UNJUST ENRICHMENT IN JEWISH LAW

UNJUST ENRICHMENT

IN JEWISH LAW

By

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Preface

The term "unjust enrichment" refers to all those situations in which one person derives material benefit from another without being legally entitled to such benefit. The central question is whether, and to what extent, the person from whom the benefit is derived (the benefactor) is entitled to something in return from the recipient of the benefit. Since no agreement exists on the matter, no action can lie in contract. Similarly, an action in tort will not be available when the donor has not been injured by the recipient's enjoyment of the benefit. Is there no way for the benefactor to assert a right to compensation?

A person who parks his car in a lot belonging to a neighbor may or may not have to pay. If he does not usually pay to park his car, it may be argued that he has derived no material benefit, and if the lot is not intended to provide parking for a fee, it may be argued that the lot's owner has sustained no loss.

In the foregoing example, benefit was obtained by an act of the beneficiary. On the other hand, a benefit may also be occasioned by an act of the benefactor. So, for instance, A may make improvements to B's property by mistake or even intentionally. If he does so intending not to receive anything in return, he is certainly not entitled to be compensated. If, on the other hand, A intended to receive

something in exchange, does his action, undertaken without B's knowledge, entitle him to be paid?

Benefit may also come to a person who acts as an agent of another person. When A represents B in a transaction, and C grants some unanticipated benefit as a consequence of that transaction, to whom does the benefit belong?

The issues discussed in this study were originally examined in preparation of a new Israeli statute concerning unjust enrichment. The new legislation, passed by the Knesset in 1979 (see Appendix Two), abandons the principles of English law in this area in favor of the approach of Jewish sources. In the bill's introduction we read:

> The law proposed herein adopts the approach of Jewish law on a number of points: One who improves another's property is entitled to recover; it adopts the principle "one benefits and the other sustains no loss" as a factor to be considered in exempting the recipient from the obligation to reimburse; and it entitles one who rescues the property of another to indemnification, with the goal of encouraging acts of rescue.

These studies were originally written in Hebrew and published in *Osher veLo beMishpat* (1987).

I would like to thank Chaim Mayerson for translating these studies into English. I would also like to thank David Louvish for his comments, Baruch Kahane for preparing the indices, Ariel Vardi for his book design, and Moshe Kaplan for the typesetting and preparation for printing.

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Part One

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Chapter One

INTRODUCTION

The subject of the present study has been a matter of considerable controversy among legal scholars.[1] The usual Common Law classification of obligations into contract and torts has led to the application of the rubric of quasi-contract or implied contract, in cases where one benefits from the property of another. There is a certain artificiality about this, however, and in recent years the tendency has been to regard such obligations as an independent category, to which the term "unjust enrichment" is applied.[2]

[1] See Goff and Jones, *Law of Restitution* (3rd ed., 1987); and J. P. Dawson, *Unjust Enrichment* (1951), chap. 1. See also D. Friedman, *Dinei Asiyat Osher veLo beMishpat* (2nd ed., Jerusalem, 1998), pt. 1; on the topic of our survey, "One Benefits While the Other Sustains No Loss," see particularly ibid., pt. 3.

[2] The Hebrew term, *osher velo bemishpat*, was coined by the late Judge S. Z. Heshin on the basis of Jeremiah 17:11: "...he that getteth riches, and not by right [*oseh osher v'lo b'mishpat*], shall leave them in the midst of his days...." The term's use in Jeremiah, however, differs from its use in Israeli law.

In Israeli law prior to enactment of the Unjust Enrichment Law, 1979,[3] the subject was not regulated by any particular statute. Several enactments, such as the Agency Law, 1965 (sec. 10), the Guarantee Law, 1967 (sec. 9), and the Land Law, 1969 (sec. 21), make provision for questions that arise in their respective areas.

So long as there was no specific enactment devoted to the subject, Israeli case law drew mainly upon English law, relying on article 46 of the Palestine Order in Council. No clear criteria exist in English Law for the right to claim in unjust enrichment. The view taken by Lord Mansfield is that the principles of natural justice and equity require restitution.[4]

In the meantime, the Israeli Knesset enacted the Unjust Enrichment Law, 1979, which adopted the principles of Jewish law as they emerge from the studies in the present volume. These principles include, on the one hand, the obligation of one who benefits from another to compensate his benefactor for value received. This approach dismisses the artificial theory of the 'volunteer.' On the other hand, recognition is granted to the special position of "one who benefits while the other sustains no loss" and the consequent possibility of exempting the beneficiary from payment.

These principles were adopted by the Israeli legislature in sections 1 and 2 of the Unjust Enrichment Law which read as follows:

[3] Unjust Enrichment Law, 5739-1979, Laws of Israel [in English; hereafter LSI], vol. 33 (5739-1978/9) pp. 44-45. The statute is quoted in full in Appendix 2.

[4] See Friedman, op. cit. (above, note 1), p. 7.

Introduction

Duty of restitution

1. (a) Where a person obtains any property, service or other benefit from another person without legal cause (the two persons herein after respectively referred to as "the beneficiary" and "the benefactor"), the beneficiary shall make restitution to the benefactor, and, if restitution in kind is impossible or unreasonable, shall pay him the value of the benefit.

(b) It shall be immaterial whether the benefit was obtained through an act of the beneficiary or an act of the benefactor or in any other way.

Exemption from restitution

2. The Court may exempt the beneficiary from the whole or part of the duty of restitution under section 1 if it considers that the receipt of the benefit did not involve a loss to the benefactor or that other circumstances render restitution unjust.

The area of law in question can be divided into four categories: (1) where the one party derives no benefit while the other party sustains no loss; (2) where the one derives a benefit while the other sustains a loss; (3) where the one derives a benefit while the other sustains no loss; (4) where the one derives no benefit while the other sustains a loss.

As to the first two categories, the Talmud, in its main treatment of the subject in *Baba Kama* 20a,[5] states that the law is clear. In the first, no payment is required; in the second, it is. The third category is more problematic and is discussed in the Talmud at considerable length. The fourth

[5] A schematic presentation of the talmudic discussion appears in Appendix 1. Points in that discussion are hereafter referred to by the numbered stages that appear in the schema.

category is not discussed explicitly in the Talmud, and is the subject of disagreement among early post-talmudic authorities.[6]

From the talmudic discussion in *Baba Kama*, we see that if the Talmud does indeed lay down guidelines where one benefits and the other sustains no loss, these must be applied in accordance with the talmudic definitions of the terms "beneficiary" (or recipient), benefactor (or donor) "who sustains no loss," and benefactor "who sustains loss."

The talmudic discussion mentioned focuses on circumstances where one benefits and the other sustains no loss, and the four categories listed above arise from that discussion. The obligation to pay and the amount to be paid under the second category are treated elsewhere in the Talmud in reference to specific situations, such as improvements made to another's property, salvage, and so on. From such cases we can deduce under what circumstances payment must be made – and the amount required – to a person who, by

[6] Of course, this does not refer to a straightforward case of real damage, but rather to an instance where the beneficiary resides upon premises designated for hire, without the owner's knowledge, when the beneficiary would not normally be willing to pay for such benefit. According to *Tosafot* (*Baba Kama* 20a, s.v. *Zeh*), the beneficiary cannot be compelled to compensate. According to Rif (*Baba Kama*, chap. 2; ed. Vilna, 9a), however, the beneficiary is obliged to compensate. Rosh (*Piskei haRosh, Baba Kama* 2:6) bases the obligation to compensate in this case on the fact that the beneficiary "consumes" the loss of the benefactor, that is to say that although by law his occupancy of the premises may not, in this case, be considered benefit, he is obliged to compensate because he gains what the owner loses. Rosh illustrates the point by contrasting it with the case of a person who merely locks up another person's premises, thereby causing the owner loss of their use but gaining no benefit for himself. In such a case, he who locks the premises is exempt from compensation. See also *Hagahot haGra*, *Baba Kama* 20a; and *Nahalat David*, *Baba Kama* 20a.

means of his actions or property, has conferred benefit upon another.[7]

[7] For bibliography on the subject, see Nahum Rakover, *A Bibliography of Jewish Law – Otzar haMishpat*, s.v. "*Yored lenikhsei havero, Me'en hozeh*" and s.v. "*Zeh neheneh vezeh lo haser*," vol. 1 (Jerusalem, 1975), p. 436; vol. 2 (Jerusalem, 1990), pp. 453-454; and idem, *The Multi-Language Bibliography of Jewish Law* (Jerusalem, 1990), s.v. "Unjust enrichment, Quasi-contract" and s.v. "One benefits while the other sustains no loss," p. 708.

Chapter Two

THE TALMUDIC DISCUSSION

As we shall see, it was clear to the Sages of the Talmud that one who benefits involving some loss to another is obliged to pay. On the other hand, the question of whether one who benefits entailing no loss to his benefactor must pay for the benefit derived occasioned considerable discussion and disagreement among the Sages.

R. Yohanan attributes to R. Yehudah the opinion that requires of one who benefits from another to pay even when the other sustains no loss:[8]

> R. Yohanan said, "In three places has R. Yehudah taught us that it is prohibited[9] to benefit from another's property."

[8] *Baba Metzia* 117b. Cf. *TJ Baba Kama* 9:5, cited below, Part 3, text at note 27.

[9] See *Resp. Rambam* (ed. Blau) 444, where Maimonides was asked what relevance there is to prohibitions in civil matters. See also R. Aharon

That is to say, it is forbidden to benefit from the property of another without paying for that benefit. What is the basis of this obligation? According to the *Tosafot*,[10] the basis is to be found in rabbinical enactment (*takkanah*):

> Although it would seem right to say that a person may enjoy a benefit if another does not thereby sustain loss, the Rabbis nevertheless instituted the rule that the first must pay since it is not proper to enjoy the property of another without permission.

The requirement to pay, it appears, does not follow from any rule of law but rather from a desire generally to discourage unauthorized use of another person's property.

The Talmud rejects R. Yohanan's assertion, however, showing how in each of the three cases mentioned R. Yehudah's opinion may be explained on a different basis, and that, therefore, it is not certain that R. Yehudah held it forbidden to benefit from the property of another without payment.

Maimonides[11] was asked to clarify the contradiction between R. Yehudah's ruling here and the regulation that "one who resides in the premises of another without the owner's knowledge need not pay rent,"[12] and he answered

Lapapa, *Resp. Benei Aharon* 16, p. 19, col. 4: "Although when one benefits while the other sustains no loss, he is exempt, all will agree that in principle it is certainly forbidden to benefit from the property of another without his knowledge."

[10] *Tosafot, Baba Metzia* 117b, s.v. *biSheloshah*.

[11] *Resp. Rambam* (ed. Blau) 444.

[12] This regulation is discussed at length later in this chapter.

that the regulation is not in accordance with R. Yehudah's opinion.[13]

While the discussion cited focuses on the opinion of R. Yehudah, the most thorough and wide ranging talmudic discussion of our problem is to be found in *Baba Kama* 20a-21a. From that discussion, it appears that the Sages were quite exercised in reaching a solution. The Talmud recounts a conversation between R. Hisda and Rami bar Hama, in which R. Hisda opens, "You were not yesterday with us in the house of study, where some especially important matters were discussed." When Rami bar Hama asks what important matters were discussed, R. Hisda replies: "One who resided in his neighbor's premises unbeknown to him, would he have to pay rent or not?"[14] The Talmud goes on to analyze the case under discussion: If the premises were not for hire and the tenant would not normally pay someone else for occupancy, there would be no question. In such a case, there is neither loss to the owner nor benefit to the tenant, and thus no obligation of payment.[15] If on the other hand, the case were one where the premises were for hire and the tenant would normally pay for occupancy, again there would be no question. Here, the tenant would derive benefit and the owner sustain loss, and there would clearly be an obligation to pay.[16] Thus, concludes the Talmud, the case under discussion must be one where the

[13] See *Resp. Hatam Sofer, Hoshen Mishpat* 79, s.v. *veNireh li mishum*, p. 33, col. 1: "Since we do not accept the opinion of R. Yehudah as presented by R. Yohanan, it seems to me that even a priori, it is permitted to benefit from the property of another... [or his effort], provided there is no loss [to the benefactor]...." But see *Resp. Harei Besamim, Mahadura Tinyana* 245, ad fin.

[14] Appendix 1, stage 1.

[15] Appendix 1, stage 2.

[16] Appendix 1, stage 3.

premises were not for hire, and the tenant one who would normally pay for his occupancy of another's premises.[17] Here the tenant benefits, but the owner suffers no loss, and in such a case the law is not clear.

Opinions of various talmudic Sages are cited, and the Talmud attempts unsuccessfully to discover the opinion of the *Tanna'im* (the Sages of the Mishnah) based upon various passages from the Mishnah. The view of the Sages of the Mishnah, thus, remains an open question. From the different traditions cited, it emerges that most *Amora'im* (the Sages of the Talmud) hold that a person occupying premises without agreement in such a case is to be treated in accordance with the principle that where "the one benefits while the other sustains no loss," no payment for the benefit need be made.

Neither Maimonides nor *Shulhan Arukh* expressly lays down a generalized theoretical rule for all cases where one benefits and the other sustains no loss. Both confine themselves to the particular question discussed. As Maimonides puts it:[18]

> If one takes residence in another's premises without his knowledge, the rule is that if the premises is not usually rented, the tenant need not pay the owner any rent even though he does usually rent a place for himself. For one has benefitted without the other sustaining any loss.[19]

[17] Appendix 1, stage 4.
[18] *M.T., Gezelah vaAvedah* 3:9.
[19] See also *Sh. Ar., Hoshen Mishpat* 363:6.

Chapter Three

THE "MANNER OF SODOM"

The exemptive principle that when one benefits and the other sustains no loss no payment is required, is often associated with the rule that "one may be compelled not to act in the manner of Sodom."[20] It may be noted that the rule is mentioned in a number of places in the Talmud[21] where the question of acting or not acting in relation to another's property occurs a priori, that is, before anything is actually done, whereas the exemptive principle is applied a posteriori – where an act has already been effected. The dif-

[20] According to tradition, the residents of biblical Sodom were not willing to confer benefit on others even when this entailed no loss whatsoever. This is sometimes referred to in English as a "dog in the manger" attitude.

[21] *Eruvin* 49a; *Ketubot* 103a; *Baba Batra* 12b, 59a, and 168a. See also R. Aharon Lichtenstein's instructive article, "leVerur 'Kofin Al Midat Sedom,'" *Hagut Ivrit baAmerikah* 1 (Tel Aviv, 1972), 362. See below, note 27.

ference is apparent in the fact that the talmudic references to the one never mention the other.

A number of Early Authorities, however, link the two rules, and conclude that one may be compelled not to act in the manner of Sodom, because in such cases one benefits while the other sustains no loss. So, for instance, Maimonides:[22] "...this is the manner of Sodom. So too, whenever one benefits and the other sustains no loss – he may be compelled."[23] Is it possible to conclude, then, that the Early Authorities believed the exemption of "one benefits while the other sustains no loss" to be based on the rule that "one may be compelled not to act in the manner of Sodom"? We will return to this question later on.

[22] *M.T., Shekhenim* 7:8.

[23] See Rashi, *Ketubot* 103a, s.v. *Midat Sedom*; Rashi, *Baba Batra* 12b, s.v. *Al midat Sedom*; *Perush haMeyuhas leRabbenu Gershom, Baba Batra* 12b; *Or Zaru'a, Baba Batra* 24; *Hiddushei haRashba, Baba Batra* 12b; Rashbam, *Baba Batra* 59a, s.v. *Midat Sedom*; and *Yad Ramah, Baba Batra* 168a.

Chapter Four

THE LEGAL BASIS FOR THE EXEMPTIVE PRINCIPLE

Some authorities seek to base the exemption of "one benefits while the other sustains no loss" on the rule that one may be compelled not to act in the manner of Sodom.[24] Indeed, we have shown that the Early Authorities speak of the rule and the exemption in one breath, as it were.[25] But what they really say is that the "Manner of Sodom" Rule applies because of the exemption, not vice versa.[26] In fact,

[24] *Penei Yehoshua, Baba Kama* 20a explains that this is the opinion of *Tosafot, Baba Kama* 20a, s.v. *Eino*. See also *Hiddushei R. Hayyim miTelz, Baba Kama*, p. 39; ibid., *Baba Batra*, p. 190; and *Levush Mordekhai, Baba Kama* 15.

[25] See above, note 23.

[26] *Tosafot, Baba Batra* 12b, s.v. *Kegon*, does appear to hold that the ex-

all that the Early Authorities assert is that the "Manner of Sodom" Rule will apply where one benefits and the other does not lose. It may well be that the exemption operates not because of the "Manner of Sodom" Rule, but rather because a party suffering no loss has no cause of action at all against the beneficiary. If so, there is no need for additional reason to exempt the beneficiary. Where, on the other hand, it is desired to prevent an offending act *ab initio*, the "Manner of Sodom" Rule may have to be invoked.[27]

The exemption of "one benefits while the other sustains no loss" may also be explained without recourse to the

emption of "one benefits while the other sustains no loss" is in fact based upon the rule that one may be compelled not to act in the manner of Sodom. See *Hiddushei R. Hayyim miTelz*, *Baba Batra*, p. 192. In the entry, "*Zeh neheneh vezeh lo haser*," note 8, of the *Encyclopedia Talmudit*, Maimonides (see above, note 22) is noted as holding the same opinion. It appears, however, that, as mentioned above, this cannot be demonstrated from Maimonides' wording. According to the *Tosafot*, it appears that there are actually two sets of circumstances in which a person may be compelled not to act in the manner of Sodom. In one set, the imperative is biblical, whereas in the second, it is a result of rabbinic legislation.

[27] Although A may be permitted to reside on B's premises where A benefits and B sustains no loss, B may not be compelled to agree. See *Tosafot*, *Baba Kama* 20b, s.v. *Ha*; and Rema's ruling, *Sh. Ar.*, *Hoshen Mishpat* 363:6 (as opposed to the opinion of Ra'avya quoted by *Mordekhai*, *Baba Kama* 2:16). See, however, Rema's reasoning there, that the owner can always let out the property if he so desires. *Resp. Divrei Malki'el* III:157 (p. 118, col. 1, s.v. *veHinei*) discusses Rema's reasoning and concludes that it is not logical. *Resp. Divrei Malki'el* distinguishes between a situation where the occupant is able to vacate immediately upon request and one where the owner risks damage due to his inability to evict an occupant at will. In the second instance, the author of *Resp. Divrei Malki'el* agrees that the owner may not be compelled to permit occupancy of his premises although he sustains no immediate damage.

"Manner of Sodom" Rule. On the one hand, it may be said that since the benefactor suffers no loss, no obligation for the beneficiary to pay is created at all.[28] On the other hand, it may be argued that although in strict law a duty to pay may indeed exist,[29] the benefactor is presumed to waive payment,[30] since no loss has been suffered.[31]

[28] In accordance with R. Ami's reasoning in the discussion in *Baba Kama* for the exemption of "one benefits while the other sustains no loss" (Appendix 1, stage 17): "What has he done to him? What loss or injury has he caused him?" See also *Hiddushei R. Shimon Shkop*, *Baba Kama* 19:3; and *Levush Mordekhai*, *Baba Kama* 15.

[29] According to this explanation the obligation to pay arises although beneficiary and benefactor have not agreed upon payment, because the beneficiary has actually taken possession of the benefactor's property. See *Birkat Shemu'el*, *Baba Kama* 14:2-3 and ibid., *Baba Batra* 7.

[30] See *Mahaneh Efrayim*, *Hilkhot Gezelah* 10, ad fin.: "The owner will not waive payment for any property that can be let for profit." From here it is apparent that the author of *Mahaneh Efrayim* believes that in situations where property cannot be let for profit, the exemption is based upon the owner's waiver of payment (*mehilah*). See also *Resp. Amudei Esh*, p. 16.

[31] See Shalom Albeck, "HaOseh Tovah laHavero sheLo miDa'ato," *Sinai* 71 (1972), 98-111 (reprinted in idem, *Dinei Mamonot baTalmud* [Tel Aviv, 1976], chap. 4). Albeck suggests that in situations where one benefits from another, whether the beneficiary is obligated to pay or exempt depends upon the presence or absence of full agreement by the parties concerning payment.

Chapter Five

PROTESTING THE BENEFIT OBTAINED

One important limitation on the exemptive power of "one benefits while the other sustains no loss" is imposed when the benefactor declares that no one may benefit from his property.

The Talmud infers this limitation from a rule regarding illegal use of Temple property (*hekdesh*). In the basic discussion of our topic in *Baba Kama*, the Talmud quotes the rule, "Use of Temple property without the knowledge of the Temple treasury is equivalent to use of a private citizen's property with that citizen's knowledge."[32] The *Tosafot*[33] explain this to mean that it is the Divine wish that Temple

[32] Appendix 1, stage 22.

[33] *Tosafot, Baba Kama* 21a, s.v. *keHedyot*. See also, Rashi ad loc; *Resp. Terumat haDeshen* 317.

property not be used, and therefore, all use of Temple property for personal needs (with or without the knowledge of the Temple treasury) constitutes a violation[34] that obligates payment. Thus, the rule concerning Temple property assumes that when an owner does not wish his property used, the principle "one benefits while the other sustains no loss" will not operate to exempt.

Other Early Authorities take the rule of Temple property quoted, to mean that use of Temple property in the absence of protest (i.e, protest by the Temple authorities) is equivalent to use of private property in the presence of protest by owner.[35] According to this interpretation, as well, it may be inferred that the owner's protest effectively suspends the exemptive principle.

A third interpretation takes the words, "use of a private citizen's property with that citizen's knowledge," to mean that it is as though it were stipulated with the beneficiary that he pay.[36] According to this approach, if there is no presumption that the beneficiary agrees to pay, he will not be obliged.

The rule in the codes is that if the owner tells the occupier to leave and the latter refuses, he must pay rent. This is the ruling of *Tur*,[37] and R. Yosef Karo, in *Beit Yosef* (his commentary on *Tur*). comments that this is obvious. In his own code, *Shulhan Arukh*, R. Karo writes:[38]

[34] Known in Jewish law as *me'ilah*.

[35] See the opinion of R. Yeshayahu quoted in *Shitah Mekubetzet*, *Baba Kama*, ad loc.

[36] See the opinion of Rashba quoted in *Shitah Mekubetzet*, ad loc.; and *Hiddushei haRashba*, *Baba Kama*, ad loc. in the name of Rabbenu Hananel.

[37] *Tur Hoshen Mishpat* 363:6.

[38] *Sh. Ar., Hoshen Mishpat* 363:6.

> When one resides in the premises of another without his knowledge, if the other tells him to leave, and he does not leave, he is obliged to pay rent.[39]

Sema[40] comments that this applies even where the premises is not for hire and the tenant does not generally pay for occupancy, since the owner has made it clear that the arrangement is not agreeable to him.[41]

[39] *Erekh Shai* on *Sh. Ar., Hoshen Mishpat* 363:6, discusses the amount of compensation the occupant will he required to pay if the owner tells him to pay such and such an amount or vacate. If the occupant refuses to pay, then he can be obligated to pay no more than the appraised rent for the premises. Having refused to pay, *Erekh Shai* reasons, the occupant is occupying the premises "by theft." As in a conventional instance of theft, where A takes an object of B's without the latter's permission, if B demands that A return the object or pay such and such an amount, and it is no longer in A's possession, he is required to pay (only) its appraised value.

[40] *Sema, Hoshen Mishpat* 363:14; See also *Be'ur haGra, Hoshen Mishpat* 363:13.

[41] *Nahalat David, Baba Kama* 21a, s.v. *keHedyot* disagrees with the ruling of *Shulhan Arukh*. Basing himself upon Rashba (see above, note 36), *Nahalat David* holds that the occupant is obliged to pay only if this was stipulated explicitly, whereas simple protest will not create an obligation to pay for benefit received. This opinion is shared by R. Hayyim of Volozhin. See *Hoshen Aharon* 363:6.

Chapter Six

INTENTION TO PAY FOR BENEFIT

1. Another limitation on the exemption of "one derives benefit while the other sustains no loss," arises when the beneficiary discloses an intention to pay for the benefit he obtains.

The *Tosafot*[42] derive this limitation from the ruling in the case where a person whose property encircles that of his neighbor erects fences along three sides of his neighbor's land. In such an instance, R. Yosi holds that if the owner of the encircled property erects a fence on the fourth side, he must pay for his share of the entire fencing. It may be inferred from this ruling that, had it been the owner of the encircling property who erected the fourth fence, the owner of the encircled property would have been exempt from

[42] *Tosafot*, *Baba Kama* 20b, s.v. *Ta'ama*.

payment. From this the Talmud attempts to deduce the exemption of "one benefits while the other sustains no loss."[43]

The *Tosafot* question the Talmud's deduction, however. Since erection of the fourth fence by the owner of the encircled property causes no loss to his benefactor, if the exemptive principle is valid, here too, the encircled owner should be exempt from assuming his share in the other three sides. It would appear equally logical, therefore, to deduce the opposite – that when one benefits and the other sustains no loss, the beneficiary is obliged to pay. The *Tosafot* answer that in the present case, the obligation to pay arises from the encircled owner's construction of the fourth fence, because by doing so, he indicates that he is agreeable to the expenditure for fencing. Hence the situation is different from that where a person occupies another's property and has not indicated that he is prepared to pay.[44]

This opinion of the *Tosafot* was disputed by R. Shelomoh Luria,[45] who challenges the reasoning of the *Tosafot* as well as their application of the case upon which that reasoning is based. As explained, the Talmud suggests that the exemption of "one benefits and the other sustains no loss" can be inferred from the case of encircled property. The Talmud finally rejects this suggestion, however, asserting that the encircled owner's exemption may have an entirely different basis. How, R. Luria asks, can anything be learned from a suggestion ultimately rejected by the Talmud? How can the

[43] Appendix 1, stage 11.

[44] A similar situation appears in the *mishnah Baba Batra* 1:4 and is explained by the *Tosafot* on the same basis. See *Tosafot*, *Baba Batra* 5a, s.v. *Af al pi* (*Tosafot*'s first explanation). *Yam Shel Shelomoh*, *Baba Kama* 2:16, does not accept this explanation; see below.

[45] *Yam Shel Shelomoh* ibid. R. Shelomoh Luria (1510-1573) was one of the outstanding rabbinic authorities of Poland in his time.

Tosafot use this case to draw conclusions about the exemption of "one benefits and the other sustains no loss" when it is concluded that there is no connection? As to the reasoning of the *Tosafot*, R. Luria asserts that since the main basis for the exemption of a person who resides in his neighbor's premises is that in fact the beneficiary does not cause the benefactor any loss, the beneficiary's indication of willingness to pay should make no difference. R. Luria reasons that payment for the fencing arises because the burden on the first person is increased by the extension of the fencing, as the Talmud explains, and therefore, only in such circumstances will the disclosure of an intention to pay have effect.[46]

R. Yo'av Yehoshua Weingarten,[47] head of the rabbinic court of Konskie, also disagrees[48] with the *Tosafot*, arguing that the reason for the obligation to pay in the fencing case is a consequence of the financial gain of having a fully fenced property – property whose worth is greater than it was before fencing – whereas the exemption of "one derives benefit while the other sustains no loss" applies only in instances of indeterminate benefit.[49]

2. In recent generations, a number of explanations have been advanced for the *Tosafot*'s opinion obligating the beneficiary to pay if he has indicated his intention to do so.

