its fruits, for the fruits are subservient to the tree. Conversely, when it comes to wine and its profits, they are both equal, with neither being subservient to the second. Therefore, although the seller mentions the profits of his wine, we can assume he is selling the wine for its profits, and there isn’t an issue of *davar she’lo ba l’olam*.

He then writes that to *Tosafos* who hold “profits of wine” is assumed to mean “wine for its profits”, the same will certainly be true where one gifts the “profit of his house”, and we will assume the intention is to give the house for its profit, for the house and the profit aren’t subservient to each other. On the other hand, where one gifts his friends with the “rent money of his house”, we won’t assume the intention is to give the house for its rent money, for there the rent money is subservient to the house itself. It is therefore comparable to fruits of a tree, where because the fruits are subservient to the tree, we don’t automatically say the tree was being given over for its fruits.

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When it works to sell a tree for its fruits, whether it is because the fruits grow from the tree

Transferring a dovecote for its “fruits” works even though the birds don’t grow from the dovecote/Whether one can transfer a net for its fish/Whether there is a difference between a dovecote for its birds versus a net for its fish

-רמב"ם, סמ"ע, רשב"א, קצות החושן, אור שמח, אולם המשפט-

ב. The *Shulchan Aruch*⁵ cites the (previously mentioned) *Rambam* that when one sells the “fruits” of his dovecote, it isn’t considered a *davar she’lo ba l’olam*, for his intention is to sell the dovecote for its “fruits”, akin to one who sells a channel of water for the purpose of trapping fish from it.

The *Smah*⁶ comments that when the *Rambam* likens our case to one who sells a channel of water for the fish that will become trapped in it, he does so

to ward off an argument that our case isn’t comparable to selling a tree for its fruits. One might reason that when it is possible to sell a tree for its fruits, it works because the fruits grow out of the tree itself. Conversely, when it comes to a dovecote, even if one explicitly states that he wishes to sell the dovecote for its “fruits”, there would be room to say it shouldn’t work, for the birds don’t grow out of the dovecote, unlike fruits of a tree. As such, this is why the *Rambam* also compares our case to the sale of a water channel for what can be trapped in it, for when it comes to a water channel, the fish don’t grow from the water. Instead, they merely grow in the water. Nevertheless, the fish can be sold through the

channel, just like when selling a tree for its fruits, thereby making it reasonable the same will be true for a dove-cote.

Interestingly, the *Rashba*⁷ writes that the same way a person cannot sell the “fish” that will eventually appear in his net, so too he cannot sell the net for its fish. As to why, he asserts that it isn’t comparable to selling a tree for its fruits, for there the fruits grow out of the tree. Even if we say it is possible to transfer the “work” of one’s hands although the work doesn’t sprout from his hands like fruits grow out of a tree, such a thing works because the work is produced through the toil of the hands. Conversely, when it comes to a net, the trapping doesn’t happen through the toil of the net. Instead, it is the fish themselves that enter its clutches. [3]

The *Ketzos Ha’choshen*⁸ points out that when the *Rambam* says one can sell the “fruits” of a dove-cote because it is as if he sold the dove-cote for its “fruits”, it is clear he disagrees with the *Rashba*, for birds don’t grow from the dove-cote either. Nevertheless, he stills holds it can be compared to selling a tree for its fruits, and the same should then apply to selling a net for its fish as well.

On the other hand, the *Ohr Sameiach*⁹ asserts that there is a difference between selling a dove-cote for its birds versus selling a net for its fish. He writes that when the *Rambam* says one can sell a dove-cote for its birds, this is because the dove-cote gets set up in his property,

and the birds are then attracted to the dove-cote, a reasoning that applies to a beehive as well. Practically speaking, ownership of the birds or bees come about through the power of the dove-cote or beehive. Conversely, when one sells a net for its fish, if the net remains in his courtyard, it will not be successful in trapping anything. This can only happen through bringing it to rivers or other ownerless locations. It is also unclear whether it will be possible to set it up, and even when set up, it isn’t in his property, thereby nullifying a comparison to a dove-cote or beehive. [He then writes that this difference seems to be obvious, just it is strange the *Ketzos* doesn’t mention it.]

On a similar note, the *Ulam Ha’mishpat*¹⁰ also differentiates between a dove-cote for its birds versus a net for its fish. He writes that when it comes to a dove-cote, the birds enter without any human intervention. Therefore, it is possible to transfer ownership of the dove-cote for any birds that will eventually enter. Conversely, when it comes to a net for its fish, the fish can only come through first setting up the net, and if someone else takes the net and sets it up in the sea, the fish caught will belong to the one who set it up, not the net’s owner. As such, it isn’t included in the ownership of the net that any fish entering the net will automatically belong to its owner. This makes it incomparable to a dove-cote that stays in one place, where the dove-cote itself is the source for the birds entering. [4]

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[3] He proves this from how the *Gemara* in *Bava Metzia*¹⁵ relates that *Chazal* enacted one can presell the daily contents of his fish net, although they are a *davar she’lo ba l’olam* (because it is necessary for his livelihood). Now, if we would say one can sell a net for its fish, it wouldn’t be necessary for *Chazal* to have made this enactment. As such, it is clear this doesn’t work.

[4] If we go with the *Ketzos*’s approach in the *Rashba*, who holds that the same way one cannot sell a net for its fish (because the

fish don’t grow from the net) so too one cannot sell a dove-cote for its “fruits” (because they don’t grow from the dove-cote), it comes out that to the *Rashba* we cannot reconcile our *Mishnah* with the words of the *Rambam* or the *Ra’aved*. Instead, it is necessary to say he holds like the *Nemukei Yosef* or *Re’av* (mentioned earlier in the notes).

מראי מקומות

1. פרק כ"ג הלכות מכירה ה"ט 2. חו"מ ס' רי"ג 3. שו"ת מהדור"ק ס' קמ"א (ד"ה ומ"מ) 4. דף ס"ו. (ד"ה דמי, בתירוץ א') 5. חו"מ ס' רי"ג סעיף א' 6. שם סק"א 7. בחי' כתובות דף נ"ט: (ד"ה ולעיקר, ומיהו) 8. ס' ר"ט סק"ד 9. פרק כ"ג הלכות מכירה ה"ט 10. חו"מ ס' רי"ג סעיף א' 11. (דף מ': מדפי הרי"ף) 12. דף ס"ז. (ד"ה התם) 13. שו"ת חו"מ סוף ס' ס"ג 14. דף ס"ב. 15. דף ט"ז.