[46] See *Encyclopedia Talmudit* s.v. "*Zeh neheneh*," note 67. See also *Ketzot haHoshen* 158:6.

[47] R. Yo'av Yehoshua Weingarten (1845-1921) was the leading student of R. Avraham Bornstein of Sochaczew, author of *Avnei Nezer*.

[48] *Helkat Yo'av*, *Hoshen Mishpat* 9.

[49] See opinion of R. Hanokh Aigesh, *Marheshet* II, 35:2:2. See also R. Shimon Shkop, *Sha'arei Yosher* 3:25; and *Or Same'ah*, *Hilkhot Nizkei Mamon* 3:2.

R. Malki'el Tzvi Tanenbaum[50] was asked[51] concerning A, who bottled "sweet and fragrant water," and marketed it with a label similar to the label of B, a competitor, who produced the same product under government license. B brought suit against A, complaining that he did not agree to A's deriving benefit from the license granted him (i.e., B) – a license the procurement of which involved considerable expense – and claiming further that A's action had resulted in a reduction of B's income. R. Tanenbaum rules that since, by printing labels similar to those of the plaintiff, the defendant had shown that the plaintiff's expenditure in obtaining the license suited his own interests, the defendant was obliged to compensate the plaintiff. R. Tanenbaum explains that whenever "there are expenditures and acts beneficial to both parties, they are partners and can compel each other to contribute." This applies, however, only where the expenditures are essential and for the common good; in any other situation, either may refuse to contribute to a benefit which he does not want to pay for. When, however, as in the present case, a recipient shows an intention to undertake an expenditure, he cannot plead that it was against his wishes. His manifest intention renders him a partner in both benefit and expenses.[52]

In the case of one who resides in another's premises, R. Tanenbaum explains that although the premises are not for hire, the resident must pay if he disclosed intention to do so, because "when he received benefit..., he intended to compensate..., and as in all cases where one benefits from

[50] R. Malki'el Tzvi Tanenbaum (d. 1910) was head of the rabbinic court of Lomza.

[51] *Resp. Divrei Malki'el* III:157.

[52] Cf. *Nahalat David, Baba Kama* 20b; and Netziv of Volozhin, *Meromei Sadeh, Baba Kama* 20b.

another on condition that he pay [the other for the benefit received], this is a fully legal obligation." That is to say, the obligation is a result of the beneficiary's undertaking.

Accordingly, R. Tanenbaum finds in the case before him that the defendant is obliged to share the expenses undertaken by the plaintiff to secure the government license.

Another modern authority, R. Shimon Shkop,[53] suggests two possible explanations for the obligations of the encircled landowner who builds the fourth fence. According to the first,[54] once the beneficiary indicates his willingness to share expenses, the encircling landowner may be considered as having lost the portion of his outlay that the encircled landowner would have paid. The same will apply in the case of premises not for hire for lack of potential hirers. Once an occupant indicates willingness to pay rent, by virtue of that willingness, it becomes premises for hire, and the occupant's failure to pay may be considered a loss to the owner. According to the second explanation,[55] once a beneficiary shows willingness to pay for his benefit, the beneficiary is enriched by the amount that he withholds, and therefore obliged to pay – even when there is no loss to the benefactor.

Both explanations of R. Shimon Shkop seek to show that willingness to compensate, so changes the circumstances that they may no longer be considered an instance of "one benefits while the other sustains no loss." The difference is that the first explanation focuses on the benefactor's loss while the second focuses on the beneficiary's gain. The second is founded upon a distinction between indeterminate

[53] R. Shimon Shkop (1860-1940), head of the yeshivah of Grodno, studied at Volozhin under Netziv and R. Hayyim Soloveichik.

[54] *Hiddushei R. Shimon Shkop, Baba Kama* 19:5.

[55] Ibid., 19:6. See above, text at note 48.

benefit and enrichment. According to the second explanation, in the case of encircled property, once the encircled property owner indicates willingness to pay, as long as he does not pay, he is considered as having increased his net worth by the amount of the payment he withholds.[56]

3. *Shulhan Arukh* rules in accordance with the view of the *Tosafot*:[57]

> Some say that where premises not intended for letting are involved, no rent need be paid, provided the occupant has not disclosed that he would be willing to pay rent, were he not otherwise allowed to take up full occupation. Where he does disclose such an intention,[58] he must pay.[59]

[56] See also ibid., 20:1, s.v. *beNidon*; and ibid., 20:2.

[57] *Sh. Ar., Hoshen Mishpat* 363:8. *Arukh haShulhan* 363:19, restricts the application of this principle to instances where the occupant is otherwise likely to pay for occupancy. In such cases, his indication is of willingness to pay as he is accustomed. Where the occupant is not otherwise likely to pay, however, his indication is of no effect; only his explicit stipulation will obligate him.

[58] As regards the timing of the occupant's indication of willingness to pay, one opinion holds that, even if the indication is expressed after he has occupied the premises for some time, he is obligated to pay for the entire period, but not if the indication was made after he vacated (*Mahaneh Efrayim, Hilkhot Gezelah* 9). Another opinion states that even if the indication comes after the occupant has vacated the premises, he is obliged to pay for the entire period (*Perishah*, *Tur Hoshen Mishpat* 363:6).

[59] According to *Resp. Noda biYehudah, Mahadura Tinyana, Hoshen Mishpat* 24, where the occupant indicates only that he is willing to undertake some small expense in return for occupying the premises, he may not be compelled to pay more than the sum he has indicated, unless he causes the owner some significant expense. Only where the occupant indicates that he would be willing to pay full rent, were he not otherwise permitted to occupy the property, is he obliged to pay the full amount. In such a case, he is obliged to pay the full amount, even if he does not cause the owner some significant expense, the

Manifestation of intention will have this effect, however, only if it is made to the true benefactor. This can be inferred from the case mentioned in the Talmud of A who rents property from B, property which, as A subsequently discovers, actually belongs to C. In such a case, the Talmud concludes, A must pay C.[60] Since the Talmud stipulates explicitly that the case is one of property that is for hire,[61] it may be inferred that were the property not for hire, A would not have been bound, although he had disclosed to B – who is not the owner – a readiness to pay.[62] *Shulhan Arukh* codifies this as law,[63] adding that rent paid to B is recoverable by A, and that even if rent has reached C, A can recover, since it was paid by mistake.

Rashba explains the point as follows:[64]

> From here we learn that, although he entered [the property] with intent to pay rent, since he did not hire it from the owner, his status reverts to that of one who resides in another's premises without [the owner's] knowledge, an instance of one who benefits while the other sustains no loss, and he is, therefore, exempt.

Rashba's explanation requires clarification. The author of *Helkat Yo'av*[65] quotes the Rashba as saying that although A manifested intention to pay rent, he does not have to pay rent to the owner, since he did not show the owner his

operative principle being that unless he causes the owner significant expense, the beneficiary cannot be compelled to pay more than he indicated he would be willing to pay.

60 See Appendix 1, stage 24.

61 See Appendix 1, stage 25.

62 See *Shitah Mekubetzet*, *Baba Kama* 21a, quoting *Gilayon*. See also Part 2, chap. 5.

63 *Hoshen Mishpat* 363:9.

64 *Hiddushei haRashba*, *Baba Kama* 21a.

65 *Helkat Yo'av*, *Hoshen Mishpat* 9.

willingness. But the *Helkat Yo'av* felt the reasoning to be "very weak."[66] The main problem with the reasoning is: What difference does it make towards whom the intent is manifested? Additionally, in the case of building the fourth fence, the encircled landowner did not show the owner of the encircling property his willingness to pay, and even so, Tosafot explain that he must pay him because his intent to pay was manifested.

[66] In explanation of this regulation, *Or Same'ah*, *Hilkhot Gezelah* 3:9, writes that, since the hirer did not rent the property from the owner, the owner may evict him whenever he pleases. Hence the hirer, having indicated his intention to pay for the right of occupancy, did not in actuality receive any such right. He is, therefore, exempt from payment. Cf. *Birkat Shemu'el*, *Baba Kama* 14:2; *Hiddushei R. Shimon Shkop*, *Baba Kama* 19:5; ibid., *Baba Batra* 4:3; *Sha'arei Yosher* 3:25; Netziv of Volozhin, *Meromei Sadeh*, *Baba Kama* 20a.

Chapter Seven

PREVENTION OF FORESEEABLE PROFIT

For a case to be removed from the category of "one benefits while the other sustains no loss," and classified as one where the benefactor does sustain loss, must the loss be actual, or is it sufficient for the benefactor to be prevented from obtaining foreseeable profit?

For the Sages of the Talmud, it is obvious that loss includes the prevention of foreseeable profit. When R. Hisda poses the problem of whether a person who occupies premises without their owner's knowledge must pay rent,[67] it is asked whether the premises were for hire and the occupier generally rents premises. If so, the occupier derives a benefit and the owner sustains a loss, and, of course, the occupier is obligated to pay.[68]

However, criterion of foreseeable profit is not defined

[67] Appendix 1, stage 1.
[68] Appendix 1, stage 3.

objectively. A person who does not usually profit from his property, although others generally do let property of the kind in question, will not be deemed to have suffered a loss. Moreover, even if he has let the property in the past, but at the time of the occupancy in question no longer does so, the situation is considered only with reference to the time that the recipient derives his benefit, and again the owner is not considered as having lost.[69]

The concept of "loss" is further restricted by prescribing that prevention of foreseeable profit is considered loss only when the owner could actually have obtained the profit, but not, for instance, where he or his agent is absent and cannot in fact let the property. The same applies where the owner is available and wishes to let the property but no one desires to rent. In such a case, the property is deemed to be not for hire.[70]

[69] See *Nimmukei Yosef*, *Baba Kama*, chap. 2 (ed. Vilna, p. 9a), in the name of Ramah; this is codified by Rema, *Sh. Ar.*, *Hoshen Mishpat* 363:6.

[70] To quote *Hagahot Asheri*, *Baba Kama* 2:6: "Ra'avya has ruled that if no one attempts to let it and no one attempts to rent it – although if the owner were here, he would have let it – whoever lives there is exempt [from payment], since this is deemed property not up for hire. But some authorities disagree [with Ra'avya's ruling]."
Rema, *Sh. Ar.*, *Hoshen Mishpat* 363:10, accepts Ra'avya's ruling as law, rejecting the opinion of those who disagree. *Beit Aharon* (Walkin), *Baba Kama* 21a, objects to Rema's ruling. R. Yitzhak Flakser, "Yishuv Piskei haRema," *Noam*, 13 (1970), 55-62, rejects the conclusions of *Beit Aharon*.
See also *Resp. Terumat haDeshen* 317: "So in the case of a premises not up for hire, the case is not one in which the owner, because of his great wealth, does not [bother to] put it up for hire. Rather, it is a situation where there is no one [willing] to rent it, though, as far as the owner is concerned, it is for hire." See also the continuation of these remarks, which require further study.

Prevention of Foreseeable Profit

The category of lettable property is significantly broadened, however, by the presumption introduced by R. Eliezer bar Natan (Ra'avan)[71] that today all vacant houses are for hire[72] – whether or not they are in fact being rented at any particular time – because one who has no use for a particular piece of property will normally let it out. This presumption is a function of circumstances, of course, and thus given to revision as circumstances change.

[71] Ra'avan (1090 – ca. 1170) was one of the early Tosafists of Ashkenaz.

[72] See Ra'avan, *Baba Kama* 21a, codified as law by Rema, *Sh. Ar., Hoshen Mishpat* 363:6.

Chapter Eight

LOSS PRECEDING ENJOYMENT OF BENEFIT

1. A benefit may become possible by a loss incurred prior to enjoyment of the benefit. When this happens, is the prior loss relevant? The *Tosafot*,[73] commenting on the discussion in *Baba Kama*, cite a case from *Ketubot* (30b) of a person who stuffs food into the throat of another, the law being that the recipient must pay. Why, the *Tosafot* ask, should the person who swallowed the food not be exempted under "one benefits while the other sustains no loss"? After all, when he received the benefit – that is to say, when the food reached his digestive organs – the food's owner sustained no loss, since the food had already lost its value when it was stuffed into the recipient's throat. The *Tosafot*, thus, conclude that since the one benefitted by virtue of the other's earlier loss, the case qualifies as one where one benefits and the other loses (and thus the recipient is obligated

[73] *Tosafot*, *Baba Kama* 20b, s.v. *Ha it'hanit*.

to pay).[74] The *Tosafot*[75] on the discussion in *Ketubot* offer a different explanation: since even after entering the recipient's throat, the food retains some value, the recipient is obligated for the small loss he causes by retaining the food, and this obligation carries with it responsibility for the entire loss sustained by the other.[76] A third view, that of Ritzba, quoted in Tosafot, is that the two acts – destruction of the food and derivation of benefit – due to their proximity in time, are treated as one (although in fact they are not).

2. It would seem from the *Tosafot* in *Baba Kama* that a prior loss will create an obligation to pay for any subsequent benefit. Such a view, however, is inconsistent with a decision cited by *Mordekhai*[77] on *Baba Kama* and recorded as law by Rema in his comments on *Shulhan Arukh*.[78] It seems that a feudal lord, after expropriating the house of A, a Jew who had fled from the lord's domain, allowed B, another Jew, to occupy the house, and A subsequently claimed rent from B. In the decision quoted, A's claim was rejected, and the exemption of "one benefits, and the other sustains no loss" was held to apply. The rationale was that since if B were to vacate the property, it might be given over to a non-Jew and no rent could then be obtained, the house must be treated as not for letting. According to the *Tosafot* in *Baba Kama*, however, it would

[74] The recipient is not obligated to pay if the food is returned, although it is worthless, since it was rendered so by the other's act of stuffing it in his throat. He is obligated, however, to pay if the food reaches his digestive organs, for this is the benefit he receives as a result of the other's (earlier) loss.

[75] *Tosafot*, *Ketubot* 30b, s.v. *La tzrikha*.

[76] See below, chap. 9.

[77] *Mordekhai*, *Baba Kama* 2:17.

[78] Rema, *Sh. Ar.*, *Hoshen Mishpat* 363:3.

seem that B should be obliged to pay rent, since his benefit was preceded by A's loss (the expropriation).[79]

R. Shelomoh Drimer,[80] head of the rabbinic court of Skala, resolves[81] the inconsistency by offering a more restrictive interpretation of the *Tosafot*'s opinion. In *Baba Kama*, argues R. Drimer, the *Tosafot* obligate the beneficiary, although the benefit is not a consequence of the loss, because where one stuffs food into the throat of another, benefit and loss may be considered as simultaneous (as suggested above in the name of Ritzba). When, however, as in the present case, A's loss occurs irrespective of B's benefit and it is impossible to view loss and benefit as simultaneous, even the *Tosafot* will agree that the beneficiary is under no obligation to pay.

3. In light of his analysis of *Tosafot*'s opinion, R. Shelomoh Drimer discusses a difficult ruling of Maharam[82] quoted in *Shulhan Arukh*.[83] The case involved A, who had borrowed money from a money lender against a pledge, and B, who persuaded A to allow him to borrow against the same pledge. As it happened, the pledge was destroyed by fire and B's debt to the money-lender was consequently canceled. The question arose whether B was obliged to compensate A, and Maharam ruled that he was not.

In this particular case, B's benefit – cancellation of his debt – was a consequence of A's loss. Thus, a simple reading of the *Tosafot* in *Baba Kama* would suggest that just as where A stuffed food into the throat of B, B was obliged

[79] See *Mahaneh Efrayim, Hilkhot Gezelah* 13.

[80] R. Shelomoh Drimer was born ca. 1800 and died in 1873.

[81] *Resp. Beit Shelomoh, Hoshen Mishpat* 122.

[82] Cited by *Mordekhai, Baba Metzia* 371 (chap. 8, ad init.). On this ruling, see B. Kahane, *Shomerim*, p. 653.

[83] *Sh. Ar., Hoshen Mishpat* 72:44.

to pay although his benefit was derived after the food's owner had sustained his loss, so B in our case should also be obliged to pay, although his benefit was derived after A's loss of his pledge. According to R. Drimer, however, since A's loss was not a consequence of B's benefit, and since when B's benefit was derived, A's property no longer existed, Maharam was justified in exempting B from payment.

R. Drimer cites Maharam's ruling in his own decision concerning A and B, who owned dwellings in the same building. B purchased insurance, which was mistakenly registered as covering A's apartment as well. When the building was destroyed by fire, A claimed his share of the compensation paid to B.[84] Here too, A's loss was not a consequence of B's benefit but rather of the fire which destroyed the building, and when B derived his benefit, A's property no longer existed. Citing Maharam's ruling, R. Drimer found that A was not obliged to share the compensation with B.[85]

[84] See below, Part 2, text at note 82.

[85] For recourse to Maharam's ruling where one person pays insurance premiums on the property of another, see *Resp. Eretz Tzvi* (Te'omim), *Hoshen Mishpat* 15; *Resp. Avnei Tzedek* (Teitelbaum), *Hoshen Mishpat* 7. See also below, Part 2, notes 87 and 97.

Chapter Nine

BENEFIT INVOLVING LESSER LOSS

1. What is the law where the value of benefit derived by the beneficiary exceeds the loss sustained by the benefactor? Does the benefactor's loss create a straightforward situation of "one benefits while the other sustains loss," in which the beneficiary is obliged to compensate for the full value of benefit received? Or will the beneficiary be obliged to pay no more than the loss sustained by the benefactor?

The discussion in *Baba Kama*[86] cites a Mishnah[87] dealing with a house the upper part of which is owned by A and the lower part by B. The house collapses and A asks B to rebuild his part so as to enable him to rebuild the upper story. B refuses. The decision there is that A is entitled to rebuild the lower part and occupy it until B reimburses him

[86] Appendix 1, stage 13.
[87] *Mishnah Baba Metzia* 10:3 (*TB* 117a).

for his outlay. R. Yehudah, however, disagrees, declaring that "one who occupied another's property without his agreement must pay rent." According to R. Yehudah, then, A will have to pay B rent although B has suffered no loss (B suffered no loss because he had not intended to rebuild his portion in any case).[88] R. Yehudah's opinion is cited as evidence that he does not recognize the exemption of "one benefits while the other sustains no loss."[89] To this assertion, however, it is replied that this is not such a case and that here R. Yehudah requires that rent be paid due to the "blackening of the walls"[90] (a consequence of occupation), which constitutes a loss to B and renders A liable to pay rent.

Legal authorities found in this portion of the discussion in *Baba Kama* a source for resolving the question of benefit involving lesser loss. The majority of Early Authorities, thus, rule that the beneficiary is obligated to pay the entire value of benefit received[91] and not just the value of the benefactor's loss.[92] *Shulhan Arukh* rules:[93]

> Some say that when the premises is not for hire, and the occupant need not pay rent, if he caused [the owner]

[88] Even those Sages who in this case disagree with R. Yehudah and exempt would agree that, normally, the occupant would be obliged to pay due to the "blackening of the walls" (see below, this paragraph). Their exemption in this case results from the lower level's encumbrance to the upper (see Appendix 1, stage 14).

[89] See Appendix 1, stage 15.

[90] See Appendix 1, stage 16.

[91] See *Tosafot*, *Baba Kama* 21a, s.v. *veYahavei*; *Hiddushei haRashba*, *Baba Kama* 21a; *Nimmukei Yosef*, *Baba Kama*, chap. 2 (ed. Vilna, p. 9a), in the name of Ritba; *Piskei haRosh*, *Baba Kama* 2:6, ad fin. See also *Resp. Yeshu'ot Ya'akov* (Orenstein), *Hoshen Mishpat* 4.

[92] But the opinion of Ramah, as quoted by *Nimmukei Yosef*, ibid, is that the occupant is liable for the value of the loss only. See also the ruling

> even a small loss, such as if it were a new building, and he caused a loss by the blackening of the walls, although that loss is minimal, it carries with it the obligation to pay the entire value of the benefit received.[94]

As we shall see, it was upon this principle that R. Yehezkel Landau based his ruling[95] on a claim lodged by an author against a printer, as described in chapter ten of the present part.

2. R. Ya'akov Falk,[96] author of *Penei Yehoshua*, explains the above principle on the basis of his opinion[97] that the exemption of "one benefits while the other sustains no loss" is based upon the rule that one may be compelled not to act

of *Noda biYehudah* cited below, note 95, according to which Maimonides agrees with Ramah.

R. Avraham Shmu'el, *Resp. Amudei Esh*, p. 16, col. 3, asserts that Ramah holds that the beneficiary's liability is restricted to the loss he has caused only where the benefactor would be willing to forgo compensation for the entire benefit. Where it is clear, however, that the benefactor would not forgo such compensation, then he is presumed [*anan sahadi*] to protest, and as we have seen (chap. 5), where the benefactor protests, the beneficiary is obliged to pay. See below, text at note 101.

93 *Sh. Ar., Hoshen Mishpat* 363:7.

94 *Giddulei Shemu'el, Baba Kama* 20a (p. 19c), discusses whether the occupant is required to pay the full value of benefit received or only what the owner might have realized in rent.

In any case there are certain restrictions in applying the principle that even a minimal loss carries with it the obligation for benefit received. See, for instance, *Sha'ar haMelekh, Hilkhot Gezelah* 3:9; *Marheshet* II, 35:2 (7 and 8); and ibid., 35:4 (9).

95 *Resp. Noda biYehudah, Mahadura Tinyana, Hoshen Mishpat* 24; and below, text at note 108. See also *Resp. Divrei Malki'el* III:157; and below, text at note 111.

96 R. Ya'akov Falk, one of Polish Jewry's most distinguished scholars, was born in Cracow in 1680 and died in 1755.

97 *Penei Yehoshua, Baba Kama* 20b; *Tosafot, Baba Kama* 20a, s.v. *Zeh*.

in the manner of Sodom.[98] According to R. Ya'akov Falk, then, once there is a loss to the benefactor, even a minor one, his situation is no longer such that his behavior may be considered as in the manner of Sodom, hence, the beneficiary is required to pay the full value of benefit received.[99]

Another explanation of the obligation of a beneficiary who has inflicted loss is advanced by R. Avraham Shemu'el,[100] head of the rabbinic court of Raseiniai. According to R. Avraham Shemu'el,[101] the determinative factor in all cases is the owner's strictness with regard to the use of his property. Once an owner has incurred some loss,

98 See above, text at note 24.

99 On whether a person who takes chattels with no intent to steal, uses them for his own purposes, and returns them somewhat damaged, must pay only the damage or the benefit received, see *Encyclopedia Talmudit*, s.v. "*Zeh neheneh*," notes 133, 135, and 136.
However, a person who steals chattels, uses them, and returns them to their owner unchanged is not obliged to pay for their use, even if they were normally hired out, and even if by stealing them he prevented the owner from using them. See *Sh. Ar.*, *Hoshen Mishpat* 363:3; and *Sema*, ad loc., 7. See *Sema* ad loc., 8, who questions the ruling if the stolen object was an animal which consequently became weaker. *Netivot haMishpat*, ad loc. 4, rejects *Sema*'s approach, but R. Shimon Shkop, *Hiddushei R. Shimon Shkop*, *Baba Kama*, 20:1 defends it. See also *Sh. Ar.*, *Hoshen Mishpat* 363:5, with regard to a person who takes a boat and uses it without permission. See also Nahum Rakover, "Ba'ayot Yesod beHilkhot Geneivah baMishpat halvri," *Sinai*, 40 (1961), chap. 4, "Geneivah Al Menat Lehahazir," 27-29; R. Avraham Shemu'el, *Resp. Amudei Esh*, p. 66b; *Resp. Divrei Malki'el* III:157, p. 118, col. 1, s.v. *veLikhorah*; and Itamar Warhaftig, "Demei Shimush beNekhes Gazul," *Tehumin*, 6 (1985), 235.

100 R. Avraham Shemu'el died in 1869.

101 See *Resp. Amudei Esh* (Vilna, 1875), p. 67a. See below, chap. 10 of the present part.

even if that loss is minimal, it is clear that he would protest the beneficiary's use of his property were he to know of it, and this is equivalent to an actual protest. Just as when an owner protests, an occupant is obligated to pay for his use of the property,[102] so too when it is presumed that he would protest.[103]

In accordance with this explanation, R. Avraham Shemu'el raises the possibility of extending the obligations of the beneficiary, as we shall discuss in the next chapter.

[102] See above, chap. 5.
[103] See above, note 92.

Chapter Ten

BENEFIT INVOLVING LOSS TO OTHER PROPERTY

Does the recipient of a benefit have to pay only where the loss has affected the property he has used, or does his obligation extend to other losses that his action may have caused the benefactor?

R. Avraham Shemu'el of Raseiniai considers this question in his discussion[104] of a case where a person stole a book containing instructions on dyeing and copied its contents. After discussing whether copying may be considered theft,[105] R. Avraham Shemu'el goes on to consider whether the case may be treated as one where one person benefits

[104] *Resp. Amudei Esh*, p. 66b.

[105] See Nahum Rakover, *Zekhut haYotzerim baMekorot haYehudiyim* (Jerusalem, 1991).

and another loses. If the thief caused even minimal damage to the book, he explains – if, for instance, the book was new and became worn – then the question of the thief's liability will depend upon the question of benefit involving lesser loss (as discussed above, Chapter 9). If, on the other hand, he caused no damage at all to the book, but the damage to the owner stems from his new-found ability to compete with him, it is questionable whether he incurs any obligations at all.

By way of illustration, R. Avraham Shemu'el compares the case to a hypothetical one where A, unbeknownst to B, uses the latter's storefront, which has not been put up for hire. B owns another storefront, where he engages in business, and A's use of B's vacant property reduces B's clientele. Are the obligations incurred when "one benefits and the other loses" incurred only when both benefit and loss arise in connection with the same object (although the beneficiary's action causes the owner a loss elsewhere)? Or, alternatively, since because of the loss inflicted upon him, it is certain that the owner would object to such use of his property, will his objection (actual or presumed) impose an obligation upon the beneficiary to compensate the owner for his losses?[106]

R. Avraham Shemu'el leans towards finding the beneficiary liable. He finds support for this position in the words of the Talmud in *Baba Kama*: "What has he done to him? What loss or injury has he caused him?" From here it appears that the recipient is chargeable irrespective of the place of the loss.

[106] See above, text at note 101, where R. Avraham Shemu'el suggests that the obligation of a beneficiary towards a benefactor to whom he has caused (even minimal) loss is a function of the benefactor's strictness regarding use of his property.

In fact, a number of authorities have rendered decisions that take for granted that the loss need not arise in connection with the same property. The eighteenth century authority, R. Yehezkel Landau[107] considered the case[108] of an author who commissioned a printer to produce his commentary on two orders of the Talmud. After completing the work, the printer used the type set at the author's expense to print a text with the commentaries of Rashi and *Tosafot* (without the author's commentary). R. Landau ruled that the printer was obliged to pay for the benefit he had obtained from using the type, on the grounds that, had he not acted as he did, the author may have sold more copies of his own book without the competition presented by the printer's publication.[109]

Similarly, R. Malki'el Tzvi Tanenbaum[110] entertained a claim against A, who had bottled "sweet and fragrant water" and marketed it with a label similar to the label of B, a competitor, who manufactured the same product under government license.[111] R. Tanenbaum found that A had indeed caused some loss to B, on three counts. First, if A had not been marketing the same product, B would have sold more. Second, due to the similarity of the labels, it would be presumed that B's sales were greater than they were in

[107] R. Yehezkel Landau, who was born in Opatow, Poland in 1713 and died in Prague in 1793, was one of the most widely respected rabbinic authorities of his time. He served as head of the rabbinic court of Prague.

[108] *Resp. Noda biYehudah, Mahadura Tinyana, Hoshen Mishpat* 24.

[109] See ruling of Judge Y. Kister, T. A. 759/56, Aguddat haKoremim v. Yikvei haGalil, *Pesakim* (*mehoziyim*) 22, p. 77, cited also in Nahum Rakover, *Modern Applications of Jewish Law* (Jerusalem, 1992), vol. 2, p. 755.

[110] See above, note 50.

[111] *Resp. Divrei Malk'iel* III:157. See above, text at note 51.

fact, and this too would be a cause of damage to B regarding his obligations towards the government. Third, if A were to manufacture an inferior product, the reputation of B's product would suffer. Thus, on the principle that one who causes even minor loss must compensate for the entire benefit received, R. Tanenbaum ruled in favor of the plaintiff, B.

Chapter Eleven

RECIPIENT PROVIDING A BENEFIT

Towards the end of the discussion in *Baba Kama* the argument takes a new line, which requires careful analysis. In the name of Rav, we find a new reason for the exemption of a person who resides in his neighbor's premises unbeknown to him: that premises left vacant tend to deteriorate, and the dweller prevents this. A similar reason is given in the name of R. Yosef: that an occupied house remains in good condition, since the occupants make repairs as the need arises.[112]

According to these reasons, then, a person who resides on the latter's premises without his neighbor's knowledge is exempt, because in addition to receiving benefit from the

[112] See Appendix 1, stages 29-30.
The *Talmud* explains that in practice, a difference will arise between the two explanations if the owner would otherwise be using the property not for dwelling but for storage (See Appendix 1, stage 31).

owner, he also confers benefit upon him. What are the implications of these reasons? Do they mean that an occupant will not be exempt unless he confers some benefit upon the owner of the premises? If so, this constitutes a drastic restriction of the exemption. Indeed, some authorities[113] do conclude that, according to the reasons advanced by Rav and R. Yosef, when the occupant confers no benefit whatsoever on the owner, one who resides in his neighbor's premises without his neighbor's knowledge is obligated to pay. Other authorities, however, hold that the reasons of Rav and R. Yosef do not imply that there is no exemption in cases where "one benefits while the other sustains no loss."[114]

Neither Maimonides in *Mishneh Torah*[115] nor R. Yosef Karo in *Shulhan Arukh*[116] mentions the reasons of Rav and R. Yosef. Thus, it would appear that, in practice, there is no restriction of the exemption. *Sema*,[117] however, in his

[113] See *Shitah Mekubetzet*, *Baba Kama* 21a, in the name of Rabbenu Yeshayahu; *Aliyot deRabbenu Yonah*, *Baba Batra* 4b; *Or Zaru'a*, *Baba Kama* 120-121 (*Or Zaru'a* writes that according to the reasons of Rav and R. Yosef there is no exemption unless the beneficiary also confers benefit upon the benefactor, but that the law follows the opinion of R. Yohanan, who exempts in all cases); *Sefer Ra'avan*, *Baba Batra* 5a (ed. Ehrenreich, p. 208, col. 3), ad init., cited also in *Resp. Maharam ben Barukh* (ed. Prague), 685, and in *Mordekhai*, *Baba Batra* 1:466. See also R. Aharon Sasson, *Torat Emet* 129, s.v. *veOd kasheh li*.

[114] A number of reasons are advanced for this. See *Hiddushei haRashba*, *Baba Kama* 21a, s.v. *Amar R. Huna*; *Piskei haRosh*, *Baba Kama* 2:6; *Nimmukei Yosef*, *Baba Kama* chap. 2 (ed. Vilna, p. 9a); *Yam Shel Shelomoh*, *Baba Kama* 2:16.

[115] *M.T.*, *Gezelah vaAvedah* 3:9 (quoted above, text at note 18).

[116] *Hoshen Mishpat* 363:6; See also *Be'ur haGra*, ad loc., 16; *Nahalat David*, *Baba Kama* 21b.

[117] *Sema*, *Hoshen Mishpat* 363:15.

commentary on *Shulhan Arukh*, does ascribe the owner's presumed willingness to forgo compensation to his satisfaction with the advantage conferred upon his property by occupancy. According to *Sema*'s explanation, the exemption would indeed seem to be greatly restricted.

Chapter Twelve

CAUSE OF BENEFIT

BENEFICIARY, BENEFACTOR, OR THIRD PARTY

The benefit derived may be the result of an act by the beneficiary, the benefactor, or a third party. Will it matter which of these actually caused the benefit?

From the examples in *Baba Kama*, it is clear that the exemption of "one benefits while the other sustains no loss" applies even when the benefit results from an act of the beneficiary, and that the obligations that arise when one benefits and the other loses are incurred by the beneficiary even when the benefit results from an act of the benefactor. As we have seen, the classic illustration of the exemption is the case of a person who resides in his neighbor's courtyard without his neighbor's knowledge.[118] Here benefit clearly results from an act of the beneficiary.[119]

[118] See Appendix 1, stage 1.

[119] However, the exemption also applies when the benefactor is aware

On the other hand, in trying to prove that when one person benefits and the other sustains no loss the beneficiary is not exempt, the Talmud brings the case of a land owner whose property is encircled and the encircling owner builds a fence on all four sides – a case in which the beneficiary is obligated to pay.[120] The proof is ultimately rejected, however, by showing that the case is actually one where the benefactor does sustain a loss.[121] Since, in any case, the ruling that the encircled owner (i.e., the beneficiary) must pay stands, it may be inferred that where one benefits and the other loses, the beneficiary will be obliged to pay even if the benefit resulted from the benefactor's own act.

The same principles apply even when benefit is made possible through the intervention of a third party. An example of this is found in the tractate *Ketubot*,[122] where A force feeds B with liquids belonging to C. Here, since A benefits and C loses, it is decided that A is obligated to make payment to C. According to one view, however, A will be obligated to C only when, as in the case cited, the benefit accrues directly to the person of A. Where, on the other hand, the benefit made possible through the intervention of a third party is only to the property of the beneficiary, the beneficiary incurs no obligation. This view is expounded by the *Tosafot* in connection with another discussion in *Baba Kama*.

Towards the end of *Baba Kama*,[123] the Talmud discusses

that the beneficiary is using his property. See *Tosafot*, *Baba Kama* 21a, s.v. *keHedyot mida'at*; *Yam Shel Shelomoh*, *Baba Kama* 2:16; and *Terumat haDeshen* 317.

120 See Appendix 1, stage 9.

121 See Appendix 1, stage 10.

122 See *Ketubot* 30b, and *Tosafot*, ad loc., *s.v. vei delo matzi*.

123 *Baba Kama* 101a.

whether, when wool is dyed, the improvement due to dyeing is to be considered part of the wool or separate. In order to eliminate confounding factors from the question, Ravina seeks to illustrate it with the following case: A is the owner of a quantity of wool, and B is the owner of pigment used for dyeing. A monkey takes B's pigment and uses it to dye A's wool. What liability will the owner of the wool incur in this case? Is the improvement considered a separate item, independent of the wool – in which case the owner of the pigment may demand the return of his pigment (or its value)? Or is the improvement considered part of the wool, in which case the owner of the wool can claim that he has nothing belonging to the owner of the pigment?

The formulation is questioned by the *Tosafot*,[124] who point out that in the final analysis the value of the wool has appreciated, conferring benefit on its owner. This being the case, the owner ought to pay for benefit received, as is the rule throughout the Talmud.[125]

The *Tosafot* answer by first noting that the benefit received by the wool owner resulted neither from his own act nor from the act of his own animal. The *Tosafot* then distinguish between this case and the case in *Ketubot* where A force feeds B with C's liquid – another case where the benefit does not result from an act of the beneficiary or his animal. In the latter case, A is obligated to compensate C, because the benefit accrued directly to the person of A. In the case of the monkey-dyed wool, however, the benefit is to the beneficiary's property and not to his person; thus, the

[124] *Tosafot*, *Baba Kama* 101a, s.v. *O dilma*.

[125] *Baba Kama* 19b, the case of an animal that consumed produce in the market; *Baba Kama* 55b, the case of a sheep who fell into a garden and derived benefit from the fruit there; *Ketubot* 30b, the case of a person who force fed another with the liquids of a third.

ruling will depend not on the question of the owner's benefit, but rather on whether the improvement is considered part of the wool or separate.

The *Tosafot* offer another answer as well – that the dyeing of the wool is not considered a benefit at all, since it is only decorative. Implied by this answer, of course, is that, were the dyeing a true example of benefit, the wool owner would have to pay (although the benefit was the result of a third element and did not accrue directly to the person of the beneficiary).

Thus, where one benefits and the other loses, but the benefit results from the act of a third element, whether the beneficiary is obligated to pay for benefit received will depend on which of the *Tosafot*'s two answers is preferred. If the second answer is preferred, then the beneficiary must pay in all such cases. If the first is preferred, then the beneficiary will be exempt from payment unless the benefit accrues to his person.

The *Tosafot*'s distinction between benefit that accrues to the person of the beneficiary and benefit that accrues to the beneficiary's property is also accepted by Rosh.[126] *Shakh*,[127] however, restricts this ruling to instances where the benefit is conferred by a third party. Where the benefit is conferred by the benefactor himself, even if the benefit is conferred only upon the property of the beneficiary (for instance, if the benefactor force feeds the beneficiary's animal with food owned by the benefactor), the beneficiary, according to *Shakh*, will be obliged to compensate. In support of this finding, *Shakh* notes that a person who improves another person's property is entitled to compensation even if, in order to do so, he entered the other person's

[126] *Piskei haRosh*, *Baba Kama* 9:17.
[127] *Shakh*, *Hoshen Mishpat* 391:2.

property without permission.[128] *Shakh* goes on to argue against the *Tosafot*'s distinction in any case, claiming that their second approach – that the dyeing of the wool is not considered a benefit at all, since it is only decorative – is preferable.[129] Given the *Tosafot*'s two approaches, *Shakh* concludes that when C causes the property of A to derive benefit from the property of B, the law is uncertain.

[128] See *Mahaneh Efrayim*, *Hilkhot Nizkei Mamon* 2, ad fin., and 4, ad fin. See also *Helkat Yo'av*, *Hoshen Mishpat* 9, s.v. *Akh be'emet*; *Marheshet* II, 35:3; and *Hiddushei R. Shimon Shkop*, *Baba Kama* 19:7.

[129] As mentioned, according to this approach, the beneficiary will be obliged to pay in all cases, if there is true benefit.

Chapter Thirteen

CONCLUSION

The question of whether a person who benefits from another who sustains no loss is obligated to pay for the benefit received was of considerable concern to the Sages of the Talmud. While some of the talmudic Sages attempted to show that the matter was debated by the *Tanna'im* (the Sages of the Mishnah), this approach was ultimately unsuccessful and the problem was divorced from tannaitic sources altogether. Among the *Amora'im* (the Sages of the Talmud), however, the question was debated extensively, with various opinions expressed.

When it was ruled that one who benefits while the other sustains no loss is exempt, this was not established as a general principle but rather as the basis for deciding the question of whether a person who resides in another person's premises without the latter's knowledge is obligated to pay rent.

It seems, moreover, that the principle was surrounded by so many qualifications and restrictions that any attempt at a general ruling – that when one benefits while the other

sustains no loss, the beneficiary is exempt from compensating the benefactor – would lead to legal conclusions quite different from those reached by the Talmud and subsequent authorities.

As to the legal basis for the exemption of "one benefits while the other sustains no loss," there are a number of possible approaches. One might conclude simply that, having sustained no loss, the benefactor has no cause of action. An alternate explanation is that in strict law, the benefactor does have a cause of action, but the beneficiary is exempted by the principle that one – in this case, the owner of the premises – may be compelled to act not in the manner of Sodom.

When considering situations of "one benefits while the other sustains no loss," one must establish when the benefactor is deemed to have sustained no loss. Here, important guidelines were fixed. So, for instance, one may be considered as suffering a loss even when foreseeable profits are prevented, and it is not necessary to demonstrate a real loss. On the other hand, if the benefactor is not in the habit of profiting from the property, he will not be deemed to have sustained a loss, although he could have profited from it. This applies even when others do profit from such property. Similarly, when the owner wishes to profit from his property but for practical reasons this is impossible – such as when neither he nor his agent is present, or when no one can be found who is willing to rent – the beneficiary's use of the property will not be considered to have caused a loss to the owner.

The range of property types considered as designated for profit was broadened with establishment of the presumption that in general all houses are meant for hire. As a result of this presumption, anyone residing in the premises of an-

other will be obliged to pay rent without the owner's having to prove that the property was up for hire.

Another guideline with regard to the benefactor's loss establishes that it need not correspond to the entire value of the beneficiary's benefit. Once the owner suffers even minimal loss, the occupant will be required to compensate for the entire value of his benefit.

Two additional important guidelines were established concerning the parties. With regard to the benefactor, it was established that if he protests the beneficiary's benefiting from him for free, the beneficiary will be obligated to compensate if he chooses to continue to benefit. As regards the beneficiary, if he has at any time indicated his willingness to pay for the benefit he receives, and the benefactor so demands, he will be obligated to do so.

The above guidelines provided a suitable moral and legal basis for the exemptive principle while withholding the exemption from those who in all fairness ought to pay for benefit received. Indeed, the various restrictions prevented improper exploitation of an exemption meant to apply only to a person who benefits from another who truly sustains no loss.[130]

The foregoing part has dealt with situations in which one person benefits from the property of another, thereby sparing himself expenditures that he would have incurred had he not used this particular property. We have not discussed situations in which the property of another is a

[130] The view that the beneficiary is not exempt unless his use of the property confers some benefit upon the benefactor, had it been accepted, would have for all intents and purposes rendered the exemption inapplicable. It appears, however, that this view was never accepted as normative.

necessary instrumentality in not just avoiding expense but in realizing real profit.[131] This topic, as well as the principle, "How shall one profit from his neighbor's cow?" are discussed separately.[132]

[131] See above, text at note 48.
[132] See Part 2 and Part 3, below.

Part Two

PROFITING FROM ANOTHER PERSON'S PROPERTY

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Chapter One

INTRODUCTION

In our discussion above,[1] we learned that Jewish law distinguishes between a person who benefits from the property of another, who sustains loss thereby, and a person who benefits from the property of another but causes the latter no loss.

Nevertheless, there do exist situations in which although the benefactor sustains no loss, it is proper for the beneficiary to pay for benefit received. This is the case, for instance, when one profits from the property of another, such as when A lets the property of B and receives the rent. Here, even if B, the owner, sustains no loss (so that were A to use the property himself he would be exempt from payment), A will nevertheless be obliged to pay B for benefit received. Fairness dictates that A may not profit from B's property but must rather remit his profits to B.

Even before enactment of the Unjust Enrichment Law, Israeli law contained an example of the right of a property

[1] See above, Part 1.

owner to the profits earned from his property by another. Section 7 of the Bailees Law, 1967,[2] discusses the matter of a bailee who entrusts his charge to another bailee; in subsection (a), it is established that

> where a bailee has delivered the property to a sub-bailee, the acts and omissions of the sub-bailee are deemed to be the acts and omissions of the bailee, and the sub-bailee is liable to the owner of the property to the same extent as he is liable to the bailee.

Hence it follows that, should the sub-bailee become liable to the original bailee for damages for which the original bailee bears no liability towards the property's owner, the owner will be entitled to be recompensed by the sub-bailee in the amount that the sub-bailee is liable to the original bailee.[3]

The basis for this provision is found in tractate *Baba Metzia* of the Mishnah[4] in the case of a person who hires another's cow and lends it to a third party. As quoted below, in chapter two, R. Yosi expresses his opinion on the matter in the rhetorical question, "How shall one do busi-

[2] Sec. 7, Bailees Law, 5727-1967, LSI, vol. 21 (1966/67), p. 50.

[3] C.A. 1439/90 Medinat Yisrael v. Home, 47(2) P.D. 346, 383, based on section 5(b) of the Bailees Law, according to which the owner is entitled to recover his damages from the compensation or indemnification due the original bailee.

[4] *Mishnah Baba Metzia* 3:2. See also Nahum Rakover, "Mekorot haMishpat haIvri leHok haShomerim, 1967," *HaPeraklit*, 24 (1968), 108, and 222, n. 84. See also M. Corinaldi, "Shomer sheMasar leShomer baMishpat haIvri uveHok haShomerim, 1967," *Shenaton haMishpat haIvri*, 2 (1975), 452; Nahum Rakover, ed., *Hok l'Yisrael* series: Yehonatan Blas, *Asiyat Osher veLo beMishpat* (Jerusalem, 1992), pp. 11, 21, 30, 53, 185; and Baruch Kahane, *Shomerim* (Jerusalem, 1999), pp. 466-469.

ness with his neighbor's cow?" followed by his conclusion, "The [value of the] cow must be returned to its owner."

In the past, when considering whether to require a user of property to remit his earnings to the property's owner, Israeli courts relied upon article 472 of the *Mejelle* (the Ottoman Civil Code), which held:

> One who used the property of another without agreement and without permission, if the thing was such as yields profit, he is obliged to pay the proper rental, and if not, he is exempt.

At first glance, it would appear possible to apply this regulation in the case of one who "profits from his neighbor's cow." However, the provision that the property be "such as yields profit" greatly restricts its applicability. An example is the case of one who used the roof of another to stage plays for which he charged admission.[5] At first, use of the roof was with the permission of the owner. Use continued, however, after the owner had withdrawn his permission, and the roof's owner sued, claiming to be owed rent for the use of his property. The court rejected his claim, however. Since the roof had never been designated for rental, it could not be considered property that yields profit.

Since enactment of the Unjust Enrichment Law, 1979, it is no longer necessary to rely upon foreign legal sources. Moreover, it is now mandated to seek guidance in questions of unjust enrichment in the sources of Jewish law.[6]

[5] C.A. 59/52, Ben Menahem v. Mahalah, 8 P.D. 917. See Friedman, *Dinei Asiyat Osher veLo beMishpat* (2nd ed., Jerusalem, 1998), p. 429.

[6] See above, Introduction to the book and Introduction to Part 1.

In the present part, we examine Jewish legal sources concerned with profiting from the property of another.[7] We open with consideration of R. Yosi's pronouncement, "How shall one profit from his neighbor's cow?" and the legal basis for this principle. We then go on to examine how and to what extent R. Yosi's principle was applied to different instances of profiting from the property of others. We conclude with the problem of a person who insured property belonging to another and was later indemnified by the insurance company for damages sustained by the property. The question here is whether R. Yosi's principle requires that the insured remit the compensation received to the property's owner.

[7] The matter of deriving benefit from another person's money by delaying payment is discussed elsewhere. See Nahum Rakover, *HaMis'har baMishpat haIvri* (Jerusalem, 1988), Part 5, "*Pitzuyim Al Ikkuv Kesafim* (*Ribit Piggurim*)."

Chapter Two

THE OWNER'S RIGHT TO PROFITS

A discussion of enrichment at the expense of another is found in the third chapter of tractate *Baba Metzia* of the Mishnah. There[8] the Mishnah records a disagreement between R. Yosi and other Sages concerning a person who rents another's cow and loans it to a third party. If, while in the possession of the third party, the cow dies a natural death, what will the law require? Since in Jewish law a borrower is liable in cases of *force majeure*, it appears that the borrower is obliged to compensate the hirer. Since, on the other hand, a hirer is exempt from damages in such cases, it would appear that the hirer is not obliged to compensate the original owner. Thus, it develops that the hirer profits from the death of a cow owned by another, and this is indeed the opinion of the Sages: "The hirer must swear that it died naturally, and the borrower must pay the hirer." R. Yosi disagrees, however, declaring, "How shall one do

[8] *Mishnah Baba Metzia* 3:2 (*TB Baba Metzia* 35b).

business with another person's cow? The [value of the] cow must be returned to its owner."

The law was codified[9] as accords with the opinion of R. Yosi,[10] and since the case involves enrichment at another's expense,[11] we may conclude that indeed one is not able to profit from another's property. This, then, is the general principle, which remains to be more precisely defined and whose application remains to be clarified.[12]

[9] See Maimonides, *M.T.*, *Sekhirut* 1:6: "If a bailee delivered the bailed object to another bailee, raising the standard of care, the resulting benefit accrues to the owner. How is this to be understood? If, for example, a man hired a cow from another, and then lent it to a third party, and it died a natural death while in possession of the third party – who, being a borrower, is liable in all cases of loss – it is the owner, and not the first bailee, to whom the value of the cow is to be restored, since a bailee is not permitted to do business with another person's property. And so it is in all similar cases." See also *Sh. Ar.*, *Hoshen Mishpat* 307:5: "If one hired a cow from another and loaned it to a third, and the cow died a natural death or died as the result of some *force majeure*, since the latter is liable, it [the cow's value] returns to the owner, since one may not profit from the other's cow. But if he [the owner] said to the hirer, 'Lend it out if you wish, and the borrower will be accountable to you, and you will be accountable to me,' then the borrower compensates the hirer." See also *Resp. Maharashdam*, *Hoshen Mishpat* 371.

[10] The opinion of the Sages, as well, can be interpreted as not permitting one to profit from another person's property. Still, they disagree with R. Yosi because they consider the hirer in the present case to be using his own property, since he has purchased the rights to its use. See, for instance, *Hiddushei haRim*, *Baba Metzia* 35b.

[11] Thus we can also explain the seeming contradiction between R. Yosi's principle and the exemption of a person who benefits while the other sustains no loss. See above, Part 1. See also *Hiddushei haRim*, *Baba Metzia* 35b (ed. Tel Aviv, 1959), p. 121.

[12] Concerning the question of whether R. Yosi's principle applies when a gratuitous bailee pays another to care for the animal entrusted to him and the animal dies under circumstances where the gratuitous

1. CREATION OF A DIRECT ADVERSARY RELATIONSHIP

First, it must be noted that some early post-talmudic authorities dissociate the principle completely from the question of enrichment at another's expense.

So, for instance, the *Tosafot*[13] explain that R. Yosi's ruling is not a function of the fact that, once the borrower has compensated the hirer, the owner can claim, "you have possession of my cow."[14] From another talmudic discussion[15] it may be understood that R. Yosi requires the borrower to pay the owner even when the borrower is exempt from paying the hirer.[16] Thus, conclude the *Tosafot*, the reason why R. Yosi requires the borrower to return the value of the cow to the owner is that in this case the hirer does not acquire the cow by paying for its hire. Usually, in instances – such as *force majeure* – where the hirer is exempt, he acquires the cow by swearing, which exempts him from the owner's claim.[17] In the present case, the owner can demand that the hirer remove himself and his oath from the litigation and

bailee is exempt and the paid bailee is liable, see *Tosafot*, *Baba Kama* 11b, s.v. *La mibaya*; *Pit'hei Teshuvah*, *Hoshen Mishpat* 307:1; *Arukh haShulhan*, *Hoshen Mishpat* 291:47; *Resp. Shevut Ya'akov* III:148; and *Helkat Yo'av*, *Mahadura Tinyana* 15; B. Kahane, *Shomerim*, pp. 466-467, 1237-1240. See below, notes 79 and 97.

13 *Tosafot*, *Baba Metzia* 35b, s.v. *Tahazor*.

14 That is to say, possession of the value of my cow.

15 *Baba Metzia* 96b.

16 According to Jewish law, if the bailor is in the service of the bailee at the beginning of the bailment, and the property is damaged during the bailment, the bailee is exempt from payment. So here, the Talmud implies that even in an instance of such an exemption – that is to say, if the hirer was in the service of the borrower at the beginning of the loan and the borrower is thus exempt from compensation – the borrower will nevertheless be obliged to compensate the owner.

17 In all cases where a bailee is exempt from damages, he is not exempt

that he (the owner) deal directly with the borrower (and, as mentioned, the borrower is liable in cases of *force majeure* and is not permitted to swear and acquire the cow).[18] The Sages who disagree with R. Yosi, the *Tosafot* explain, hold that the hirer's acquisition of the cow takes place at the time of the animal's death. Thus, the compensation which the borrower is obligated to make belongs to the hirer and not the owner.

According to the *Tosafot*, then, it would appear that the disagreement between R. Yosi and the Sages bears no connection to the question of enrichment at another's expense. R. Yosi rejects the hirer's right to compensation not because, by being compensated, the latter profits from the property of another,[19] but rather because, legally, nothing has occurred that would grant the hirer any rights whatsoever in the property.

It is possible, however, that even according to *Tosafot*, R. Yosi's reason is that one should not be allowed to profit at another's expense. According to this interpretation, R. Yosi's explanation, "How shall one do business with his neighbor's cow?" creates a direct adversary relationship between the owner and the borrower: By lending the cow to

unless he takes the "bailees' oath." See Maimonides, *M.T.*, *Sekhirut* 1:1.

[18] Parenthetically, *Tosafot* add that the same will apply where there are witnesses to the loss of the object of bailment and, thus, no need for the hirer to swear. Since there is no oath, the hirer can acquire the cow only by bringing witnesses, and the owner is entitled to exempt him from bringing witnesses, thus preventing the hirer's acquisition of the cow.

[19] See R. Yosef Hazan, *Ein Yehosef*, *Baba Metzia* 35b; R. Nehemyah son of R. Faivel Rushniz (Segal), *Divrei Naba*, *Baba Metzia* 35b; R. Tzvi Eliezer Slutzkin, *Matza Hen*, *Baba Metzia* 35b: "Who can fail to see the difficulty of this?"

a third party, the hirer creates certain advantages that might materialize in consequence of the lending, and the owner is entitled to a direct claim against the borrower[20] in order to enjoy the benefit of these advantages. According to this explanation, the *Tosafot* do not ignore R. Yosi's pronouncement, but rather define it and show its basis in law.

In truth, however, the *Tosafot* do limit the owner's right to indemnification. If the owner is present when the animal dies, the hirer is exempt from damages without having to swear. In such a case, therefore, it cannot be argued that his acquisition of the cow is by virtue of his swearing. Here his acquisition of the cow could only be by virtue of its death, and then the owner cannot demand that the hirer remove himself and his oath from the litigation, for the hirer has already acquired the cow and effectively removed the original owner as a party. Hence, in such a case, the *Tosafot* conclude, R. Yosi will agree with the Sages that the borrower is obliged to indemnify the hirer.

Such a conclusion, of course, does not appear consistent with R. Yosi's "How shall one do business with his neighbor's cow?"[21] In accordance with the above explanation of *Tosafot*, however, it may be suggested that the original owner is entitled to a direct claim against the borrower only

[20] On the "direct adversary relationship" as regards our particular *mishnah*, as well as and parallel cases where the plaintiff may collect from either party he chooses, see, for instance, Rashi, *Baba Metzia* 42b, s.v. *uMeshalem bakara*; Ritba, *Baba Metzia* 35b, s.v. *Tahazor*; *Mordekhai, Baba Kama*, chap. 10, ad init., 141-142 (in the name of *Sefer haHokhmah* and the decision of R. Eliezer of Metz); R. Shelomoh Luria, *Yam Shel Shelomoh, Baba Kama* 10:1; *Bah, Hoshen Mishpat* 363:5; *Shakh, Hoshen Mishpat* 291:41; *Mahaneh Efrayim, Hilkhot Shomerim* 33; but see *Netivot haMishpat* 291, *be'urim* 27.

[21] Cf. the question to this effect advanced by R. Avraham son of Azuz ibn Burgil in his *Lehem Abirim, Baba Metzia* 35b.

where he has some claim to begin with. Where he has himself witnessed the animal's death, under circumstances that exempt the hirer (with no need for oath or witnesses), he has no claim at all and thus no cause for action, against either hirer or borrower.

In practice, most of the Early Authorities reject this opinion of *Tosafot*, holding that even if the circumstances surrounding loss of the object of bailment are known to the owner, so that there is no need for an oath or witnesses, R. Yosi will yet hold that compensation for the loss is due the original owner.[22] Nor has the *Tosafot*'s opinion been accepted as law.[23]

2. QUASI-AGENCY

Another explanation of the direct adversary relationship between owner and third-party borrower is advanced by R. Yom Tov ibn Ashbili (Ritba).[24] Ritba explains[25] that in lending the cow to another, it is as though the hirer is acting as an agent of the owner.[26] A similar opinion is advanced

[22] Rashba explains that according to R. Yosi, the borrower is the bailee of the original owner and not of the hirer. *Netivot haMishpat*, cited above, in note 20 reaches the same conclusion.

[23] See *Shakh*, *Hoshen Mishpat* 307:3.

[24] R. Yom Tov ibn Ashbili (ca. 1250 – ca. 1320) was a widely respected rabbinic authority, who lived in Spain.

[25] *Hiddushei Ritba*, *Baba Metzia* 35b, s.v. *Ela tahazor*.

[26] Cf. formulation of Rashba: "R. Yosi's reason is that the borrower is considered in all matters to be the bailee of the owner of the cow, and it cannot be said that he [i.e., the owner] is not a party...." See also the formulation of *Tosefot Rabbenu Peretz*, *Baba Metzia* 35b: "It can be said that R. Yosi's reason is that the hirer is as an agent of the owner, and thus, it is as though the owner himself had loaned it to the borrower."

by Rosh:[27] "R. Yosi's reason is that [the hirer] is considered as having acted as the owner's agent in lending the cow; therefore the owner's claim is against the borrower."[28]

3. PREVENTION OF ENRICHMENT AT THE EXPENSE OF ANOTHER

Prevention of enrichment at another's expense is seen by Ramakh as the basis for R. Yosi's opinion. So we find in *Shitah Mekubetzet*:[29]

> One who hires a cow and lends it to another, and the cow dies a natural death [while in possession of the borrower], the borrower pays the owner and not the hirer, for it is not proper for one to profit from his neighbor's cow and for the hirer to benefit from the owner's [property] and the owner lose.[30]

Thus, we have seen three explanations of R. Yosi's principle: (1) that of the *Tosafot* who hold that the normal basis of a hirer's exemption is his acquisition of the object of hire after its destruction by virtue of taking the bailees' oath, and that here the owner has the right to demand that the hirer remove himself from the proceedings, thus preventing him from swearing and acquiring the cow; (2) the approach of Ritba, Rosh and others, according to which the hirer in lending the object of hire to a third party, is acting as the owner's agent; (3) the opinion of Ramakh, that the hirer is not permitted to enrich himself at the owner's expense.

[27] Rosh, *Baba Metzia* 3:5.

[28] See also *Shitah Mekubetzet*, *Baba Metzia* 35b, s.v. *vehaSho'el*, in the name of *Tosefot* Shantz: "Perhaps R. Yosi's reason is that the hirer is considered to be an agent of the owner."

[29] Ibid., s.v. *uleInyan Pesak*.

[30] Ramakh concludes: "And if the borrower is a poor man and unable to pay, the hirer is exempt from payment."

Chapter Three

BENEFIT FROM ANOTHER'S LABOR

R. Yosi's principle served as the basis for further legal development. The principle was applied with quite far-reaching implications by R. Me'ir haLevi Abulafia (Ramah)[31] to the field of labor law. The case involves a person who instructs his agent to hire workers at a particular wage. The agent hires the workers but undertakes to pay a higher wage than specified. According to Jewish law, if A said to B, "hire me workers for three [coins]" and B hired them for four, if B, the agent, says to the workers, "I will pay your wages," he pays them the four [coins] promised, and collects from A the value of the benefit received. That is, if the benefit received by A was worth more than three coins per worker, then B is entitled to collect more than three coins per worker, thereby reducing his loss.[32] To

[31] R. Me'ir haLevi Abulafia (ca. 1165-1244) was a widely recognized rabbinic authority who lived in Spain.

[32] See *Baba Metzia* 76a; *Tur* and *Shulhan Arukh, Hoshen Mishpat* 332:1.

this regulation, however, Ramah adds a new limitation – that the agent (B in our case) may collect no more than he paid in wages (in our case, four coins). *Tur* cites Ramah's limitation:[33]

> Ramah wrote [that he collects] no more than four, even if the work is worth more, in order that he [the agent] not profit from his neighbor's cow.[34]

Here, we may ask, What does Ramah intend by the term "his neighbor's cow," with which the agent will be deemed as making profit should he collect more than what he has paid? According to Rema, it appears that the equivalent of the "cow" in this case is the labor of the workers. In his *Darkhei Moshe*, Rema writes:[35] "For how shall one profit from his neighbor's cow, that is, from the labor of the workers? Although an agent may lose, he is not entitled to profit." According to this interpretation of Ramah's application of R. Yosi's principle, we come to an extremely important conclusion, namely, that the claim, "how shall one profit from his neighbor's cow," is not restricted to the party equivalent to the cow's owner. The claim may be lodged also by a third party, although no use has been made of his property or labor. So in the present case, A, who appointed B as his agent to hire workers, may use the claim to protect himself against having to pay the entire amount of benefit received by virtue of B's agency.

[33] *Tur Hoshen Mishpat* 332. See below, text at note 110, where it is shown how Ramah's ruling is applied in cases where one person insures the property of another.

[34] Ramah's ruling is not cited in *Shulhan Arukh* by R. Yosef Karo or Rema. It is cited, however, by a number of glosses; see *Sema*, *Hoshen Mishpat* 332:2; and *Shakh*, *Hoshen Mishpat* 332:3.

[35] *Darkhei Moshe*, *Hoshen Mishpat* 332.

Chapter Four

HIRING STOLEN PROPERTY

Ramah proposes another innovative application of R. Yosi's principle. In a discussion of a person who steals property and hires it out to another, Ramah rules that the thief is obliged to remit the rent received to the original owner. Ramah's ruling is quoted in *Shitah Mekubetzet*, on a case discussed in *Baba Kama* 97a, of a person who stole and used another's boat:[36]

> This applies [only] when the thief uses it [himself]. When, however, he hires it out to another and receives rent, even if he possessed it with the intention of theft, since it was designated by the original owner as being for hire, when the hirer hires it with the consent of the thief, he is obliged to pay the rent to the owner, since the acquisition of the thief is not full acquisition, but only acquisition as far as obligating him for damages

[36] *Shitah Mekubetzet*, *Baba Kama* 97a, s.v. *ulelnyan Pesak*.

> caused by *force majeure*. Thus, we find that the money received by the thief from the hirer belongs to the owner, and he is obliged to forward it to him.

Tur[37] quotes Ramah's opinion but omits the words, "and receives rent," emphasized above, and this omission opens the way for a restrictive construction of Ramah's ruling. According to this reading, the obligation to pay rent to the original owner applies only as long as the thief has himself received no rent for use of the stolen property. If the rent has been paid to him, however, he is permitted to keep it.[38] This construction was offered in spite of *Tur*'s own words, "Thus, when the thief receives rent from the hirer, this is money belonging to the owner, and he [the thief] must return it to him [the owner]." Those adopting the restrictive construction of Ramah's ruling apparently take *Tur*'s words to explain why *ab initio* the thief is not entitled to receive rent, being that any such revenues are rightfully the property of the owner. Once rent is paid to the thief, however, as explained, this approach would hold that he is not obliged to remit it to the original owner.[39]

Such an interpretation is contradicted, however, by the wording of Ramah's ruling as quoted by *Shitah Mekubetzet*, where it seems clear that any rent collected must be paid to the owner.

[37] *Tur Hoshen Mishpat* 363:5.

[38] See *Shiltei Giborim* on Rif, *Baba Metzia*, chap. 5 (ed. Vilna, p. 36a). It appears that *Shiltei Giborim* holds that, if the rent is paid to the thief after the stolen object has been recovered by the original owner, then the rent must in any case be forwarded to the owner.

[39] *Resp. Sho'el uMeshiv, Mahadura Talita'ah* II:146, p. 43, col. 3, interprets Ramah's ruling in a manner similar to the interpretation of *Shiltei Giborim*.

Ramah's ruling was rejected by R. Yosef Karo.[40] R. Karo cites an explanation of Ramah's ruling according to which not obligating the thief to remit any rent he receives to the owner would result in an injustice to the owner (*de'im lo ken laktah shurat hadin*). He then goes on to express his disagreement with both the ruling and the reasoning cited:

> Ramah's ruling is most strange in my eyes. Since it is established that all thieves repay the value that the object had when it was stolen, what difference is there if he used it himself or hired it out to someone else...? And the argument that otherwise there will be an injustice done [to the owner] is no argument, for it is established that any appreciation of stolen property belongs to the thief.

Rema, on the other hand, writing in *Darkhei Moshe*, supports Ramah's ruling, dismissing R. Karo's objections, partly on the basis of R. Yosi's principle:[41]

> There is no argument at all in what he [i.e., R. Yosef Karo] writes. That which he argues, "what difference is there if he used it himself, etc.?" is refuted by the case of one who hires a cow and lends it to another and the cow dies while in the possession of the borrower. For if the hirer did some work with it, and it died, he is exempt from payment, whereas if he loaned it to another, and it died, compensation goes to the owner, [since otherwise] it would be an instance of profiting from his neighbor's cow.... And it is the same here. Although the thief is required to pay only the value of the object at the time it was stolen, as regards any rent he may receive, he is not permitted to profit from his neighbor's cow. His argument that all appreciation of

[40] *Beit Yosef*, *Hoshen Mishpat* 363:5.
[41] *Darkhei Moshe*, *Hoshen Mishpat* 363:2.

> stolen property belongs to the thief is also not relevant, since here, the hirer meant only to pay rent, and thus, the rent is owed directly to the owner as though he had hired it out himself.[42]

As a consequence of this reasoning, Rema, in his comments on *Shulhan Arukh*, rules in accordance with Ramah:[43] "If the thief hired it out to someone else, he must return the rent to the owner, since the [stolen property] had been designated as for hire."[44]

It is Rema's opinion, then, that when the regulations concerning theft (according to which the appreciation of stolen property belongs to the thief) come into conflict with R. Yosi's principle, the latter takes precedence. Thus, in the case under discussion, rental payments are due the original owner and not the thief. R. Karo had asserted that the principle that any appreciation of stolen property belongs to the thief exempts the thief from returning rental payments to the owner. On the other hand, Rema argues that, since here there is a hirer who is obliged to pay rent, and the question is, to whom must he pay it? we do not apply the principle that appreciation of stolen property belongs to the thief, rather ruling that rental payments must go to the owner.[45]

[42] See below, note 49.

[43] Rema, *Sh. Ar., Hoshen Mishpat* 363:5.

[44] With regard to the applicability of *takkanat hashavim* in the present case, see *Sema, Hoshen Mishpat* 363:13; the Hebrew version of the present work, Nahum Rakover, *Osher veLo beMishpat* (Jerusalem, 1987), Part 2, n. 40; *Be'ur haGra, Hoshen Mishpat* 363:12; and *Taba'at haHoshen* 363, with reference to the opinion of *Netivot haMishpat* 363, *be'urim* 9. See below, note 57.

[45] This apparently answers R. Yosef Sha'ul Nathanson's objection to the opinion of Rema. See R. Nathanson's *Sho'el uMeshiv, Mahadura Talita'ah* II:146 (p. 43, end of col. 2). See also *Imrei Binah* I, responsa, 2:6-7.

Chapter Five

HIRING OUT ANOTHER'S PROPERTY

The point of law discussed by Ramah (and the subsequent authorities quoted) concerns the hire of movable property – property which can be stolen. Rashba[46] discusses immovable property, which, of course, cannot.

Rashba considers the case of A who lets a house to B, and later it is found that the house belongs not to A but rather to C. In *Baba Kama*, the Talmud establishes that if the house is not available for hire, the tenant has no obligation to compensate the owner.[47] What will be the law, however, where B has already paid rent to A (although A is not the owner)? Rashba rules that the rent is to be recovered from A. As regards disposition of the money recov-

[46] Rashba, R. Shelomoh son of Avraham son of Adret of Barcelona (1235-1310) was the most widely respected rabbinic authority in Spain in the generation following Nahmanides.

[47] See *Baba Kama* 21a; see above, Part 1, chap. 6.

ered, however, he is not certain whether it should be remitted to C, the owner, in accordance with R. Yosi's principle, or perhaps returned to B, the rationale being that since the house was not for hire, B can say to C, "What loss have I caused you?" Rashba writes:[48]

> Where he has already paid rent to A, we take it from him, for he has let that which is not his. And it may be that it is given to C, for how shall one profit from his neighbor's house? And even though it was not for hire, since he entered it on a rental basis and paid, A has already acquired [the rental fee] for C.[49] Or it may be that the money is taken from A and returned to B rather than to C, since B can say, "What loss have I caused you?"

What is noteworthy in this passage is that, although A in letting C's property has no connection, legal or physical, with it, and no legal relationship with C, the owner, the latter may yet be entitled to receive rental monies from him. Rashba's uncertainty does not concern whether R. Yosi's principle applies. Apparently it is clear to Rashba that if the rent is not returned to B, the tenant, the owner, C, is entitled to claim it from A. His uncertainty, rather, is whether B (who has already paid) is entitled to receive his money back.[50] As regards the relationship between the owner, C,

[48] *Hiddushei haRashba*, *Baba Kama* 21a, s.v. *Hakhi ka'amar nimtza*, quoted also in *Beit Yosef*, *Hoshen Mishpat* 363:7.

[49] In suggesting that A acquires the rent for C, Rashba puts A in the position of C's agent, in spite of A's intention to acquire the rent for himself. Compare opinions of Ritba and Rosh, above, text at notes 25 and 27. See also the opinion of Rema, above, text at note 42.

[50] *Shulhan Arukh*, *Hoshen Mishpat* 363:9, rules that the rent is to be returned to the tenant: "Some hold that the principle that when the property is not for hire, [the tenant] need not pay rent, applies even if he rented it from another, whom he thought to be the owner, and it was

and A, the person who has let his property without his consent, Rashba holds that R. Yosi's principle applies. As for the relationship between B, and C, however, Rashba is uncertain whether the exemption of "one benefits while the other sustains no loss" will apply.

It is important to note, by the way, that Jewish legal authorities sometimes use R. Yosi's "How shall one do business with his neighbor's cow?" in a strictly rhetorical fashion without its actually serving as the legal basis for the ruling in question.

So, for instance, in a responsum of R. Me'ir son of Barukh of Rothenburg,[51] regarding A, who made B his agent to purchase clothing for him and delivered to him a sum of money for that purpose. B purchased clothes from a non-Jew, who disappeared before collecting the payment due him.[52] Maharam rules that the money belongs to A and that B has no right to it.

found that he is not, although [the tenant] took up residence with the intention of paying rent. And even if [the tenant] paid rent to [the illegal lessor] who rented it to him, [the illegal lessor] must return it [to the tenant]."

The meaning of the ensuing passage in *Shulhan Arukh* is not clear, however: "And if he paid him rent, since it is clear that it was paid in error, he must return it." To whom did he pay rent? If to the illegal lessor, it has already been stated above that the illegal lessor must return the rent to the tenant. *Sema*, ad loc., 23, attempts to clarify the passage; see also *Netivot haMishpat*, ad loc., *be'urim* 7.

[51] R. Me'ir son of Barukh of Rothenburg (1215-1293), also known as Maharam ben Barukh or Maharam of Rothenburg, was one of the last of the Tosafists. He was born in Worms and died in prison in Ensisheim, Alsace.

[52] R. Me'ir son of Barukh's responsum is quoted in *Mordekhai, Ketubot* 258; and *Mordekhai, Baba Kama* 168-169. See also *Resp. Beit Yitzhak, Hoshen Mishpat* 55:3; but it seems that the author of *Beit Yitzhak* extends R. Me'ir son of Barukh's ruling beyond its original intention.

> Accordingly, so long as the money is in the possession of B, it is still owned by A. If the non-Jew forgets it and subsequently cannot be found, how shall one profit from his neighbor's cow? Rather, the money must be returned to its original owner.

The ruling is based upon the fact that the money belongs to its original owner and must, therefore, be returned to him. The statement, "How shall one profit from his neighbor's cow?" comes only to dramatize the original owner's right to the profit realized by the vendor's failure to collect that which is due him.

Chapter Six

SUBLETTING

1. PERMISSION TO SUBLET, AND THE RIGHT TO REVENUES RECEIVED

Further application of R. Yosi's principle was made by R. Yosef Haviva,[53] in his *Nimmukei Yosef*,[54] to situations where a tenant profits by subletting the property he has rented. Considering the case of a person who rents a house and sublets it for a higher rent than he himself pays, R. Haviva distinguishes between a tenant who was permitted to sublet the property and one who was not: if the tenant received permission (be it explicit or implied) to sublet, then the profit belongs to him; if not, the profit belongs to the property's owner. In support of his ruling, *Nimmukei Yosef* cites R. Yosi's principle.

Not only does *Nimmukei Yosef* use R. Yosi's principle to support his ruling that when the tenant does not have permission to sublet, profits must go to the owner, he also goes

[53] R. Yosef Haviva was an important rabbinic authority who lived in Spain near the end of the fifteenth century.

[54] *Nimmukei Yosef*, *Baba Kama*, chap. 2 (ed. Vilna, p. 9a).

to considerable length to demonstrate that, when the tenant does have permission to sublet, the profits belong to him. R. Haviva argues that, since the tenant is acting within the bounds of what he is permitted to do, the simple fact that he shows a net gain by collecting a higher rent than he is paying is not sufficient to entitle the owner to his profits; and since permission to sublet was part of the original agreement, the owner has no claim against the tenant's doing so. Neither is the profit itself sufficient cause for action by the owner. This is comparable to renting to the tenant for less than the going rate. Here, too, the tenant "profits" from the owner's property, yet, clearly, the owner has no cause for action to recover the difference between the rent charged and the going rate. He concludes by adding that, where there has been permission, it is a case where one person benefits while the other sustains no loss.[55]

[55] One problem noted by various commentators with regard to *Nimmukei Yosef*'s opinion is that, in the original case concerning which R. Yosi formulates his principle, the Talmud (*Baba Metzia* 36a) asserts that the owner of the cow had granted permission to the hirer to lend it to others. This being the case, why, in the present case of subletting real property, should the owner's permission grant the tenant the right to the profits realized by subletting – would it not appear that in both cases one person profits from the property of another? Apparently, *Nimmukei Yosef* takes the Talmud's assertion, that our case is one where the owner had granted his permission to lend the cow, to be a temporary conclusion, ultimately rejected. See *Resp. Benei Aharon* (Lapapa) 1, p. 2, col. 2; *Mahaneh Efrayim*, *Hilkhot Sekhirut* 19; *Sema*, *Hoshen Mishpat* 307:5; *Shakh* (in response to the opinion of *Sema*), *Hoshen Mishpat* 307:2; *Ketzot haHoshen* 363:8; *Be'ur haGra*, *Hoshen Mishpat* 363:30; and *Minhat Pitim* (Arik), *Hoshen Mishpat* 307:5.

In his comments on *Shulhan Arukh*, Rema[56] rules in accordance with the opinion of *Nimmukei Yosef* as law.[57]

2. THE RIGHT TO SUBLET BY LAW AND BY OWNER'S CONSENT

Basing himself on a distinction between the legal right to sublet and the owner's permission to sublet, R. Aharon Lapapa (a noted Turkish rabbinic authority)[58] seeks to restrict the application of R. Yosi's principle.

This problem figures in the opinion of R. Aharon Lapapa, cited in sub-section 2 of the present chapter.

[56] Rema, *Hoshen Mishpat* 363:10. See also *Beit haMelekh* (Hason) 7, p. 47, col. 3.
Shulhan Arukh, Hoshen Mishpat 307:5, rules: "If one hired a cow from another and loaned it to a third, and the cow died a natural death or as the result of some *force majeure*, since the latter is liable, it [the cow's value] returns to the owner, since one may not profit from the other's cow. And if he [the owner] said to the hirer, 'Lend it out if you wish, and you will deal with the borrower, and I will deal with you,' then the borrower compensates the hirer." According to the emphasized passage, then, the possibility exists that compensation for the cow will be paid to the hirer; however, simple permission to lend the cow is not sufficient, since it must be stipulated that the hirer will deal with the borrower and the owner with the hirer. Hence it seems clear that *Shulhan Arukh* does not accept the ruling of *Nimmukei Yosef*. See also *Beit haMelekh*, loc. cit., who suggests that *Nimmukei Yosef*'s opinion should not be understood at face value, since "I have not found a single authority who accepts it...."

[57] See *Netivot haMishpat*, *Hoshen Mishpat* 356, *be'urim* 4: "And if [the thief] sells [what he has stolen] for more than its value, and the owner is agreeable to the sale and claims the money received by the thief, the thief cannot argue that he must surrender only the value [and not the profit] in the manner that all thieves pay only the worth of an object at the time it was stolen. For how can one do business with his neighbor's cow?"

[58] R. Aharon Lapapa was active during the seventeenth century.

R. Lapapa opens[59] by questioning *Nimmukei Yosef*'s opinion, asking what difference there is between a tenant who has the owner's permission to sublet and the case in the Mishnah concerning which R. Yosi concluded that one may not profit from another's property (given[60] that the Talmud concludes that in R. Yosi's case as well the owner had given his permission to lend the cow to others). He concludes that there is indeed a difference between the two cases. In the case of R. Yosi, the hirer is not permitted to lend the cow without the owner's permission, an indication that the object held in bailment (i.e., the cow) does not belong to the hirer. In the present case of immovable property, however, the tenant is permitted by law to sublet the premises even without permission of the owner. The tenant's right to sublet without permission shows that he actually acquires rights in the property – that for the rental period, the property belongs to the tenant. On the other hand, where the object of hire can he hired or loaned out by the hirer only by permission of the owner, the hirer does not acquire such rights in the object for the agreed period, and where the hirer does not acquire such rights, R. Yosi's principle, which prohibits profiting from the property of another, will apply. On the other hand, in the case of immovable property, where the tenant actually acquires the property that he rents, R. Yosi's principle is not relevant.[61]

R. Lapapa's approach requires further study, however, particularly since he presents it in explanation of the opinion of *Nimmukei Yosef*, who speaks explicitly of a case

[59] *Resp. Benei Aharon* 1:3, p. 2, col. 3.

[60] See above, note 55.

[61] Further on in the responsum, R. Lapapa relates to a possible objection to his approach based on the talmudic discussion in *Baba Metzia* 96. See also his discussion, *Resp. Benei Aharon* 1:2, p. 5, of a responsum of R. Mordekhai Kalai. See also R. Lapapa's remarks, ibid. 3, p. 7.

where the tenant is not permitted by law to sublet (that is, to a bigger family than his), but the owner allowed him to sublet. In this case, *Nimmukei Yosef* still says that the profit belongs to the tenant.[62]

In his *Mahaneh Efrayim*,[63] R. Efrayim Navon[64] discusses sub-hiring of chattels, adopting R. Aharon Lapapa's distinction, though, for the reason mentioned, he does not attribute it to *Nimmukei Yosef*. Nor does R. Navon argue that where a legal right to sublet exists that this indicates acquisition by the tenant.

3. PROFIT FROM THE OWNER'S PROPERTY AND PROFIT FROM THE TENANT'S RIGHTS

R. Efrayim Navon goes further still, introducing a new distinction between the situation concerning which R. Yosi formulated his principle, on the one hand, and profits on rental revenues, on the other. R. Yosi, of course, is concerned with who will receive compensation from the borrower for the dead cow. In this case, the body of the cow remains the property of the original owner, and thus it is relevant to ask how one person may be permitted to profit from the property of another. In rental of immovable property, however, the tenant acquires the usufruct, the right to whatever earnings the property may yield, for the duration

[62] Against the opinion of R. Lapapa, R. Me'ir Simhah of Dvinsk (below, note 65) argues that since the *mishnah* presenting R. Yosi's principle contains no qualifications, it must certainly apply in all cases, including one where the hirer has stipulated that he be permitted to lend the property to others. Here, although the hirer clearly lends out that which is his to lend, R. Yosi's principle still applies. Hence R. Lapapa's distinction is not valid.

[63] *Mahaneh Efrayim*, *Hilkhot Sekhirut* 19.

[64] R. Efrayim Navon was born in Constantinople in 1677 and died in 1753.

of the rental period. This being the case, whether the property is used by the renter himself or by a third party, the renter's profits are a function of the right that he has acquired.[65]

While *Mahaneh Efrayim* agrees with *Nimmukei Yosef* that, where the owner of immovable property grants permission to sublet, the profits belong to the tenant, *Mahaneh Efrayim* rules that even where the subletting is without the owner's permission, the profits belong to the tenant.

4. PROFIT FROM THE VALUE OF THE PROPERTY AND PROFIT BEYOND THE VALUE OF THE PROPERTY

Mahaneh Efrayim seeks further to restrict application of R. Yosi's principle with regard to immovable property, asserting that *Nimmukei Yosef*'s opinion applies only to situations where the property was originally rented for less than the going rate. In such a case, when the tenant sublets it for more than he pays, his profit is a function of the value of the property, and thus, in accordance with R. Yosi's principle, it is the owner who is entitled to it. Where the property has been rented for the going rate for such properties, however, then any profit realized by subletting is not based upon the value of the property. In such instances, the profit belongs rightfully to the tenant, for this is a situation where the tenant benefits and the owner sustains no loss. *Mahaneh Efrayim*

[65] A similar explanation is advanced by *Ketzot haHoshen* 363:8. See also *Taba'at haHoshen*, ad loc.; *Hiddushei haRim*, *Baba Metzia* 35b (ed. Tel Aviv, 1959), p. 106, col. 1, p. 107, p. 122, ad fin., and above, note 10; *Resp. Beit Yitzhak*, *Hoshen Mishpat* 55:3; and *Or Same'ah*, *Hilkhot Sekhirut* 5:6, ad fin.
For the distinction offered by R. Me'ir Simhah of Dvinsk between delivery of a cow to a borrower on the one hand and subletting of real property on the other, see *Or Same'ah*, ibid.

goes to some length attempting to show that this approach does not contradict *Nimmukei Yosef*.

It appears, however, that this is not in fact *Nimmukei Yosef*'s intention, since *Nimmukei Yosef* reasoned that when the tenant has permission to rent, he is exempt from remitting his profit to the owner, just as he would be exempt from any further obligations if he himself had rented the property at less than the going rate. Thus, it seems apparent that in discussing tenants who sublet with or without permission, *Nimmukei Yosef* was not referring specifically (or even primarily) to tenants who were renting for less than the going rate.[66]

5. WHEN THE OWNER SUSTAINS LOSS

R. Yosef ibn Hason[67] discusses the case of A, who lets his house to B who, in turn, sublets it to C at a higher rate. After citing the opinion of *Nimmukei Yosef*, R. Yosef ibn Hason distinguishes between situations where the original owner sustains loss and those where he does not. He concludes that where the owner sustains some loss, the tenant will be obliged to remit his profits to him. In so ruling, R. ibn Hason cites the opinion of Ramakh quoted in *Shitah Mekubetzet*:[68]

> It is not proper that the hirer should do business with his neighbor's cow and benefit from the owner's [property] while the owner loses.

In the case under consideration, R. Yosef ibn Hason rules

[66] See *Erekh Shai*, *Hoshen Mishpat* 316:1.

[67] *Beit haMelekh* (Hason), *Hoshen Mishpat* 7.

[68] *Shitah Mekubetzet*, *Baba Metzia* 35b, s.v. *uleInyan Pesak*. See above, text at note 29.

that since the owner has not sustained a loss, the tenant is not obliged to turn over his profits to him.

His reasoning is somewhat similar to that of *Mahaneh Efrayim*. *Mahaneh Efrayim*, however, emphasizes profiting from the property of the owner, whereas R. Yosef ibn Hason is concerned with whether or not the owner suffers a loss.

Chapter Seven

INSURING ANOTHER'S PROPERTY

1. INTRODUCTION

Nearly every aspect of R. Yossi's principle has been examined in connection with an issue widely discussed during the last hundred years – the issue of insurance.

Many questions have arisen with regard to a person who pays insurance premiums upon a house belonging to someone else, the usual case being that of a tenant[69] who insures the house he is renting.[70]

It must be emphasized that payment of insurance premiums by someone who does not own the property may some-

[69] Where someone insures a property against which he holds a mortgage, R. Yitzhak Schmelkes holds that R. Yosi's principle does not apply (although in the case mentioned of a tenant who insures property that

times obligate the owner to return the amount of the premiums to the person who paid them – for example, when one partner paid the insurance on property owned jointly with another, or when a tenant insured a property based upon the owner's undertaking to reimburse him for his expenditure. In such situations, it may be assumed that the one purchasing the insurance acts as the agent of the owner, and thus, the rights arising from the insurance are the owner's.[71] When, on the other hand, the tenant who purchases insurance is not entitled to be reimbursed for his expenditure, it may be asked whether his payment of the premiums entitles him to whatever profits may arise as a consequence. Or would the tenant be considered as one who profits from his neighbor's property, in which case profits will go to the owner and the tenant will be entitled only to the return of his expenses?

As we shall see, Jewish legal authorities examined such questions in light of the rationales offered by the early post-talmudic authorities for R. Yosi's principle – to dis-

he rents, R. Schmelkes expresses uncertainty). See *Resp. Beit Yitzhak, Hoshen Mishpat* 55:5; and below, text at note 113.

[70] There is a distinction, of course, between coverage purchased by the tenant for the purpose of insuring the structure and coverage purchased by him with intention of protecting his own chattels. The author of *Resp. Divrei Malki'el* (V:128) was asked concerning a case where a tenant asked his landlord to pay a higher premium and purchase more insurance on the house he was renting in order that the existing policy cover the tenant's chattels as well, the tenant reimbursing the landlord for the additional expense. After the tenant left the dwelling, it was destroyed by fire, and the tenant claimed his share of the compensation. The respondent replied that, having paid his share of the premium, the tenant was indeed entitled to his share of the compensation, in spite of the fact that the policy was registered only as protecting the structure.

[71] See, for instance, *Resp. Beit Shelomoh, Hoshen Mishpat* 48.

cover whether according to these explanations, the principle will apply in insurance cases such as those just described. The authorities also developed certain distinctions between lending out a cow and insuring a structure belonging to someone else, by finding certain factors operative in the lending of a cow to a third party that do not operate in the act of purchasing insurance from an insurance company.

The similarities between lending property to a third party and insuring the property of another have been well set forth by R. Yitzhak Aharon Ettinger.[72]

He was asked[73] concerning a house insured by its tenant and subsequently destroyed by fire. The house's owner claimed that the compensation paid by the insurer was rightfully his. The tenant, on the other hand, argued that since he had paid the premiums, and since if there had been no fire, he would not have been reimbursed for his expenditure, once the house was destroyed and his payments had secured a profit, the profit should belong to him only.

In his responsum, R. Ettinger emphasizes that the similarities between the present case and that of R. Yosi go beyond the fact that, in the case of the cow, the profit resulted from the hirer's lending of the cow, while in the case of the insured house, profit resulted from the tenant's purchase of insurance. They are similar also in that both cases concern profit that is a consequence of the owners' loss. Another similarity is that in both cases the second party invested in the profit: in R. Yosi's case, the hirer loses by lending the cow without a fee during the period for which he himself has paid for its use; while in the case considered by R.

[72] R. Yitzhak Aharon Ettinger (1827-1891) served as head of the rabbinic court of Przemysl and later of the rabbinic court of Lvov.

[73] *Resp. Maharia haLevi* II:77.

Ettinger, the insurance policy was purchased at the tenant's expense (with no agreement by the owner to reimburse). Thus, the increased liability of the borrower[74] arises from an expense incurred by the hirer, and the potential insurance payment arises from an expense incurred by the tenant. In R. Ettinger's words: "[the case of R. Yosi] is truly comparable to the case under discussion, for what difference is there between the borrower's acceptance of responsibility in cases of *force majeure* and the insurance company's acceptance of responsibility for damage by fire, which is also a *force majeure*?"

Thus, it would seem that, in view of the close parallels between the two cases, compensation for the insured house destroyed by fire, like the compensation for the cow loaned by the hirer to a third party, is due the original owner. As we shall see, however, R. Ettinger does not rule this way.

In the following subsections, we first examine the opinions of those authorities who do not apply R. Yosi's principle to cases where one insures the property of another, and then the opinions of those who do invoke R. Yosi's principle in such cases.[75]

2. DISTINCTIONS BETWEEN PROFITS FROM LENDING AND PROFITS FROM INSURANCE

A. Lending Without Permission; B. The Borrower Uses the Property

R. Yitzhak Aharon Ettinger asserts that the outcome of the

[74] Unlike hirers, borrowers are obliged to compensate even in cases of *force majeure*.

[75] In Part 3, chap. 4, we cite responsa of authorities who hold that compensation is to be divided between the person purchasing the insurance and the owner of the property, since the profit that arose as a result of the purchase of insurance was in some way dependent upon each.

case under his consideration will depend upon a disagreement between *Shakh* and *Sema*.[76] Whereas *Sema* is of the opinion that R. Yosi's case in the Mishnah is one where the owner had not given permission to lend the cow to a third party, *Shakh* holds that the case is one where the owner's permission to lend had been granted. Since R. Ettinger leans towards acceptance of *Sema*'s opinion,[77] he asserts that there is a distinction between the loan of property without the owner's consent and the purchase of insurance by the tenant, which represents no negligence on the tenant's part, since there is no loss whatsoever to the owner. Thus, R. Ettinger concludes, in the present case, R. Yosi would admit that the compensation is due the tenant and not the owner.[78]

R. Ettinger goes on to demonstrate that in the present case, the ruling will be the same even according to *Shakh*'s opinion that R. Yosi's case was one where the cow was lent with permission. This, R. Ettinger asserts, is because there is a distinction between lending, in which the property is delivered to the borrower in order for him to use it,[79] and

[76] See note 55 above.

[77] In this, he relies upon the opinion of *Nimmukei Yosef* (see note 54 above) accepted as authoritative by *Shulhan Arukh*; Ritba's opinion (*Baba Metzia* 35b, ed. Halperin) as quoted by *Shitah Mekubetzet* (*Baba Metzia* 35b); and Ramakh's opinion, also quoted by *Shitah Mekubetzet* (loc. cit.), according to which it appears that, had the owner granted permission to lend the cow, R. Yosi would have admitted that the compensation belongs to the hirer.

[78] See also *Resp. Maharia haLevi* II:126, where R. Ettinger discusses another case of a tenant who insured a structure belonging to his landlord and repeats the basic principles set forth in the responsum cited here.

[79] Based upon the opinion of the *Tosafot*, *Baba Kama* 11b, s.v. *La*

insurance, where the insurance company does not receive the use of the house but only assumes responsibility for whatever damages may be incurred:

> Only where [the hirer] loaned the cow to another or sublet the house to a third party is this considered profiting from the property of another, because the second bailee uses the thing itself. This is not true, however, of the present case, since the insurance company never had the use of the thing itself, but only accepted responsibility for destruction by fire, [and therefore] this is not considered making profit. And R. Yosi would admit that the compensation is due to the tenant.

C. The Owner's Property is in the Borrower's Possession; D. The Borrower's Undertaking is to the Owner

Whereas R. Ettinger's distinction was based upon use of the owner's property, R. Shelomoh Drimer,[80] in a responsum concerning insurance, emphasizes possession. R. Drimer was asked[81] concerning A and B, who were neighbors in a two-family dwelling. A paid to have only his portion of the structure insured, but, unbeknownst to him or the insurance agent, the coverage was recorded as applying to the entire structure. When B went to insure his portion of the property, he was informed that this was impossible, but not knowing that his portion was already insured, he did not understand the insurer's refusal. In any case, the structure was destroyed by fire, and A claimed that the entire amount

mibaya, that R. Yosi's principle applies also where an unpaid bailee entrusts the cow to a paid bailee, *Minhat Pitim* (Arik), *Hoshen Mishpat* 307:5, disagrees with R. Ettinger's line of reasoning. See note 12 above.

[80] See Part 1, note 80 above.

[81] *Resp. Beit Shelomoh, Hoshen Mishpat* 122 (the responsum is dated 1865).

of the compensation belonged to him, while B claimed that the compensation ought to be divided between the two, since they had equal shares in the property.

R. Drimer opens by asserting that although initially it might appear that a decision in this case must be based upon R. Yosi's principle, in fact, R. Yosi's principle is not relevant.[82] This, he explains, is because the various reasons suggested by the early post-talmudic authorities for R. Yosi's principle do not apply in the present situation.

R. Drimer explains that, according to *Tosafot*'s understanding of the basis for R. Yosi's ruling, it is clear that there is no relevance to the present case.[83] Moreover, even according to Ritba's explanation,[84] that a direct adversary relationship is created between the cow's owner and the borrower, because the owner's property was delivered to the borrower, R. Yosi's principle will not apply to the present case, where the property was never delivered to the possession of the insurer.[85] This reasoning is relevant to all cases of insurance.

As regards the case under discussion, R. Drimer relates

[82] In another responsum written some twenty years later on a question of insurance, R. Drimer does not mention R. Yosi's principle at all. There he rules that if the person who purchased the insurance had no intention of requesting that the owner share in the expense, then the entire compensation is due to him as having purchased the insurance. In the case before him, however, R. Drimer doubts the tenant's claim that he had no intention of requesting that the owner reimburse him for any portion of the premium. See *Resp. Beit Shelomoh, Hoshen Mishpat* 48 (the responsum is dated 1883).

[83] Since the plaintiff is not in a position here to say, "remove yourself and your oath." See text at note 13 above.

[84] See text at note 25 above.

[85] See *Minhat Pitim* (Arik), *Hoshen Mishpat* 307:5, the responsum of R. Shalom Yosef, head of the rabbinic court of Lakacz, Russia. R. Shalom Yosef agrees with R. Drimer but adds that if, according to the

to the fact that B was prevented from insuring his portion of the property. Here it would seem that since B's loss was caused by an act of A, A ought to be obliged to divide the compensation with B. To this proposition, however, R. Drimer does not agree. Since A's act carried with it no advantage for B, R. Drimer believes that Ritba's invocation of agency as the mechanism for creating a direct relationship between owner and borrower will not apply. Agency can be created not at the owner's behest only when doing so entails some advantage to him, as when the hirer extends liability for the property by delivering it to a borrower.

R. Drimer's conclusion concerning agency in the present case seems to be based upon a misreading of Ritba, however, for he paraphrases Ritba as stating that agency is created in R. Yosi's case, because "from this time forth" (i.e., from delivery of the cow to the borrower) there is an advantage to the property's owner (which is clearly not true in the insurance case under discussion). What Ritba writes, however, is that when the hirer lends the property, it is as though he does so as an agent for the owner as regards any advantage as may pertain to the owner from this time forth. Such a mechanism, it may be argued, does apply to the present case, since the advantage to the owner may be ascertained now that the insurer is obliged to compensate, and it is clear (in retrospect) that it was to B's advantage that the house was insured.[86]

R. Avraham Mordekhai Landau of Makilinitz, who originally addressed this query to R. Shelomoh Drimer, head of the rabbinic court of Skala, addressed the same question to

law of the land, the compensation belongs to the owner, then the law of the land is certainly to be followed.

[86] See R. Drimer's opinion cited in Part 1, text at note 83 above.

R. Tzvi Hirsch Te'omim, head of the rabbinic court of Haraskow.[87] R. Te'omim, does not relate to R. Yosi's principle, but, for other reasons, finds in favor of the person who insured the property. R. Te'omim also considers whether the insurer ought to be obliged to compensate B, since it was his action that prevented B from insuring his share of the property. He rejects this possibility, however, since the damage to B was caused by the insurer indirectly and unintentionally.

E. The Basis of the Borrower's Obligations in the Laws of Bailment

The responsa cited thus far have focused on certain distinctive features of the cow-borrowing case, namely, the borrower's use of the cow and his possession of it. We next consider a new point of view, which emphasizes the source of the borrower's obligations and disregards R. Yosi's principle entirely in questions of insurance.

R. Shelomoh Yehudah Tabak[88] considered[89] the case of a person who insured his house and subsequently sold it. After the sale, the house was destroyed by fire. The question here is, who is entitled to the compensation, the original owner, who payed the premiums, or the second owner, whose house was destroyed?

R. Tabak finds in favor of the first owner, based on the fact that he did not sell the buyer of his property his rights to compensation by the insurer.[90] R. Tabak considers

[87] *Resp. Eretz Tzvi, Hoshen Mishpat* 15.

[88] R. Shelomoh Yehudah Tabak served as head of the rabbinic court of Sighet from 1858 until his death in 1908.

[89] *Resp. Teshurat Shai* 106.

[90] In support of this ruling, R. Tabak cites the opinion of Nahmanides quoted by Rema, *Sh. Ar., Hoshen Mishpat* 241:12. For similar use of the same source, see *Resp. Eretz Tzvi* (Te'omim), *Hoshen Mishpat* 15; and *Resp. Maharsham* II:211. A concurrent opinion is expressed by

whether R. Yosi's principle effects a transfer of such rights, and concludes that it does not. He explains that, even according to the opinion that in lending the property to a third party the hirer acts as an agent of the owner, there is an essential difference between that case, where the hirer loaned the property itself to the borrower, and the present case, where the insurer does nothing at all to the house of the insured. Here it is only the payment of the premium that gives rise to the compensation:

> And support for this may be found in the writings of *Tosafot*, Rosh. and *Hagahot Oshri* on the third chapter of *Baba Metzia*, according to which the reason for [R. Yosi's principle] would not apply here. There, [the hirer] loaned the owner's cow itself, and the borrower, by taking delivery for the purpose of using it [*mashakh gufah lehishtamesh bah*], obligated himself in cases of *force majeure*. In insurance, however, nothing was done to the house itself, and the insurer obligates himself in return for the premiums paid to him. Compensation, thus, belongs to the one who paid them.

In other words, the obligations of the borrower (to pay the owner) are a function of the laws of bailment. In the case of insurance, however, there is no cause to apply the laws of bailment, and, therefore, no obligation towards the owner of the house simply by virtue of his ownership.

R. Yosef Sha'ul Nathanson, *Resp. Sho'el uMeshiv, Mahadura Talita'ah* I:305.

R. Tzvi Pesah Frank (*haPardes*, 33 [Tevet, 5719], 6-7) considered whether one who commits a tort against insured property is liable for damages. For additional responsa on this issue, see *Resp. Harei Besamim, Mahadura Tinyana* 245; *Resp. Maharsham* IV:7; *Or Same'ah, Hilkhot Sekhirut* 7:1; and *Resp. Minhat Yitzhak* (Weiss) II:88.

F. The Basis of the Hirer's Obligations in the Laws of Bailment

A similar approach, with emphasis upon the laws of bailment as the basis for R. Yosi's principle, is taken by R. Shemu'el Engel.[91] R. Engel, however, does not discuss the obligations of the borrower, but rather those of the hirer. R. Engel advances an original explanation of the obligations of bailees.[92] According to the opinion that bailees' obligations originate upon their taking delivery of the object of bailment, R. Engel asserts that upon delivery, the bailee immediately incurs the obligation of returning the object to its owner. In cases of *force majeure*, a hirer is exempted from this obligation as long as its fulfillment would entail a loss for him. When returning the object entails no loss to the hirer, however, his obligation remains in force even in cases of *force majeure*. Therefore, when a hirer lends a cow which then dies a natural death, since the borrower must pay, return of the cow's value will entail no loss to the hirer, and thus, he remains obligated. Since R. Engel sees R. Yosi's principle as a direct function of the laws of bailment, clearly there is no basis for applying it to the relationship of insured and insurer, where the insurer in no way assumes the role of bailee (or his obligations).[93]

R. Engel goes ou to show that a distinction will also exist between bailment and insurance according to the opinion that a bailee's obligations do not arise upon his accepting delivery, but only when he is actually negligent in his duties towards the object of bailment. According to this view of bailment, R. Yosi holds that the original owner is enti-

[91] R. Shemu'el Engel was born in Tarnow (western Galicia) in 1853 and died in Kosice (Czechoslovakia) in 1935. He served as rabbi of Bilgoray (Poland), Dukla (Galicia), and Radomysl (Ukraine).

[92] *Resp. Maharash* VI:103.

[93] Cf. the explanation of *Hiddushei R. Me'ir Simhah*, *Baba Metzia* 35b.

tled to the borrower's compensation for the cow, because the borrower is acting as bailee for the original owner, whereas the insurer does not assume the role of bailee at all:

> And to those who hold that the bailee's property becomes encumbered [only] from the moment of negligence – that as long as the object of bailment exists, it remains in the possession of the original owner, with the bailee having no obligation, [since the object never leaves the possession of the original owner,] the Torah obligates the borrower to take proper care of the object for the original owner. Hence, R. Yosi's remark, "How shall one profit from his neighbor's cow?" is logical. In the case of insurance, however, the insurer has no obligation to care for the house. The insurer has rather obligated himself to the owner of the funds paid him that, should the house be destroyed by fire, he will compensate. If so, what right does the owner have in this?

G. Profit Is Not the Purpose of the Lending

A new outlook on the distinction between R. Yosi's case and a tenant who insures his landlord's property is suggested by R. Me'ir Simhah haKohen of Dvinsk.[94]

R. Me'ir Simhah sees the purpose of the purchase of insurance as pivotal.[95] When a person pays insurance premiums, it is with the intention of enjoying the profits that such payments may ultimately yield. A hirer who lends a cow, however, does not do so with the intention of profiting from the borrower's obligations should the cow not survive the experience. The hirer's intention is rather that the cow

[94] R. Me'ir Simhah haKohen of Dvinsk was born in 1843 and died in 1926.

[95] *Or Same'ah, Hilkhot Sekhirut* 5:6.

be returned to him as he delivered it.[96] The cow's death is not anticipated. Since the object of paying insurance premiums is to receive compensation in the event of fire, "It is not logical to say that the house's owner [who did not pay the premiums] will have any part of the compensation – that one should pay and the other receive;[97] is that why he bought insurance?" Thus, while in the case of the hirer who lent the cow to a third party, it may be claimed "How can one profit from the cow of another," in the case of insurance, it may be argued that it is unthinkable that one person should pay the premiums and another receive compensation.[98]

[96] Moreover, even the money paid when he hired the cow on condition that he be permitted to lend it to others, was not paid to the owner for the purpose of acquiring the right to whatever compensation might result from the cow's death, but rather for the right to use the cow and lend it.

[97] See *Pit'hei Teshuvah*, *Hoshen Mishpat* 307:1, with regard to a gratuitous bailee who pays another to care for the animal entrusted to him, and the animal dies under circumstances in which the gratuitous bailee is exempt and the paid bailee liable. According to those authorities who hold that here, too, the paid bailee pays the owner (see references cited in note 12 above), will the owner be obliged to reimburse the gratuitous bailee for his expenses in paying for the animal's care? See Part 3.

[98] How would R. Me'ir Simhah of Dvinsk relate to the various arguments thus far presented that base the owner's rights upon the obligations of the hirer or the borrower? It appears that R. Me'ir Simhah would deem such considerations inadequate when they would result in an injustice to the hirer. For instance, if the hirer invested money with intention of gain, then it is not proper that someone else should enjoy the profits. Therefore, when the hirer delivers the object of hire to another for the purpose of profiting and incurs expense in doing so, R. Yosi's principle will not apply. For a discussion of R. Me'ir Simhah's opinion, see the chapter, "Gidrei Hiyyuvei Shomerim," in: R. Yehoshua Yagel, *Netivot Yehoshua* (1984), pp. 200-204.

H. Payment of the Borrower in Exchange for the Owner's Property

Another interesting approach distinguishing between lending and insuring the property of another is that of R. Refa'el Mordekhai haLevi Solovei.[99] R. Solovei's view turns on the claim, "My cow is in your possession." Such a claim, R. Solovei explains, is available only to the cow's owner. In the case of insurance, however, the owner of the house was never the owner of the money paid by the insurance company in benefits and is, therefore, unable to claim the equivalent of "My cow is in your possession":

> There the reason is that one may not profit from "his neighbor's cow." That is to say that, since the borrower compensates the hirer, the cow of the hirer's neighbor [i.e., the original owner] is, in effect, still in the hirer's possession. Thus, R. Yosi holds that against the hirer in such a case, the original owner can claim, "My cow is in your possession." This is not true, however, in our case [i.e., insurance], where the tenant does not hold "his neighbor's cow." Here the owner cannot claim "My money is in your possession," since this money [i.e., compensation paid by the insurer] was never his. The money derives, rather, from an outside source, and the tenant profits from his original expenditure on the purchase of insurance.[100]

In his conclusion, however, R. Solovei shows that R. Yosi's principle has broader application than simply "profiting

[99] *Resp. Yad Ramah, Hoshen Mishpat* 80:3.

[100] R. Solovei goes on to assert that even according to the *Tosafot*'s explanation of R. Yosi's principle, there is certainly no reason to find in favor of the owner of a structure insured by a tenant: "According to the *Tosafot*, who hold that R. Yosi's reason is that the hirer is obliged to swear or bring witnesses... there is certainly no room in the present case [to apply R. Yosi's principle]...."

from one's neighbor's cow."[101] R. Solovei's reasoning requires careful study, though, since it is based upon the claim, "My cow is in your possession," rejected by the *Tosafot*.[102] It would appear that he bases himself on those authorities who do not accept the opinion of *Tosafot* with regard to a different point. The *Tosafot*, as shown above, argue that if the original owner is present when the cow dies while in the borrower's possession, then R. Yosi would admit that compensation goes to the hirer and not to the owner. Various authorities reject this conclusion, and it is apparently for this reason that R. Solovei attributes to them the view that the owner's case is based upon the claim of "My cow is in your possession." In fact, however, those who disagree with the *Tosafot*, as we saw with regard to Ritba and Rosh, base their opinions on their conclusion that, in lending the cow, the hirer is acting as the original owner's agent.[103]

3. SIMILARITIES BETWEEN R. YOSI'S PRINCIPLE AND INSURANCE

Alongside those authorities who hold that R. Yosi's principle does not apply to situations where one insures the property of another, other authorities are convinced that it indeed applies.

R. Shelomoh Kluger[104] was asked[105] concerning A, a partner in a jointly owned two-family dwelling, who had paid to insure the entire structure. When he was compen-

[101] See below, text at note 108.
[102] See above, text at note 13.
[103] See above, text at notes 25 and 28.
[104] R. Shelomoh Kluger (1786-1869) was one of the most widely recognized rabbinic authorities of his time. He served as rabbi of a number of communities in Galicia and as preacher of Brody.
[105] *Hokhmat Shelomoh*, *Hoshen Mishpat* 176:41.

sated for the structure's destruction, B, his partner, claimed his share, but A refused to divide the payment with him. R. Kluger opens by establishing that the purchase of insurance is not an automatic function of such a partnership, but rather a matter to be agreed upon by the partners. On the question of who is actually entitled to the compensation, R. Kluger rules that this depends upon the law of the land.[106] If the law permits one partner to insure the other's property, then the partner who paid the premiums is entitled to collect the full amount of compensation. If, on the other hand, the law does not permit one to insure the property of another, then the compensation for the uninsured partner's property belongs to the uninsured partner, since one may not profit from his another person's property.[107]

R. Refa'el Mordekhai haLevi Solovei, although disagreeing with R. Shelomoh Kluger's reasoning,[108] nevertheless finds support for the view that one may not profit from insuring the property of another.[109] His source is Ramah's ruling in

[106] "Thus, here is how the law appears to me: Let them ask what is the law of the land. If one person can insure the property of another and collect compensation in the event of fire, then the other partner has no share of this. If, however, it is the law of the land that one cannot insure another's house, then the one who bought the insurance can do so only as a function of his partnership in the property, and he is not permitted to profit from his neighbor's property...."

[107] The distinction between whether it is permitted to insure the property of another or not is found also in *Resp. Sho'el uMeshiv, Mahadura Tinyana* III:129 (see below, Part 3, text at note 136). According to R. Kluger, however, if it is not permitted to insure the property of another, the entire compensation belongs to the owner, whereas R. Yosef Sha'ul Nathanson, author of *Resp. Sho'el uMeshiv*, rules that compensation must be divided between owner and tenant.

[108] *Resp. Yad Ramah, Hoshen Mishpat* 80:3. See above, text at note 99.

[109] Ibid., 80:4.

the case of the agent who hired workers for another.[110] As mentioned, Ramah concluded that the agent may collect no more than the sum he paid to the workers, even if this sum is less than the benefit received by the person for whom the agent hired them. Thus, R. Solovei concludes:

> Also in our case, he who insured the house cannot claim, "I entered into this transaction on my own and at my own expense, having risked my own money. For had the house not been destroyed by fire, I would have lost all my expenses, and now, the profits are mine." The reason [that he has no such claim] is that we say to him, "Were it not for the other's house, from where would you have profited?" No one may profit from something that belongs to his neighbor, and therefore, the profits belong to the owner.[111]

A case where the person insuring the property holds a mortgage against it is considered by R. Moshe Te'omim.[112] R. Te'omim concludes that although his interest[113] in the property might suggest that he is not "profiting from his neighbor's cow," R. Yosi's principle will, in any case, bar him from collecting insurance compensation.[114] Nevertheless, R. Te'omim concludes, the owner must divide the insurance money with the mortgage holder who insured the property. The principle here is that of an agent sent to buy merchan-

[110] See above, text at note 33.

[111] For an explanation of why the owner and the one who purchases insurance do not divide the compensation in accordance with the ruling in *Sh. Ar., Hoshen Mishpat* 183, see below, Part 3, text at note 138.

[112] R. Moshe Te'omim (1819-1887) served as head of the rabbinic court of Gorodenka.

[113] See the opinion of R. Yitzhak Schmelkes, *Beit Yitzhak, Hoshen Mishpat* 55:5, cited above in note 69.

[114] *Resp. Oryan Talita'i* 156.

dise at a known price. If the vendor supplied more merchandise than the going rate would have called for, the agent may not keep the windfall for himself. Rather he must divide it with the person who sent him, since it was the latter's money that brought about the unexpected profit.[115] Here, it is the mortgage holder who is equivalent to the agent, as it is the property of the owner that brought about the compensation paid by the insurer.[116, 117]

A responsum that needs clarification is that of R. Yekuti'el Asher Zalman Tzuzmir[118] concerning A, who insured his own dwelling and that of his brother, B, both dwellings being registered under the same number. When the structure in which both lived was destroyed by fire, B demanded that A surrender B's share of the compensation.

R. Tzuzmir[119] found in favor of B and ordered A to divide the compensation with him. Thus, it would seem that

[115] See *Ketubot* 95b; and Maimonides, *M.T.*, *Sheluhin veShutafin* 1:5.

[116] For R. Te'omim's objection to the opinion of R. Yosef Sha'ul Nathanson, see below, Part 3, note 136.

[117] *Hiddushei haRim*, *Baba Metzia* 35b (ed. Tel Aviv, 1959, p. 108) discusses R. Yosi's principle in light of the rule in the case of the agent, wondering why hirer and owner should not divide the borrower's payment for the value of the cow, given that the hirer has paid for his use of the animal. In answer to this question, the author of *Hiddushei haRim* distinguishes between profit and loss. Where there was a windfall profit, as in the case of the agent who received more merchandise than would have been expected according to the going rate, then the agent and the person who sent him divide it. Here, where there is only compensation for loss and the entire loss is that of the owner, all compensation belongs to him. This approach, however, requires further clarification.

[118] R. Yekuti'el Asher Zalman Tzuzmir (d. 1858), who was a disciple of the author of *Ketzot haHoshen*, served as head of the rabbinic courts of Prezmysl and Stryj.

[119] *Resp. Mahariaz Enzil* 72 (the responsum is dated 1847).

R. Tzuzmir disagrees with those authorities who hold that compensation belongs to whomever pays the premiums (whether or not he owns the property).[120] Upon further study, however, this does not seem to be the case. In his responsum, R. Tzuzmir cites a responsum of Rashakh[121] concerning A and B, who sent merchandise to C with instructions to ship it to a particular destination. Only A instructed C to insure his shipment, but C mistakenly insured only the merchandise of B. In his ruling, Rashakh reasons that since B, not having instructed C to purchase insurance, had not obligated himself to reimburse C for the premiums, he was not entitled to benefit from the compensation. C, on the other hand, as a result of his negligence towards A's shipment, was obligated to restore its value to A who had previously obligated himself to reimburse C for his outlay on the premiums by instructing him to purchase insurance. Thus the compensation was to be paid to A. From this precedent, R. Tzuzmir concludes that

> a person who has become obligated to pay insurance premiums is entitled to whatever advantage may be consequent, even if he has not yet paid. Since in the present case [that of the two brothers], B became obligated to pay his share, he is also entitled to his share of the compensation.

Thus, it is not clear that R. Tzuzmir would always hold that compensation belongs only to the owner of the property (as opposed to another party who paid the premiums).

[120] This is the conclusion of B. Z. Eliash, "Al Dinei haBitu'ah baMishpat haIvri," *Iyyunei Mishpat*, 1, 359 (at 367).

[121] *Resp. Maharshakh* II:159. Rashakh (d. 1602) was one of the most widely recognized rabbinic scholars in Turkey during the sixteenth century. For a discussion of this responsum and its bearing on our topic, see R. David Pipano, *Resp. Hoshen haEfod* I (Salonika-Sofia, 1915), 36.

Chapter Eight

CONCLUSION

The basis for the Jewish legal treatment of situations where one person profits from the property of another is R. Yosi's pronouncement, in the case of a cow, which having been hired and subsequently loaned to a third party, died a natural death. To the possibility that the hirer in this case might profit from the death of the cow that he has hired, R. Yosi responds, "How shall one [i.e., the hirer] profit from another person's cow? The cow must be returned to its owner."

What is the legal basis of R. Yosi's principle? Some commentators have emphasized the injustice of one person's profiting from the property of another when this entails the owner's losing the property altogether. Others explain the principle in more formal legal terms, positing that, in the paradigmatic case of R. Yosi, the hirer, by lending the cow to the third party, is acting as the owner's agent or quasi-agent. This latter approach seems to be characteristic of commentators who were not satisfied with the simple affirmation of a principle which, in effect, transfers rights

from one party to another. These commentators felt constrained, rather, to explicate in detail the legal mechanism of such transfer.

Though R. Yosi's ruling was made with respect to a particular case, certain early post-talmudic commentators applied it by analogy to a broad range of similar situations. So, for instance, when one person lets a property that does not belong to him, the early post-talmudic commentators rule that the rent belongs to the property's owner. So, too, when one person sublets property without the owner's permission, if the rent received by the tenant is greater than that which he himself is paying, profits must be turned over to the owner. However, if the subletting is done with the owner's permission, the profits will belong to the tenant.

Other authorities, however, sought to restrict the applicability of this latter ruling, arguing that subletting without permission should not entitle the owner to the profits unless he sustains some loss as a result.

The Later Authorities do not seem to have extended R. Yosi's principle significantly beyond the bounds set by the Earlier Authorities. In recent generations, R. Yosi's principle has been considered with regard to situations where one person insures the property of another, such as when a tenant insures the property of his landlord. Here it was asked, who is entitled to collect in the event that compensation is paid? The case of insurance is similar to R. Yosi's case. In R. Yosi's case, benefit arises from the hirer's lending the owner's cow to a third party, and in the situation of insurance, benefit arises from the tenant's insuring the property. Another similarity is that, in both cases, profit is conditional upon a prior loss by the hirer or tenant: the hirer in that he receives no compensation for the borrower's use of

the cow, although he himself has paid for its hire; the tenant in his payment of the insurance premiums.

In spite of such similarities, the majority of respondents dealing with such questions have held that the comparison is not adequate and that R. Yosi's principle will not operate to entitle the property owner to payment in the event that the insurer is required to compensate. The respondents emphasize certain elements of R. Yosi's case which do not exist where one person insures the property of another, and although a number of approaches have been taken, it appears that the main distinction between the two situations turns upon the original owner's link with the compensation paid by the borrower. This link arises from the hirer's obligation to return the object of hire, from the borrower's use of the object of hire, or from the fact that the object of hire entered the possession of the borrower. In insurance, on the other hand, the transaction between tenant and insurer is a personal one, completely separate from the actual rental of the property. Thus, the tenant does not profit from "the owner's cow," and the owner has no link with any compensation paid by the insurer. Or, as may be concluded from the approach of one of the respondents, whereas in R. Yosi's case, it would not be proper for the hirer to profit from the owner's property, in the insurance situation, it would not be proper for the tenant to pay the premiums and the owner receive compensation.

In consideration of the applicability of R. Yosi's principle in modern times, various distinctions have been drawn, some substantive, relating to the question of unjust enrichment, and others seemingly of a formal nature only. Whatever the case may be, it is critical to remember that when a party lays claim to profits derived from his property, it is his obligation to demonstrate that the property is in fact the

source of the profits in question. By being subjected to thorough legal analysis, R. Yosi's principle has been removed from the realm of abstract theory and given application in day-to-day questions of equity and justice. Such analysis, as well as careful application, has prevented the principle from being stretched to the extent that concern for the interests of property owners would result in injustice to others.

Part Three

AGENT WHO RECEIVES BENEFIT IN CONSEQUENCE OF AGENCY

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Chapter One

INTRODUCTION

When benefit arises from the activity of one person who represents another, to whom does such benefit rightfully belong, to the principal or his representative? The question can be considered from a number of perspectives.

1. AGENCY

The first perspective that has to be considered is the institution of agency. In such situations, is the agency broadened to include acquisition of the benefit? If it is, the benefit will belong to the principal even though the original agreement of agency carried no such stipulation. Is the agent viewed as the representative of the principal also with regard to (unanticipated) advantages arising from the agency, or is the activity of the agent viewed as his own independent activity, unrelated to the agency?

Some activities must certainly not be considered part of the agent's activity as an agent. So, for instauce, if during the discharge of his agency, the agent commits a theft, the theft is not attributed to the principal, even where it was

the agency that enabled the agent to commit the theft.[1] On the other hand, there are some activities concerning which it is difficult to determine whether they are an integral part of the agency or not. An example might be when the third party, with whom the agent must transact his appointed task, gives a gift to the agent. Here, perhaps, we must distinguish between instances where the third party specifies for whom the gift is meant (agent or principal) and instances where he does not.

2. UNJUST ENRICHMENT

From a different perspective, it may be asked whether the fact that the advantages derived from an agent's actions (regardless of whether the particular actions may technically be classed as part of the agency) is sufficient to determine the rights of the parties to the advantages created. Even if the agency itself does not secure the rights to the advantages for the principal, perhaps he is entitled to them or to a share of them because he was instrumental in their creation. Or, on the other hand, even when the principal acquires the advantages, perhaps the agent is entitled to a share, since if the agent had not acted, the principal would not have received the advantages – given that they were not part of the agency. If, in principle, we recognize one's right to the advantages received by the other, then we must de-

[1] We are not concerned here with one's claim to benefit from a theft on the basis of his participation in the theft or on the basis of a general partnership that would entitle one partner to his share of benefits received by the other by any means. Concerning a claim to a share of stolen property on the basis of participation in the risk incurred by the thief, see below, chap. 3; and Nahum Rakover, *Anishah beMa'aseh haBa baAveirah*, monograph no. 2 of *Sidrat Mehkarim uSekirot baMishpat halvri* (Jerusalem, 1970).

termine criteria for deciding when one party may be considered instrumental in the other's acquisition to the extent that he is entitled to a share of the advantages he helped create. Such questions belong to the category of unjust enrichment,[2] the field of law that regulates enrichment due to the property or actions of another, when the party enriched has no legal claim to the benefit received.[3]

3. BREACH OF TRUST

Another aspect of our question concerns acceptance by the agent of some benefit without the principal's knowledge. In such cases, personal interests may be created that bring the agent to violate his obligations to the principal.[4] The benefit conveyed to the agent may be tantamount to bribery and may prejudice the agent against the best interests of the principal (whether or not this is the intention of the agent or his benefactor).[5] Moreover, such benefit may actually be part of the transaction, artificially separated from it only for the sake of appearances. An example of this may be when an item could have been sold to the principal at a lower price, were it not for the "commission" granted to the agent. The question is whether such matters (in addition to any prohibition against the agent's acceptance of some benefit without the knowledge of the principal) bear upon the

[2] See D. Friedman, *Dinei Asiyat Osher veLo beMishpat* (2nd ed., Jerusalem, 1998), p. 43; and A. Barak, *Hok haShelihut*, 1965 (2nd ed., Jerusalem, 1996), p. 92.

[3] See the end of the present chapter.

[4] See Barak, op. cit. (above, note 2), pp. 1067-1069.

[5] Concerning a guardian who let his ward's property for a low price as the result of a bribe he received from the tenant, see R. Hayyim of Tzanz (Nowy Sacz, Poland), *Resp. Divrei Hayyim* II:46. R. Hayyim of Tzanz rules that if the ward sues the guardian, the ward is entitled to the amount of the bribe.

rights of the parties to the advantages that arise in consequence of the agency. Or perhaps sanctions under such circumstances belong exclusively to some other field of law, such as the penal code.

The Israeli Agency Law, 1965[6] contains a number of provisions relevant to our question. Section 8(4) stipulates that "[an agent] may receive no benefit connected to the subject of his agency without the agreement of the principal." Section 10(2) provides that "the principal is entitled to any profit or benefit accruing to the agent in connection with the subject of the agency."[7]

The Trust Law, 1979[8] contains similar provisions relating to benefit derived by trustees in consequence of their trusteeship. Section 13(1) states: "A trustee... may not derive for himself or his relative any other benefit from the property entrusted to him or from the activities connected with it." In addition to the prohibition stated, the statute, in Section 15, awards all such benefit to the property held in trust: "Profit unlawfully derived by the trustee, has the same status as the property and is considered as part of the property held in trust."

As regards public servants, section 2(1) of the Public Service (Gifts) Law provides that any gift received by a public servant as a public servant becomes the property of the state.[9]

The previous parts of the present work dealt with various aspects of unjust enrichment. We saw that where one person benefits while the other sustains no loss, the beneficiary

6 *Sefer haHukkim*, 1965, p. 220.
7 See Barak, op. cit. (above, note 2), pp. 1128-1131.
8 *Sefer haHukkim*, 1979, p. 128.
9 *Sefer haHukkim*, 1980, p. 2.

is exempt from compensating the benefactor for benefit received.[10] We also learned that where one person profits from his neighbor's property, the owner is entitled to any profits realized from his property.[11] In the present part, we discuss benefit received by an agent in consequence of his agency.

[10] See Part 1.
[11] See Part 2.

Chapter Two

AGENT RECEIVING BENEFIT

I. THE TALMUDIC BASIS

1. A Third Party Who Grants Added Consideration

A. Views of the Tanna'im

In the *Tosefta*[12] we find various opinions of *Tanna'im* concerning an agent sent to purchase something, who received from the vendor more than anticipated for the price paid: "If they gave him one more, R. Yehudah says: '[It belongs] to the agent.' R. Yosi says: 'To the common advantage [i.e., they divide it].'"

B. Distinction between Merchandise that Has a Fixed Price and Merchandise that Does Not

The passage quoted is cited by the Talmud[13] in connection

[12] *Tosefta Demai* 8:3.
[13] *Ketubot* 98b.

with a *mishnah*[14] in *Ketubot* dealing with a widow who, in order to collect what she is owed by virtue of her *ketubah*,[15] sells her children's property for more than its value:

> [If] a widow whose *ketubah* was at the sum of two hundred sold property valued at one hundred for two hundred or property valued at two hundred for one hundred, her *ketubah* has been paid in full.

On this *mishnah*, the Talmud asks why, if the widow is held responsible for any property she sells at a loss, she does not receive the profit of property that she sells at a price higher than the market value. To this the Talmud answers that here the editor of the Mishnah rules in accordance with the opinion that, if a vendor grants added consideration to an agent (*hosifu lashali'ah*), the profit belongs to the principal who appointed him. In support of this explanation, the Talmud cites the two opinions contained in the *Tosefta*: that of R. Yehudah – all belongs to the agent; and that of R. Yosi – they divide it. Concerning R. Yosi's opinion, the Talmud goes on to point out that elsewhere R. Yosi apparently rules that the entire unanticipated gain belongs to the principal. The apparent contradiction in R. Yosi's opinion is then resolved by introducing a distinction between something that has a fixed price (*davar sheyesh lo kitzbah*) and something

[14] *Mishnah Ketubot* 11:4 (*TB Ketubot* 98a).

[15] According to Jewish law, when a man marries, he must give his wife a promissory note, known as a *ketubah*, guaranteeing her a sum of money in the event that he divorces or predeceases her. In the latter instance, the note is paid from the late husband's estate, which normally passes on to his children. In the case under discussion, a widow sells property belonging to the estate for the purpose of collecting that which is owed her under the provisions of the *ketubah*. The *mishnah* establishes that if the widow sells the property at a loss, the loss is hers, and that if she sells it at a profit, the profit belongs to the children.

that does not (*davar she'ein lo kitzbah*). Thus, the Talmud concludes, it is the opinion of R. Yosi that the unanticipated gain is divided only when the merchandise purchased has a fixed price. In such a case, it may be presumed that the vendor did not lower the price, but rather gave extra merchandise as a gift. Where there is no fixed price, however, it may be presumed that the merchandise was simply sold at a lower price, in which case, R. Yosi holds that the entire saving belongs to the principal and not to the agent. At the conclusion of the talmudic discussion, R. Papa declares that the law is in accordance with the opinion of R. Yosi – that where merchandise has no fixed price, the unanticipated gain belongs to the principal.

To summarize, when an agent receives more than anticipated for the price paid, the Talmud recognizes three possible approaches: (1) the unanticipated gain belongs to the agent – R. Yehudah's opinion; (2) agent and principal divide the unanticipated gain – the opinion of R. Yosi concerning merchandise that has a fixed price; (3) the entire unanticipated gain belongs to the principal – the opinion of R. Yosi concerning merchandise that does not have a fixed price.

Comparison Between Added Consideration Granted to an Agent and a Mistake in Sale: Since the passage of the *Tosefta* which discusses added consideration granted to an agent is cited by the Talmud in connection with sale by an agent of property for a price higher than its valuation, it appears that the two cases are equivalent. That is to say, the law concerning an agent's sale of property for a price higher than expected is the same as the law concerning added consideration granted to an agent. If so, just as in the latter case, where R. Yehudah holds that the unanticipated

gain belongs to the agent, in the former case as well, R. Yehudah would hold that the unanticipated profit on the sale belongs to the agent.

What caused the sale of the property at a price higher than anticipated? The discussion in the Babylonian Talmud does not specify. From the discussion in the Jerusalem Talmud,[16] however, it emerges that the higher price resulted from an error in the evaluation of the property. This is clear from the Jerusalem Talmud's question, "When property worth one hundred is sold for two hundred, will not the property return in the end, seeing as how this is a purchase in error [*mikkah ta'ut*]?"

Since the case is one of error, one may ask what is the law in other matters of error, such as a transaction where too great a quantity is delivered, too little payment is exacted, or there is a mistake in calculation? When the mistake can be corrected by return of merchandise or by additional payment, there is clearly no question. The question does arise, however, when the mistake cannot be corrected, as when the vendor cannot be found. In such a case, who is entitled to the unanticipated gain, the principal or his agent? As we shall see below, this question occasioned a far-reaching difference of opinions among the early post-talmudic authorities.[17]

C. Jerusalem Talmud: Division of Unanticipated Gain Based on the Agent's Share

Why, in R. Yosi's opinion, is an unanticipated gain to be divided between agent and principal when the price of the merchandise is fixed? The Babylonian Talmud does not

[16] *TJ Ketubot* 11:4.
[17] See text at note 50 below.

suggest what R. Yosi's reasoning might be, but the Jerusalem Talmud does:[18]

> R. Yehudah says that the vendor meant to transfer ownership only to the buyer [i.e., the agent]. R. Yosi says that the vendor meant to transfer ownership only to the owner of the money [i.e., the principal]. Therefore, if one extra was given, R. Yehudah holds [that it belongs] to the agent, and R. Yosi holds [that it belongs] to both. R. Yosi's opinion [as quoted] is reversed! Elsewhere he says that the vendor meant to transfer ownership only to the owner of the money, and here he says thus?[19] Here, [where the transaction is] by means of the money of one and the feet [i.e., the action] of the other, they divide [the unanticipated gain].

In other words, although it was the vendor's intention to transfer ownership only to the principal, the agent is entitled to half, because the gain is the product of two factors: (1) the principal's money and (2) the agent's action.[20]

2. An Agent Who Deviates from Instructions

A. Disagreement of Tanna'im

The reason given by the Jerusalem Talmud for dividing unanticipated gain, then, is that since the gain was in part caused by the action of the agent, the agent is entitled to a share. Therefore, although the third party meant to transfer ownership only to the principal, the agent is entitled to half

[18] *TJ Demai* 6:8 (25d).

[19] If R. Yosi holds that the vendor meant to benefit only the principal, how can he rule that principal and agent divide the unexpected gain? Surely R. Yosi's opinion must be misquoted.

[20] The Jerusalem Talmud does not distinguish between merchandise that has a fixed price and merchandise that does not. Nor is it explained under what circumstances R. Yosi rules that all belongs to the principal.

the gain. In another discussion in the Jerusalem Talmud, we find that profits are divided, but there the point of departure is the opposite – that the principal is entitled to gains that accrue to his agent. Thus, the reverse of the previous rule is applied: where the principal shares responsibility for the gain, he is entitled to share the gain as well (this rule as well is recorded only in the Jerusalem Talmud, with no mention whatsoever in the Babylonian Talmud).

The basis for this ruling is a *baraita* concerned not with the rights of the principal as instrumental in gain that accrues to the agent, but simply with the laws of agency. The *baraita* in *Baba Kama*,[21] deals with an agent who deviates from instructions and profits thereby. When this happens, it may be asked: Who is entitled to the unanticipated gain resulting from the agent's disregard for instructions?:

> Our Rabbis taught: Where money was given to an agent to buy wheat and he bought with it barley, or barley and he bought with it wheat, it was taught in one *baraita* that if there was a loss, the loss would be sustained by him, and so also if there was a profit, the profit would be enjoyed by him, but in another *baraita* it was taught that if there was a loss, he would sustain the loss, but if there was a profit, the profit would be divided between them.

B. Recourse to the Laws of Agency

In its discussion of the above *baraita*, the Talmud in tractate *Baba Kama*[22] attempts to identify the two opinions cited with a known disagreement between R. Yehudah and R. Me'ir, concerning whether an agent, by deviating from his instructions, acquires the merchandise that he purchases

[21] *TB Baba Kama* 102a-b.
[22] *Baba Kama* 102b.

for himself rather than for the principal.[23] The Talmud concludes, however, that both views expressed in the *baraita* reflect the opinion of R. Me'ir. The first opinion cited is R. Me'ir's opinion regarding the purchase of food for the principal's own consumption, where it may be presumed that the principal is particular about what is to be purchased, and the second opinion is R. Me'ir's ruling where the purchase is for resale at a profit, where it may be presumed that it makes no difference to the principal:

> Said R. Yohanan, "There is no difficulty, as one opinion was in accordance with R. Me'ir and the other opinion with R. Yehudah; the former opinion was in accordance with R. Me'ir who said that a change transfers ownership,[24] whereas the latter was in accordance with R. Yehudah who said that a change does not transfer ownership." R. Elazar objected: "From where [do you know this]? May it not be perhaps that R. Me'ir meant his view to apply only to a matter which was intended to be used by the owner personally, but in regard to matters of merchandise, he would not say so?" R. Elazar therefore said that one opinion as well as the other might be in accordance with R. Me'ir, and there would still be no difficulty, as the former dealt with a case where the grain was bought for domestic food, whereas in the latter it was bought for merchandise.

In other words, according to R. Yehudah, who holds that an agent, by deviating from instructions, does not acquire

[23] R. Yehudah holds that an agent who deviates from instructions does not acquire the object of his agency for himself. R. Me'ir, subject to certain qualifications, holds that he does.

[24] According to the opinion that a change transfers ownership, the change in the merchandise purchased transferred ownership to the agent. Since the merchandise acquired was acquired by the agent, any gain involved would belong to him.

the merchandise purchased for himself, if the agent varies his agency and this results in unanticipated gain, the gain is divided between agent and principal. The same will apply, according to R. Me'ir, when the act that the agent was instructed to perform is such that the principal does not care if he deviates from his instructions. Even according to R. Me'ir, where the principal does not care, an agent who deviates from his agency does not acquire the merchandise purchased for himself, and therefore unanticipated gain is divided.

Here it must be asked: what is the reason for the division of profits? After all, it would appear that there are only two possibilities: (1) the principal is entitled to all gains; (2) the agent is entitled to all gains. What, then, is the legal basis for the division?

The Babylonian Talmud does not explain, and some commentators, therefore, go so far as to suggest that the transaction under discussion was one in which such a division was stipulated from the outset.[25] The Jerusalem Talmud, however, associates the division of profits with the principle that whoever was instrumental in creation of an advantage is entitled to enjoy that advantage.

C. The Jerusalem Talmud: Division Based on the Agent's Share

The Jerusalem Talmud[26] also cites the two sources which seem to give contradictory answers to the question of whether unanticipated gains belong to an agent who varies his agency or must be shared with the principal:

> Whose opinion is it that if there is loss, the loss is his [i.e., the agent must suffer the loss]?

[25] See text at note 96 below.
[26] *TJ Baba Kama* 9:5.

R. Me'ir's.

What is R. Me'ir's reason?
[R. Me'ir's reason is] that the vendor meant to transfer ownership only to the agent.

Whose opinion[27] is it that if there is loss, the loss is his [i.e., the agent], whereas if there is gain, it is to the common advantage [i.e., they divide it]?
R. Yehudah's.

What is R. Yehudah's reason?
[R. Yehudah's reason is] that the vendor meant to transfer ownership only to the owner of the money.

Why,[28] then, must he divide it?
Because it is prohibited to benefit from something that belongs to another [i.e., it is prohibited for the principal to benefit from the agent's action without compensating him].

In other words, according to R. Yehudah, although the vendor intended to transfer ownership only to the principal,[29] the principal is obliged to share the profit with his agent, because he is not permitted to derive benefit from his agent without compensating him.

Division Based on the Principal's Share. According to the explanation just cited, the unanticipated gain belongs to

[27] Text as emended in *Or Zaru'a*, *Baba Kama* 413.

[28] See Sha'ul Lieberman, *Talmudah Shel Keisarin*, p. 39, n. 43; cf. the opinion of R. Yehudah cited in Part 1, text at note 89.

[29] In the passage from the Jerusalem Talmud cited above (text at note 18), R. Yehudah holds that the vendor wished to transfer ownership to the agent (*loke'ah*). *No'am Yerushalmi* suggests emending the text. Lieberman as well declares that "it is clear that the reading of the Jerusalem Talmud there does not fit the opinion of the Jerusalem Talmud here." See also *Mishkenot haRo'im*, letter *shin*, 114, *ad fin.*

the principal who is nevertheless obliged to share it with his agent. As the discussion continues, however, the Jerusalem Talmud cites an opinion of R. Nisa, who holds that the gain belongs to the agent, but that he is obliged to share it with the principal since he is deriving benefit from the principal's money:

> Said R. Nisa. When the agent discharged his agency, did the seller of the produce not intend to pass ownership to the principal? [Of course he did.] Now, when the agent did not discharge his agency, the seller intended to pass ownership to the agent. [If so,] why must he [the agent] divide it with him [the principal]? Since he [the agent] derived benefit from him [the principal], he must divide it with him.

Division of the unanticipated gain, then, is not the result of some prior stipulation between partners, as certain commentators on the Babylonian Talmud have explained;[30] it is rather the result of an obligation to divide profits with the party whose funds were instrumental in their creation.

II. ANALYSIS OF OPINIONS AND RULING

1. Third Party Who Gave Added Consideration (*Hosifu laShali'ah*)

Having surveyed tannaitic and talmudic sources, it remains to examine the opinions of the earlier and later post-talmudic authorities. As we have seen, the approach of the Babylonian Talmud to the right of a person instrumental in the creation of a benefit to share that benefit is not necessarily the same as the approach of the Jerusalem Talmud to the same question. Thus, it must be asked how the various commentators and legal authorities have dealt with the

[30] See text at note 96 below.

sources. As we shall see, the authorities are not unanimous; there are two main approaches.

A. The Division is Based On Uncertainty

A departure from the Jerusalem Talmud's approach concerning the case where a third party gave an agent one more item than expected may already be found among the *Geonim*. Rather than explaining that the division results from the principal's being instrumental in the benefit that accrued to the agent, Rav Hai Gaon, in his *Sefer haMikkah vehaMimkar*, explains that the division results from our uncertainty as to whom the vendor wished to benefit.

The Opinion of Rav Hai and Rashi: Rav Hai Gaon writes:[31]

> As regards something that has a fixed price..., when the vendor adds [to the merchandise that he delivers], we can say that it was his desire to add, as though he personally gave [the additional merchandise] to the agent. Or we can say that he added only because this merchandise was purchased from him, and thus, [the addition] belongs to the owner of the money. Therefore [as a result of this uncertainty], we divide it.

Rashi adopts the same approach with a small modification:[32]

> If they added one extra item, it is divided, for it is a gift, and it may be said that it was given to the agent, or it may be said that it was given to the principal.

Rashi, in explaining the second half of the uncertainty, dispenses with the explanation that the addition may have been

[31] *Sefer haMikkah vehaMimkar* 6.
[32] Rashi, *Ketubot* 98b, s.v. *sheYesh*.

"because this merchandise was purchased from him," explaining simply that, just as it is logical to conclude that the gift was meant for the agent, it is equally logical to conclude that it was meant for the principal.

When the Addition is Given Explicitly to the Agent: This small difference in wording between Rashi and Rav Hai Gaon may be important. Accordiug to Rashi, where the vendor makes it clear that the gift is given specifically to the agent, the entire gift will belong to the agent, for here there is no room for uncertainty.[33] According to Rav Hai Gaon, however, even where the vendor makes it clear that the gift is given specifically to the agent, the agent may be obliged to share it with the principal who appointed him. This is because, according to Rav Hai Gaon, the uncertainty may be whether it is possible at all to view such a gift as separate from the transaction, or whether, on the contrary, the vendor is in all cases considered to be adding to the merchandise delivered in recognition of the purchase. If, as in the second possibility, the vendor is always considered to be adding in recognition of the purchase, then the addition would rightfully belong to the principal. According to this view of R. Hai Gaon's opinion, Rav Hai believes the uncertainty to be objective rather than subjective, hence the vendor's intention is not relevant.

[33] So Ran understands Rashi's opinion. See note 46 below. See also R. Uzi'el Alha'ikh, *Mishkenot haRo'im*, letter *shin*, 114, p. 346, col. 1. R. Alha'ikh poses two questions concerning Rashi's approach: (1) Is the vendor's indication of intention effective only at the time of the transaction or also subsequently? (2) Does the uncertainty of to whom the vendor wished to transfer ownership apply only when the vendor is aware that the agent is an agent or also when he has no knowledge of this?

Possibly, Rashba[34] too distinguished between the opinions of Rashi and Rav Hai. Rashba was asked about an agent appointed by the Jewish community to collect taxes and deliver them to the minister in charge of taxation. When the agent received a certain benefit from the minister, the agent claimed that the benefit was granted independently of his collection of taxes:[35]

> If the members of the community appointed A their agent to collect taxes and convey to the minister all he collects, and the minister received the payment and rewarded the agent with his own [i.e., the minister's] funds, and the community says to A, "That which the minister gave you, we have acquired as a gift"; and A claims, "The gift was not granted to me because of you, but rather because [in the past,] I benefitted him and loaned him from my own funds before I had collected any taxes"; whose claim is accepted?

Rashba rules in favor of the agent, demonstrating that the community cannot make recourse in the present situation to the regulation concerning an agent who receives an extra item of merchandise. In explanation of his ruling, Rashba cites the opinion of R. Hai Gaon, explaining:

> From here [we conclude that] anything given to the agent not as part of a business transaction, and to which the *Gaon*'s [i.e., Rav Hai Gaon] reason does not apply, belongs entirely to the agent.

Rashba goes on to quote the passage from Rashi cited above, and then adds:

> According to this explanation, in the matter before us,

[34] On Rashba, see Part 2, note 46 above.
[35] *Resp. Rashba haMeyuhasot laRamban* 60.

> [when] someone gives something explicitly to the agent, it belongs entirely to the agent.

Only after quoting Rashi does Rashba rule that when something is given explicitly to the agent, it belongs entirely to the agent. This suggests that such a conclusion cannot be reached on the basis of Rav Hai Gaon's opinion alone.[36]

Further on, Rashba shows that his ruling would apply even according to the opinion that the reason that unanticipated gains must be shared is because the principal is instrumental in the benefit that accrues to the agent. Rashba quotes this opinion in the name of *Sefer haIttur*, based on the Jerusalem Talmud,[37] arguing that, according to this approach as well, the agent in the present case is entitled to the gift in its entirety, "seeing he claims that he had [previously] benefitted the minister by lending him money and that he [the minister] gave it explicitly to him [the agent] and not to the community."

Rashba expresses his preference for the approach of Rashi and Rav Hai Gaon,[38] based on the Babylonian Talmud, over the approach of *Sefer haIttur*, based on the Jerusalem Talmud, since the two Talmuds are at odds on this matter.[39]

[36] But see *Darkhei Moshe*, *Hoshen Mishpat* 183:4. See also *Be'ur haGra*, *Hoshen Mishpat* 183:22.

[37] See note 43 below.

[38] However, in *Resp. Rashba* I:671 (=III:25; *Resp. Rashba*, first printing [Rome, 1470], 212; see also ibid., 237), Rashba appears to accept the approach that the division is due to the principal's being instrumental in the gain. See also *Resp. Ba'ei Hayyei*, *Hoshen Mishpat* 133, p. 163, col. 4; *Knesset haGedolah*, *Hoshen Mishpat*, *Mahadura Batra* 183, *Hagahot Beit Yosef* 66.

[39] See text at note 96 below.

B. The Approach that the Agent is Entitled to Half Because he Created the Unanticipated Gain

As against those that explain the division of unanticipated gains on the basis of the uncertainty as to whom the third party wished to benefit, others follow the approach of the Jerusalem Talmud.

Although Rabbenu Hananel, in his explanation of the division, does not mention the Jerusalem Talmud explicitly, his language is similar:[40]

> [Concerning the ruling that] where the price is fixed and known to be such-and-such an amount of money, they divide [unanticipated gains], what share does the owner of the money [i.e., the principal] have in this; after all, he has already received [merchandise] for the known market price? Since the owner of the money was instrumental in the benefit that came to his agent, he [the agent] must divide it with him.

Rif also follows the approach of Rabbenu Hananel:[41]

> Why do agent and principal divide [unanticipated gains]?[42] Since the principal was instrumental in the benefit received by the agent, he [the agent] must divide it with him.[43]

Both Rabbenu Hananel and Rif take the Babylonian and Jerusalem Talmuds to disagree concerning the rightful owner

[40] *Or Zaru'a*, *Baba Kama* 413. Cited also in *Otzar haGe'onim*, *Ketubot*, *Likkutei Perush Rabbenu Hananel*, p. 78.

[41] Rif, *Ketubot* 11 (ed. Vilna, 57b).

[42] *Mishkenot haRo'im*, letter *shin*, 114, p. 346, col. 2, discusses the circumstances to which Rif's opinion applies.

[43] *Sefer halttur*, *Shalishut Mamon* (ed. R. Me'ir Yonah) 43b follows the same logic, citing Rif on the case of an agent granted additional consideration and the Jerusalem Talmud on the case of an agent who varies his agency.

of the benefit, with the Babylonian Talmud holding that legally the benefit belongs to the agent and the Jerusalem Talmud holding that it belongs to the principal.[44] Nevertheless, both authorities adopt the Jerusalem Talmud's explanation for the division and apply it to the Babylonian Talmud's approach. That is to say: just as if the unanticipated gain were to belong to the principal, he would be obliged to share it with his agent, so if the gain rightfully belongs to the agent, he must share it with the principal. Jnst as in the discussion (quoted above) of the agent who deviates from instructions, the approach of the Jerusalem Talmud, as expounded by R. Nisa, is that the agent must share the profits with the principal, since the latter was instrumental in the benefit received by the agent, so too in the case of one extra item of merchandise granted to the agent, the same principle may be applied.[45]

Addition Given Explicitly to the Agent: If the third party states explicitly that the unanticipated gain is meant for the agent and not for the principal, will this have any effect? According to the explanation that the division is a result of uncertainty as to the vendor's intention, such a statement will be effective. According to the explanation that the party to whom the gain rightfully belongs must share it with the other party who was instrumental in its creation, however, it follows that the vendor's statement of intention is not relevant. Thus Ran explains the opinion of Rif:[46]

From the wording of Rif, it appears that when

[44] See *TJ Demai* 6:8 (25d), cited above, text at note 18.

[45] Even though Rif does not accept the approach of the Jerusalem Talmud regarding the matter of an agent who varies his agency. See text at note 98 below, and text at note 37 above.

[46] Ran, ad loc.

something has a fixed price, even if the vendor gave it explicitly to the agent, since the principal was instrumental in the benefit received by the agent, the agent must divide it with him.[47]

C. Transaction Involving a Mistake due to the Agent

One source that is somewhat problematic in this context is a responsum appearing in *Sefer Ra'avan*,[48] attributed by some to R. Tzemah Gaon.[49] The responsum deals with A, who assisted B (the purchaser) in a particular transaction. A succeeded in deceiving the vendor, and as a result the gain realized was greater than anticipated. The question is: to whom does the unanticipated gain belong? The ruling does not mention the talmudic precedent of an agent's receiving additional merchandise; nevertheless, it is established that the unanticipated gain must be shared equally, since both were instrumental in its creation – B by means of his purchase and A by means of his deception. Had there been no purchase, Ra'avan explains, there would have been

[47] Consistency in this approach would, of course, dictate that if the vendor states explicitly that the added consideration is meant for the principal, the principal should still be obliged to divide it with the agent. Nevertheless, a number of Later Authorities explain that in such a case, the entire unanticipated gain will belong to the principal. See *Knesset haGedolah, Hoshen Mishpat, Mahadura Batra* 183, *Hagahot Beit Yosef* 43. *Ketzot haHoshen* agrees that even according to the opinion of Rif, the agent in the case mentioned will have no share and asks rhetorically, "If one person gives a gift to another by means of an agent, will the agent have a share in that gift!?" This is also the opinion of Maharsham, *Mishpat Shalom* 183:7, s.v. *veHinei Yesh leVa'er*.

[48] *Sefer Ra'avan, Resp.* 3. Cited also in *Resp. Maharam ben Barukh* (ed. Prague), 802. See also following note.

[49] So in *Mordekhai, Ketubot* 256; and in *Teshuvot Maimoniyot, Sefer Kinyan* 22.

no deception, and had there been no deception, there would have been no surplus.

What is the basis of the division here? Does the unanticipated gain rightfully belong to the assistant, who is nevertheless obliged to divide it with the purchaser, or vice versa? Ra'avan's language does not clarify the point. As we shall see below, a clearer indication may be found in a responsum of Rabbenu Tam concerning gain that resulted from a mistake.

Mistake in the Value of a Transaction – All Belongs to the Principal: It was noted above[50] that, since the Talmud in tractate *Ketubot* juxtaposes the case of a mistake in the value of a transaction with the case where an agent is granted additional value, it appears that in principle, the two matters are equivalent. Such, in any case, is Rashi's understanding of that discussion.[51]

Rabbenu Tam, however, does not accept this conclusion. According to his view,[52] when there is a mistake in the value of a transaction, even R. Yehudah – who holds that added value granted to an agent belongs entirely to the agent – will admit that all belongs to the principal. Understanding why Rabbenu Tam distinguishes between the cases of a mistake in value of a transaction, on the one hand, and granting of additional value to an agent, on the other, requires careful reading of his opinion. At first Rabbenu Tam explains as follows:

[50] See text at note 17 above.

[51] See Rashi, *Ketubot* 98b, s.v. *Kan shanah Rabbi*; and ibid., s.v. *kedeTanya*. See also *Ketzot haHoshen*, 183:8; and *Karnei Re'em* on Maharsha, *Ketubot* 98b.

[52] *Tosafot*, *Ketubot* 98b, s.v. *Kan shanah Rabbi*. On Rabbenu Tam see note 56 below.

> Where there is no fixed price, they [i.e., R. Yehudah and R. Yosi] disagree only where he [the vendor] gives it [the additional merchandise] as a bonus [*tosefet*], saying, "take this for your purchase, and this I add of my own."

Accordingly, wherever there is a mistake, since it cannot be said that the unanticipated gain was granted as a bonus, R. Yehudah and R. Yosi would not disagree; rather, both would agree that the gain belongs to the principal. Further on, however, Rabbenu Tam asserts:

> But if [the vendor simply] sold it cheaply because of the money, as the case in the our *mishnah*[53] of a property worth one hundred [sold by the widow] for two hundred,[54] even R. Yehudah would admit that all [gain] belongs to the owner of the money.

Here, Rabbenu Tam's opinion is restricted to a mistake similar to the one of the *mishnah*, a mistake of sale for under

[53] I.e., the case of *mishnah Ketubot* 11:4 (*TB*, 98a) cited above, text at note 14: "[If] a widow whose *ketubah* was worth two hundred sold property valued at one hundred for two hundred or property valued at two hundred for one hundred, her *ketubah* has been paid in full."

[54] A case of a vendor's selling merchandise to an agent for less than the market value and a widow's selling property of her deceased husband's estate for more than the market value are parallel for purposes of the present discussion. This is because, in both cases, the unanticipated gain – the rights to which are being debated – accrues to the side of principal and agent. Where the widow sells her deceased husband's property for more than its market value, she acts as the agent of the heirs, and the question arises as to who will enjoy the unexpected profit. Similarly, when a vendor delivers more merchandise to an agent than anticipated, thereby selling it for less than the market value, it must be asked whether the unanticipated gain – in the form of additional merchandise – belongs to the agent or to the principal who appointed him.

the market value.[55] Such a mistake, however, as Rabbenu Tam suggests in the emphasized phrase above, may be considered as caused by the money of the principal, and this would explain why R. Yehudah agrees that the unanticipated gain belongs entirely to the principal. Where a mistake is due to some other factor, such as a mistake in calculation, the disagreement of R. Yehudah and R. Yosi will apply, and R. Yehudah will hold that the unanticipated gain belongs to the agent.

The question of a mistake in the value of a transaction is primarily theoretical, for the law as codified accords with the opinion of R. Yosi that (where there is a fixed price) principal and agent share the unanticipated gain. Nevertheless, as we shall see, the opinions cited figure significantly in questions of unanticipated gain, where the mistake is not in the value of the transaction but rather some other sort of mistake.

Mistake in Calculation – Agent and Principal Share the Unanticipated Gain: Rabbenu Tam[56] was asked with regard to an error not in the value of the transaction but rather in calculation. As we shall see, in answer to this question, every possible course of action was suggested: (1) the entire gain belongs to the principal; (2) the entire gain belongs to the agent; (3) principal and agent divide the gain equally.

The query, addressed to Rabbenu Tam[57] by R. Ya'akov Yisrael,[58] reads as follows:

[55] See previous note.

[56] R. Ya'akov ben R. Me'ir Tam (ca. 1100-1171), son of Rashi's daughter, was the most important of the Tosafists.

[57] *Sefer haYashar leRabbenu Tam*, *Teshuvot* 53:2, and 54:2. See also *Tosafot*, *Ketubot* 98b, s.v. *Amar R. Papa*; *Resp. Maharam ben Barukh* (ed. Prague), 252, 803; *Resp. Maharam ben Barukh* (ed. Cremona) 50;

> A sent B to accept payment due A from the sale of grain.... B... received[59] an extra five *dinar*s. To whom does the extra payment belong? Do we say that it belongs to A, as in the [talmudic] case where an agent received an extra item, [since] A can claim, "You wish to profit from my payment?! It was for my own benefit that I sent you." Or perhaps B can claim, "There is neither benefit nor harm to your interests here; you have received your payment in full, and if I have chanced to 'find a lost object,' what right do you have to it?"

Thus, R. Ya'akov Yisrael raises two possibilities: (1) The entire gain is awarded to the principal, A, as in the case of an agent who receives extra merchandise where there is no fixed price, the principal seeking to incorporate the agent's action in accepting the additional payment as part of the agency ("It was for my own benefit that I sent you"). (2) The entire gain is awarded to B, the agent, who claims that there is no connection whatsoever between the agency and his acceptance of the additional payment; for since the principal has received what was due him, he has no relation to the additional payment, and the additional payment is considered as lost property found by the agent, property in which the principal has no part at all.

Rabbenu Tam, on the other hand, does not adopt either approach suggested by the questioner, ruling, rather, that the additional payment be divided between the parties.

Mordekhai, Ketubot 255; responsum of Maharam ben Barukh cited in *Mordekhai, Baba Kama* 168-169; *Teshuvot Maimoniyot, Sefer Kinyan* 9:20; and *Piskei haRosh, Ketubot* 11:15.

[58] R. Ya'akov Yisrael was one of a group of student-colleagues of Rabbenu Tam. See E. E. Urbach, *Ba'alei haTosafot* (4th ed., Jerusalem, 1980), pp. 116-118.

[59] The question of whether the mistake was spontaneous or the result of the agent's action may have legal implications. See note 90 below.

Rabbenu Tam accepts the analogy with the talmudic case where the agent receives additional merchandise. However, whereas the questioner felt this to be an instance where there is no fixed price, Rabbenu Tam considers it to be an instance where the price is fixed:

> ...It appears to me that they divide it between them, since the money is comparable to something that has a fixed price, as we say, where the agent receives one extra item, R. Yosi holds that they divide it. And it is established that this applies where there is a fixed price, but that where there is no fixed price all belongs to the principal. The reason that it is divided is that once the principal receives what is due him, what connection has he to the mistaken or additional [merchandise] received by the agent? Nevertheless, we hold that since his money was instrumental in the agent's profit, he [the agent] must give him half. And this applies equally to an error in calculation. For when a widow sells property worth one hundred for two hundred this too is an error, and the Jerusalem Talmud establishes that the purchaser agreed to it. The reason that the entire unanticipated gain belongs to the owner of the money is that there is no fixed price and it is his money that lowers the price. Thus, where something does have a fixed price, even in case of an error of calculation, the unanticipated gain is divided [between agent and principal].

From Rabbenu Tam's response, it is apparent that in his opinion the division is based upon the principal's part in creation of the gain. Even his language is similar to that of Rabbenu Hananel, who explains:[60]

> What share does the owner of the money [i.e., the principal] have in this? After all, he has already received

[60] See text at note 40 above.

> [merchandise] for the price known to him! Since the owner of the money was instrumental in the benefit that came to his agent, he [the agent] must divide it with him.

Further on, Rabbenu Tam hints at the existence of a different approach. Nevertheless, he accepts the first explanation as the correct one:

> Although another reason for the division could be advanced, this reason, as explained, is correct, for possession confers the advantage [*demuhzak yado al ha'elyona*], and they must divide the gain.

All Belongs to the Principal: However, Rabbenu Tam reconsidered his ruling that agent and principal share unanticipated gain, finding, rather, that in instances of error the entire gain belongs to the principal:[61]

> And again, he reconsidered, deciding that in all cases of error, whether in the transaction or in counting, all belongs to the principal.

Rabbenu Tam does not abandon the basic reason for the division – that the principal was instrumental in the agent's gain. However, whereas previously he held that legally the unanticipated gain belonged to the agent (who was obliged to share it with the principal, who was instrumental in its creation), Rabbenu Tam now holds that legally the gain belongs not to the agent but to the principal.[62] What was the basis for this change of opinion? Previously, Rabbenu Tam held that an error in calculation – as opposed to an error in the value of the transaction – is analogous to an instance of additional merchandise granted to the agent where the price

[61] *Tosafot, Ketubot* 98b, s.v. *Amar R. Papa.*
[62] Cf. *Sh. Ar., Hoshen Mishpat* 194:2; *Netivot haMishpat, be'urim* 5.

is fixed, where the unanticipated gain is divided between principal and agent. Subsequently, when he reconsidered, he decided that when the unanticipated gain stems from an error, that is to say, it is not known to the third party, the circumstances are not comparable to additional merchandise where the price is fixed. As mentioned above, Rabbenu Tam asserts that when there is a mistake in the value of the transaction, all (including R. Yehudah) will admit that the entire unanticipated gain belongs to the principal. On the other hand, for a transaction to qualify as a situation of "additional merchandise granted to the agent where the price is fixed," the vendor must give the additional merchandise "as a bonus, saying, 'take this for your purchase, and this I add of my own.'" Only where this is the case, then, will agent and principal share the unanticipated gain. In the event of error, this is clearly impossible. In all other situations, according to Rabbenu Tam, as in the case of the widow who sold property from her deceased husband's estate as an agent of the heirs, all unanticipated gain will belong to the principal.[63]

All Belongs to the Agent: The extreme opposite position to that of Rabbenu Tam is taken by Rabbenu Yitzhak,[64] an-

[63] See text at note 52 above.

[64] What the opinion of Rif would be in cases of an error in calculation is a matter of disagreement among legal authorities. R. Yosef Karo, in *Kesef Mishneh*, *Sheluhin veShutafin* 1:5, asserts that Rif would favor division. In *Beit Yosef*, *Hoshen Mishpat* 183:8, however, R. Karo suggests that perhaps Rif would agree with the opinion of Rabbenu Yitzhak, that the unanticipated gain in such instances stands by itself and thus belongs to the agent. That in cases of an error of calculation Rif would award all to the agent is also the opinion of R. Avraham di Boton, *Resp. Lehem Rav* 124; idem, *Lehem Mishneh*, *Sheluhin veShutafin* 1:5; and *Shakh*, *Hoshen Mishpat* 183:13. See also

other Tosafist. To some extent, Rabbenu Yitzhak's opinion can be considered similar to Rabbenu Tam's opinion prior to the latter's change of heart. In his earlier ruling, Rabbenu Tam felt that legally the entire unanticipated gain belongs to the agent, but that he is obliged to share it with the principal, who was instrumental in its creation. Rabbenu Yitzhak agrees that the unanticipated gain belongs to the agent, but believes that he need not share it with the principal, since the latter has no legal connection to it at all:[65]

> To Rabbenu Yitzhak,[66] it appears that all belongs to the agent, for if he stole, robbed[67] and deceived, what has this to do with the principal? And we do not even say that they must divide it on the basis of the principal's being instrumental in the agent's gain. For this is not comparable with other errors [i.e., errors in the value of the transaction], where [the erring party] gives everything because of the money, believing the money [he receives] to be equal in value to all that he gives. Here, however, the error stands by itself.
>
> And know that all of this is hypothetical, for if he wished, he would return it, for it is unreasonable to imagine that he should be unable to inform him and return it to him.

Maharsham, *Mishpat Shalom* 183:6; and *Shimru Mishpat* on *Hukkot haDayanim* 291 (p. 143). See also *Resp. Rashba* I:671 (=III:25).

[65] *Tosafot*, *Ketubot* 98b, s.v. *Amar R. Papa*.

[66] This is the reading of R. Shelomoh Luria (Rashal), ad loc.; and of *Mordekhai*, *Ketubot* 255.

[67] From here, Maharashdam, *Resp. Maharashdam*, *Hoshen Mishpat* 27, concludes that if the agent stole, all authorities would admit that all belongs to the agent. This opinion is also held by R. Yitzhak Diabela in a responsum appearing in *Resp. Torat Hesed* 210. The opinion requires further clarification, however. See also *Shimru Mishpat* on *Hukkot haDayanim* 291, p. 140ff.

A number of other post-talmudic authorities follow the same approach.[68]

The following table summarizes the various opinions:

Source of Gain	Principal	Division	Agent
Additional merchandise granted to the agent:			
Fixed Price		R. Yosi	R. Yehudah
Price Not Fixed	R. Yosi		R. Yehudah
Mistake in value	R. Yosi	R. Yosi (R. Yonah)	R. Yehudah (Rashi)
	R. Yehuda (R. Tam)		
Mistake in calculation	R. Yosi (R. Tam Final Opinion)	R. Yosi (R. Tam 1st Opinion)	R. Yosi (R. Yitzhak)

D. The Law as Codified in Shulhan Arukh

Recourse to the Approach that the Agent is Entitled to Half Because he Created the Gain: The disagreement among the early post-talmudic authorities over the reason for sharing unanticipated gains is apparently at the root of the disagreement between R. Yosef Karo and Rema in *Shulhan Arukh* concerning additional merchandise granted to the agent.

R. Yosef Karo, in his *Beit Yosef*[69] on the *Tur*, quotes the reasoning of Rif, "Since the principal was instrumental in

[68] *Mordekhai, Ketubot* 255, after citing the opinion of Rabbenu Yitzhak says: "So did Rashbam explain in the presence of Rashi." Similarly, Rashba was asked concerning an error, and his response distinguishes between error and deliberately granting added consideration. See *Resp. Rashba* I:671 (=III:25). See also *Resp. Maharil haHadashot* 156.

[69] *Beit Yosef, Hoshen Mishpat* 183:8.

the benefit received by the agent, he [the agent] must divide it with him," as well as Ran's comment that Rif and Rashi would differ where the third party gives additional merchandise explicitly to the agent. R. Karo also notes that Rosh and *Sefer halttur* advance the same reasoning as Rif. In his *Darkhei Moshe* (also on the *Tur*), Rema responds to R. Yosef Karo as follows:[70]

> But Nahmanides [i.e., Rashba in the responsa attributed to Nahmanides] wrote in a responsum that the opinion of Rashi is correct and that Rashi's opinion is also the opinion of Rav Hai Gaon.

It would appear that R. Karo accepts Rif's reasoning, whereas Rema accepts the reasoning of Rashi and Rav Hai Gaon.

This disagreement between R. Karo and Rema is also reflected in their rulings in *Shulhan Arukh*, where R. Yosef Karo writes:[71]

> [If] the price was fixed and known, and he granted additional [merchandise] to the agent in number, weight, or measure, whatever the vendors added belongs to both, and the agent must divide the additional [merchandise] with the principal. And if it was something that did not have a fixed price, all belongs to the owner of the money [i.e., the principal].

Although R. Karo gives no rationale for his ruling, his reasoning may be inferred from his adoption of the wording of Maimonides.[72] Concerning Maimonides' opininion, R. Karo himself, writing in *Kesef Mishneh*, states that according to the opinion of Rif, even if the additional merchandise

[70] *Darkhei Moshe, Hoshen Mishpat* 183:4.
[71] *Hoshen Mishpat* 183:6.
[72] Maimonides, *M.T., Sheluhin veShutafin* 1:5.

is given explicitly to the agent, it must be divided, and that Maimonides' ruling "leans toward this opinion." R. Karo may have inferred this from Maimonides' wording, "whatever the vendors add" – which R. Karo apparently takes to mean: in all cases, even when given explicitly to the agent.[73] From here it may be inferred that, where the vendor grants additional consideration explicitly to the agent, R. Karo will nevertheless require that it be divided. However, R. Karo himself does not rule on such a case in *Shulhan Arukh*.

To R. Yosef Karo's ruling in *Shulhan Arukh*, which makes no explicit mention of the vendor's granting additional consideration explicitly to the agent, Rema adds:[74] "However, if the vendor explicitly gives it to the agent, all belongs to the agent." From here, it seems clear that Rema accepts Rashi's approach and rules accordingly.

Nevertheless, although Rema rules according to Rashi, a number of commentators on *Shulhan Arukh* seek to introduce Rif's opinion as a consideration in such cases. *Sema*, for instance, after summarizing the disagreement among the Earlier Authorities and showing that Rema follows the opinion of Rashi, continues:[75] "And I have in any case recorded the opinion of Rif, Rosh, and *Ittur*, for sometimes, at the judge's discretion, it may be relied upon." Thus, *Sema* gives judges the freedom to divide unanticipated gains between agent and principal even when the vendor gives the added consideration explicitly to the agent.

[73] See *Mishkenot haRo'im*, letter *shin*. 114 (p. 346, col. 3). *Bah*, *Hoshen Mishpat* 183:8, suggests a different basis in the wording of Maimonides for R. Karo's reasoning.

[74] Rema, *Sh. Ar.*, *Hoshen Mishpat* 183:6.

[75] *Sema*, *Hoshen Mishpat* 183:18.

Shakh,[76] as well, expresses his surprise that Rema rules according to Rashi with no reference whatever to the other approach. *Taz*[77] goes one step further, recommending that the opinion of Rif be given precedence. Relating to *Sema*'s statement that a ruling may follow the opinion of Rif, at the judge's discretion, *Taz* writes that this is the proper ruling. He goes on to cite various authorities who accept Rif's approach and asserts that the only proponent of Rashi's approach is Rashi himself. He concludes that Rashi must to some extent recognize the logic of Rif's approach; otherwise, how would Rashi explain division of the unanticipated gain where there has been no specification of for whom it is meant? If it is a matter of pure uncertainty, then the law should be straightforward – the onus of proof rests upon the claimant (*hamotzi mehavero alav hare'ayah*).[78]

Rights of The Person Instrumental in the Unanticipated Gain Based Upon Rabbinic Enactment: *Sema*'s comments also include an important reference to the legal basis for the division of unanticipated gain. Recording the opinion of Rif and those who agree with him, *Sema* writes:[79]

> And when the vendor gives the agent more than one measure per *dinar* [i.e., more merchandise than antici-

[76] *Shakh*, *Hoshen Mishpat* 183:18. *Ketzot haHoshen*, ad loc., 7, explains the basis for Rema's ruling.

[77] *Taz*, ad loc. *Mishkenot haRo'im*, letter *shin*, 114 (p. 346, col. 4), rules in accordance with the opinion of Rif as implied by the language of *Shulhan Arukh*.

[78] It appears that Me'iri, *Beit haBehirah*, *Ketubot* 98b (ed. Avraham Sofer, p. 452), relates to this problem: "And the greatest of the rabbis have explained that this is disputed property [*mamon hamutal besafek*], and where neither has possession, it is divided."

[79] *Sema*, *Hoshen Mishpat* 183:18.

> pated for the amount paid], legally, all should belong to the agent. However, since the principal's money was instrumental in the benefit received by the agent, our Sages said that they must divide the surplus.

In other words, according to *Sema*, the obligation to divide the unanticipated gain is a rabbinic enactment.

Hazon Ish[80] explains that "it appears to be a rabbinic enactment to prevent altercation, since according to the strict law causation such as this should not entitle [the principal] to a share of the profit." According to Hazon Ish, then, although a person instrumental in the creation of gain is entitled to a share, this does not hold when his contribution is remote – as it is here. Here, the division is based, rather, on rabbinic enactment.

Concerning unanticipated gain that arises from error, *Shulhan Arukh* rules in accordance with the opinion of Rabbenu Yitzhak as recorded by the *Tosafot*:[81] "[If] a person sent his agent to accept payment,[82] and the debtor gave more [than anticipated], the entire surplus belongs to the agent."[83, 84]

[80] *Hazon Ish*, *Baba Kama* 22:5.

[81] *Sh. Ar.*, *Hoshen Mishpat* 183:7.

[82] If, however, an agent was sent to pay a creditor and deceived him into accepting less, the entire saving belongs to the principal. So rules Rema in *Sh. Ar.*, *Hoshen Mishpat*, 183:9. *Sema*, *Hoshen Mishpat* 183:26, explains that the money belongs to the principal and the portion which was not paid remains in his possession. This, however, he explains, is not the case where an agent deceives another into paying more, since there he receives money from the other and thus acquires it.
See also *Resp. Lehem Rav* 125; *Resp. Ba'ei Hayyei*, *Hoshen Mishpat* 133; but see notes 84 and 87 below; and *Resp. Karnei Re'em* 177.

[83] Rema, ad loc., adds: "Only when the agent knows of the error before transferring the unanticipated gain to the principal. If, however, he [i.e., the agent] did not know of the error and the entire gain was

As mentioned above,[85] where another person aids the purchaser in deceiving a third party, Ra'avan rules that assistant and purchaser share the surplus. Rema accepts this ruling in his comments on *Shulhan Arukh*,[86, 87] but in so doing seems to be inconsistent with a previous ruling. As shown, Ra'avan's ruling that assistant and purchaser share is based upon the principle that a person instrumental in creating a gain is entitled to enjoy the gain that he helped create;[88] but this principle was apparently rejected (or at least restricted) by Rema,[89] in his ruling that, where a vendor specifies that additional merchandise is meant for the agent, the agent

transferred to the principal, then all belongs to the principal...." See also *Shakh*, *Hoshen Mishpat* 183:14; *Ketzot haHoshen* 183:9; *Netivot haMishpat* 183, *be'urim* 12.

See also *Resp. Maharashdam*, *Hoshen Mishpat* 26; R. Mikha'el Ya'akov Yisrael, *Resp. Yad Yemin*, *Hoshen Mishpat* 34 (p. 135, col. 3); and *Resp. Sho'el uMeshiv*, *Mahadura Talita'ah* III:37.

[84] R. Yitzhak Adarbi, *Resp. Divrei Rivot* 111; and the author of *Resp. Rashakh* II:3 (=91), were asked concerning an agent who concealed merchandise from the customs. They ruled in accordance with the opinion of Rabbenu Yitzhak that the entire unanticipated gain belonged to the agent. See, however, Rema's ruling, cited in note 82 above, and *Sema*'s explanation of that ruling. See also *Resp. Maharashdam*, *Hoshen Mishpat* 26-27; R. Petahyah Mordekhai Birdugo, *Resp. Nofet Tzufim*, *Hoshen Mishpat* 134.

[85] See text at note 48 above.

[86] Rema, *Hoshen Mishpat* 183:7.

[87] *Shakh*, *Hoshen Mishpat* 183:15, also discusses the case of an agent who manages to evade customs. See also *Resp. Beit Yitzhak*, *Hoshen Mishpat* 55:6, concerning *Shakh*'s ruling in this matter. See also Maharsham, *Mishpat Shalom* 183:7, p. 30, col. 3; and note 84 above.

[88] See the end of the explanation of Ra'avan's responsum, text at note 49 above. *Be'ur haGra*, *Hoshen Mishpat* 183:25, explains that this ruling is in accordance with the approach of Rif and *Ittur* regarding merchandise that has a fixed price (see text at notes 41 and 43 above).

[89] See text at note 74 above.

need not share it with the principal. It may be possible, however, to explain the inconsistency by suggesting that in Ra'avan's case, Rema recognizes that the two parties participated equally in an action that created a gain, and must, therefore, be considered partners with equal rights in the gain received.[90]

R. Shelomoh Kluger, in a responsum,[91] also distinguishes between Ra'avan's case and the talmudic case where additional consideration is granted to an agent. According to R. Kluger,[92] it appears that Ra'avan's ruling, dealing as it does with a case of error, is not subject to the disagreement concerning additional consideration given to an agent, and that all would agree that the unanticipated gain must be shared. R. Kluger emphasizes, however, that this is so only when both purchaser and assistant are present, thus acquiring equal rights to the unanticipated gain as though they had simultaneously picked up some lost property:

> For this is not a function of the merchandise [provided by the principal]. Rather, this is a different matter similar to an instance where two persons pick up lost property simultaneously and must, therefore, divide it equally. And this is not analogous to where a vendor gives additional merchandise to an agent, concerning which there exists a disagreement among rabbinic authorities. There, the person granting the additional merchandise knows what he is adding[93] and he does so be-

[90] *Sema*, *Hoshen Mishpat* 183:24, substantiates this explanation of Rema's opinion by quoting Rema's *Darkhei Moshe*: "Since both were involved with the merchandise, they divide it, although only one actually carried out the deception."

[91] *Kuntres Yosif Da'at* (*Nidrei Zerizin*, ad fin.), responsum 13, ad fin.

[92] On R. Shelomoh Kluger, see above, Part 2, note 104.

[93] This approach requires clarification in light of the opinions of those Earlier Authorities who hold that cases of error and cases of granting

> cause of the transaction, and the authorities disagree over who is entitled to it. And in such a case it may also be argued that since only the agent was present at the time of the transaction, the unanticipated gain belongs entirely to the agent.
>
> In the present case, however, since both were present, and the third party had no intention of giving additional consideration, but rather they deceived him in the calculation, this is a different matter altogether, not dependent on the [principal's] merchandise, and it is like lost property [i.e., unanticipated and unrelated to anything else]....

R. Kluger bases his opinion on two factors. First, since, in Ra'avan's case, the additional consideration was given in error, R. Kluger does not consider it to be part of the transaction. Second, since both purchaser and assistant were present, both acquired equal rights to the additional consideration. According to this explanation, then, there is no room for uncertainty concerning whom the vendor meant to benefit – the basis for Rashi's approach in the case of "one additional item granted to the agent." If we posit that Rema accepts this line of reasoning, there will be no inconsistency. Where a vendor knowingly grants additional consideration, Rema would argue, together with Rashi, that an uncertainty as to whom he wished to benefit is created and the gain is, therefore, shared. Where the vendor specifies for whom the additional consideration is meant, the uncertainty is resolved, and the gain belongs to the person for whom it was designated. In Ra'avan's case, however, where principal and agent were both involved in and present at the deception that earned the unanticipated gain,

additional consideration are equivalent. See the opinions of R. Ya'akov Yisrael and Rabbenu Tam cited above.

Rema can rule that (for the reasons mentioned by R. Shelomoh Kluger) both are equally eutitled to a share of the unanticipated gain.

2. An Agent Who Deviates from Instructions

As we saw above,[94] the Jerusalem Talmud links the ruling in the case of an agent who varies his agency, thereby creating an unanticipated gain, with the principle that a person who is instrumental in creating a gain is entitled to enjoy the gain that he helped create. We also saw that the Babylonian Talmud remains silent on the matter.[95]

A. The Approach that Awards All to the Principal

The early post-talmudic commentators are divided over how to interpret the Babylonian Talmud. Rashi[96] and the *Tosafot*[97] believe that the transaction under discussion is one where principal and agent agreed to share the profits equally, and therefore, even if the agent varies his agency, they still share the profits. Rif[98] comes to the same conclusion, distinguishing between an agent who enters into partnership with the principal and one who does not:

> And since it is established that the law is in accordance with R. Yehudah,[99] we must ascertain whether money was given to the agent [to acquire merchandise] for resale as part of a partnership arrangement – in which case a loss would be sustained by him [the agent], be-

[94] See text at note 26 above.
[95] See text at note 25 above.
[96] Rashi, *Baba Kama* 102b, s.v. *Likah*.
[97] *Tosafot*, *Baba Kama* 102a, s.v. *Noten*.
[98] Rif, *Baba Kama*, chap. 9 (ed. Vilna, 36a). See also *Shimru Mishpat* on *Hukkot haDayanim* 291 (ed. Jerusalem, 1974, p. 137).
[99] R. Yehudah holds that an agent who deviates from instructions does not thereby acquire for himself the merchandise he purchases.

> cause he deviated from instructions, and a profit would be divided between them. For even according to R. Me'ir,[100] since [the principal] gave him money to purchase for resale, the deviation from instructions does not acquire the merchandise for the agent. And if the money was not given to the agent as part of a partnership arrangement, but only to purchase wheat for resale, the agent receives nothing – if there is a loss he sustains it, because he has deviated from instructions, and if there is a gain, it belongs to the owner of the money. Similarly if he gave him money to purchase wheat for his [the principal's] personal consumption, if there is a loss, the agent sustains it, and if there is a profit, it belongs to the owner of the money, since we do not say that they divide the profit unless the principal gives him money to buy wheat as part of a partnership arrangement, and he [the agent] bought barley with it....

Thus Rif explains the discussion in the Babylonian Talmud. Only if a partnership agreement is stipulated from the outset do agent and principal share the unanticipated gain when an agent deviates from instructions. When no such agreement is stipulated, however, an agent who deviates from instructions must compensate for any loss but is not entitled to a share of unanticipated gain.

B. The Approach that Awards a Share to Whoever Was Instrumental in Creating the Gain

Some of the Earlier Authorities chose the approach of the Jerusalem Talmud. In *Sefer haIttur*,[101] the talmudic discus-

[100] R. Me'ir, who holds that an agent who deviates from instructions acquires the merchandise he purchases for himself, holds this only in cases, such as purchase for personal consumption, where the principal will be particular about what is purchased.

[101] *Sefer haIttur*, *Shalishut Mamon* (ed. R. Me'ir Yonah, p. 43d).

sion is understood to refer to a conventional agent – not one who has entered into a partnership arrangement – and to rule that, if an agent deviates from instructions and is instrumental in an unanticipated gain, the agent is entitled to his share:

> And it is logical to conclude that the *Tana* is not discussing a partnership arrangement, but rather conventional agency. And as regards agency for the purchase of merchandise for resale, there is no disagreement. If the principal gave him money to purchase wheat, and he did not find wheat and bought barley instead, since, if the agent had returned the money, there would have been no profit, now that he spent it on barley and there was a profit, it is like merchandise with a fixed price, and they divide [the unanticipated gain]. The disagreement [concerning an agent who varies his agency] is over [merchandise purchased for the principal's] personal consumption. And the law is established in accordance with the opinion of R. Yehudah, that even in agency for [the principal's] personal consumption, they divide.
>
> And we do not say that where there is profit it belongs entirely to the owner of the money, except where the agent does not deviate from instructions, but rather is sent to purchase wheat and purchases wheat or to purchase barley and purchases barley, and where the vendor adds one item where the price is not fixed.[102]

According to *Ittur*, then, whenever an agent deviates from instructions (regardless of whether there is a partnership agreement), he is entitled to a share of the unanticipated gain. Further on, *Ittur* notes that the author of *Metivot* concurs with this interpretation.

[102] See *Ittur*'s further comments, ibid.

An interesting opinion is that of R. Aharon haLevi, cited in *Nimmukei Yosef*.[103] R. Aharon haLevi quotes the approach of the Jerusalem Talmud[104] but then appears to quote that of Rif,[105] concluding that Rif's approach is established as law. However, it seems probable that R. Aharon haLevi agreed with the approach of the Jerusalem Talmud and that the quotation of Rif and ruling should be attributed to *Nimmukei Yosef*.

C. The Approach of Shulhan Arukh – All Belongs to the Principal

Maimonides and *Shulhan Arukh* rule according to the opinion of Rif. Maimonides writes:[106]

> If he gave him money to purchase wheat, whether for [the principal's] personal consumption or for resale, and he went and purchased barley with it, then, should the value of the merchandise he bought fall, the agent bears the loss, because he deviated from his instructions. If the price increases, the increase goes to him who invested the money.

Shulhan Arukh[107] issues a similar ruling, to which Rema[108]

[103] *Nimmukei Yosef*, *Baba Kama*, chap. 9 (ed. Vilna, 36a).

[104] That a person instrumental in creating a gain is entitled to a share of the gain he helped create.

[105] That an agent who varies his agency is entitled to a share of unanticipated gain only when a partnership agreement was stipulated from the outset.

[106] Maimonides, *M.T.*, *Sheluhin veShutafin* 1:5.

[107] *Hoshen Mishpat* 183:5. The reason for this is that the merchandise purchased belongs to the principal and it is, therefore, proper that he benefit from changes in the value of the transaction. Possibly, if the agent possesses specialized knowledge and it was that knowledge that resulted in gain, the agent is entitled to compensation for his action, even though his action was contrary to his instructions.

adds: "And that is also the law if [the principal] gave [the agent] the money under a partnership arrangement." In other words, if the money was given to the agent under a partnership arrangement, and the agent varies his agency, producing an unanticipated gain, agent and principal share it.[109]

R. Yosef ben Lev[110] discusses the disagreement among the Earlier Authorities and concludes that the opinion of R. Aharon haLevi, according to which the unanticipated gain is shared even when there is no partnership arrangement (so R. Yosef ben Lev understands R. Aharon haLevi) is not to be relied upon. R. Yosef ben Lev goes further, asserting that even if the agent remains in possession of the unanticipated gain, the court may seize it, and the agent does not have the right to claim that he accepts the ruling of R. Aharon haLevi,[111] since such a claim (the claim of *kim li*) is not recognized where virtually all authorities disagree with the minority opinion.

D. Commentators on Shulhan Arukh Favor the Approach that the Agent is Entitled to Half because he Created the Gain

Shakh[112] objects to the ruling of *Shulhan Arukh*, citing the opinions of *Sefer haIttur* and *Metivot*, who hold that, where the agent deviates from his instructions, unanticipated gain is shared even where there is no fixed price. *Shakh* asserts that this is also the opinion of R. Aharon haLevi as quoted

[108] Rema, ad loc.
[109] See Rema's further comments, ibid.
[110] R. Yosef ben Lev (1500-1580) was a widely recognized rabbinic authority who lived in Turkey.
[111] *Resp. Mahari ben Lev* I:114.
[112] *Shakh, Hoshen Mishpat* 183:10.

in *Nimmukei Yosef*, adding:[113] "And this appears to be the correct ruling according to the Talmud. And although it is established that, in accordance with the opinion of R. Yehudah, a deviation from instructions does not acquire the merchandise for the agent, nevertheless, where the agent who deviated from instructions was instrumental in creating a gain, it is divided." According to *Shakh*'s conclusion, in spite of the many authorities who rule as does *Shulhan Arukh*, an agent in possession of unanticipated gain does have a claim of *kim li* – that is to say, he may claim that the view of the dissenting authorities is the correct one.[114]

[113] *Shakh* takes the opinion of R. Aharon haLevi to be identical with that of the Jerusalem Talmud. This is disputed, however, by *Mareh haPanim* on the Jerusalem Talmud, *Baba Kama* 9:5 (7a). See also text at note 103 above.

[114] *Mareh haPanim* (cited in the previous note) disagrees with *Shakh*, arguing that the claim of *kim li* cannot be made against so large a number of authorities as he enumerates.

Chapter Three

PARTICIPATION IN RISK AS GROUND FOR SHARING PROFITS

An interesting extension of the right of one person to share the profits of another came about with the recognition that risk incurred by one person as a consequence of the action of another entitles the former to a share of the profits created as a result of the risk.

The basis for this principle is a strange passage in the Jerusalem Talmud, which reads:[115]

> A person went on a mission of agency, his brother wished to divide with him. The matter came before R. Ami, who said, "This is how we rule, when a person becomes a thief, his brothers divide with him."[116]

[115] *TJ Baba Kama* 9:3 (17a).

[116] See comments of Gedaliah Alon, *Mehkarim beToledot Yisrael*, vol. 2, pp. 91-92.

The early post-talmudic authorities are divided over the meaning of the passage. According to *Sefer halttur*,[117] R. Ami's words were meant to be followed by a question mark, and his decision, therefore, is that when one person steals, his partner is not entitled to divide the theft with him. *Mordekhai*,[118] on the other hand, does not place a question mark at the end of R. Ami's remark, and hence, R. Ami's decision is that a thief's partner is entitled to his share of the theft. *Mordekhai* writes:

> ...Brothers, one of whom goes out to rob or steal without the knowledge of the others, must divide. From here it should be ruled in the case of two people who go to the marketplace, and one sees a wallet lying unattended and steals it, he must divide it [its contents] with the other.

If this is indeed the proper interpretation of the passage, we have another indication of the Jerusalem Talmud's position that a person instrumental in creating a gain has the right to share that gain.[119] The disagreement among Earlier Authorities is reflected in *Shulhan Arukh* where Rema accepts the approach of *Mordekhai* and rules:[120] "If one partner steals or robs, he must divide [his gain] with his partner." *Shakh*[121] and *Taz*,[122] on the other hand, disagree, explaining that R. Ami's remark was a question and not a statement.

[117] *Ittur, Shittuf* (ed. Venice) 26:1, also cited in *Mordekhai, Baba Batra* 660, ad fin.

[118] *Mordekhai, Baba Batra*, 660, ad fin., cited also in *Hagahot Maimoniyot, Sheluhin* 5:4.

[119] See text at note 18 above.

[120] Rema, *Sh. Ar., Hoshen Mishpat* 176:12.

[121] *Shakh, Hoshen Mishpat* 176:27.

[122] *Taz*, ad loc. *Taz* writes that even if the two have agreed to share any lost property they may find, the partnership does not extend to cases

What is the basis of *Mordekhai's* ruling concerning two people who go to the marketplace? What legal connection is there between the two that will entitle one to share the theft of the other? An instructive discussion of this point appears in the writings of R. Yosef Katz.[123]

He received the following query:[124]

> [Concerning] a person who had the opportunity to buy something at a very low price from a non-Jew, something that was almost certainly stolen. The buyer and the non-Jew went to the home of another Jew and there [the first Jew] bought it at a very low price. During the bargaining with the non-Jew, before a price was fixed and the transaction finalized, the wife of the second Jew [in whose home all this took place] said, "What are you doing? I want to buy it, and since it is in my house, it is mine." The buyer [i.e., the first Jew] then answered her, "Do not worry, I will come to an understanding with your husband." And now the questioner [i.e., the second Jew in whose home the negotiations took place] comes to ask whether his premises acquired the entire thing for him, half of it, or nothing at all.

R. Katz opens by discussing the disagreement among rabbinic authorities concerning the rights of a home owner to

such as the present one: "Since it is prohibited to steal..., it may be presumed that the other partner is not interested in this gain...." For discussion of the opinion of *Taz*, see *Shimru Mishpat*, on *Hukkot haDayanim* 291 (ed. Jerusalem, 1974, p. 150); and R. Mikha'el Ya'akov Yisrael, *Resp. Yad Yemin*, *Hoshen Mishpat* 34.

[123] R. Yosef Katz (ca. 1510-1591), one of the most widely recognized rabbinic authorities in sixteenth-century Poland, was Rema's brother-in-law and served as head of the yeshiva of Cracow.

[124] *Resp. She'erit Yosef* 7.

inexpensive merchandise that comes to his home.[125] He then rules that in the present case, all would agree that the home owner is entitled to half, since the buyer told the home owner's wife that he would come to an understanding with her husband. This is as though he had said to the husband, "You acquire half." To this, R. Katz asserts, all will admit.

R. Katz then goes on to introduce a surprising new point: "Moreover, since in the present case, the home owner incurred great danger – should the thief be caught – and it was the buyer who brought this danger upon him, the home owner, to some small extent [*ketzat*], becomes the buyer's partner." In support of this argument, R. Katz cites the ruling of *Mordekhai* quoted above concerning two persons who go to the marketplace. R. Katz argues that *Mordekhai's* ruling does not deal with two people who had established a partnership from the outset. Such would be the case discussed in the Jerusalem Talmud. Had *Mordekhai's* case been precisely parallel to that of the Jerusalem Talmud, he would not have written, "...from here it should be ruled," a phrase indicative of the application of a principle to a new set of circumstances. Hence even when the two are not partners, if one was endangered thereby, he is entitled to his share of the other's theft:

> Therefore, it appears to me that he [i.e., *Mordekhai*] is discussing two persons who go together but are not partners, and nevertheless, the one is obliged to share with the other. How does *Mordekhai* learn this from the Jerusalem Talmud? The Jerusalem Talmud, after all, is discussing partners, for it describes brothers, who may be presumed to be partners! Clearly, *Mordekhai* must

[125] See the dispute of Ra'avya and Ra'avan discussed below, in chap. 5.

> hold that partnership makes no difference with regard to theft. Thus, the Jerusalem Talmud's ruling to obligate the one person to share his theft with the other, is because when one brother steals and does not share, although the others are not present at the time of the theft, they and their property are in danger. And since he endangered them together with himself, he is obligated to share the gain. And from here he learns that this applies to two persons who are not partners, but who go together – that if one of them steals, the other is in as much danger as the thief.... And therefore, he is obliged to share with his friend who went with him.

From here, R. Katz concludes that a person endangered by merchandise brought to his house is entitled to participate in its purchase.

A similar view is taken by R. Yo'el Sirkes,[126] author of *Bah*. R. Sirkes received the following query:[127]

> Two Jews standing in the marketplace were approached by some non-Jews and asked if they were interested in buying silver. The two Jews went with the non-Jews to the home of a third Jew, where they saw the silver and entered into negotiations with the non-Jews. The Jew in whose home this occurred, aided them [in the negotiation] and, when the transaction was finalized took out his own money, gave it to the non-Jew and took the silver into his own possession. The Jewish home owner now wishes to acquire all the silver for himself, claiming that his premises and his money acquired it for him.

R. Sirkes opens with a discussion of whether a home owner

[126] R. Yo'el Sirkes was born in Lublin towards the middle of the 16th century and died in 1640.

[127] *Resp. Bah (haYeshanot)* 12.

acquires merchandise that enters his premises[128] and concludes with consideration of the right to share a theft:

> And it appears that the gain would belong to the home owner even if he had not given his own money. Since most such purchases are stolen property, and it is against the home owner that accusations will be brought, he stands in greater danger than the two who do not live in the house where the stolen property was purchased.

In support of his conclusion, R. Sirkes cites our passage from the Jerusalem Talmud and *Mordekhai's* ruling based on it and shows that when discussing the "two people who go to the marketplace" *Mordekhai* could not have been referring only to partners:[129]

> It is implied in his wording, "two people who go to the marketplace," that [this applies] even if it were just two people who had to travel together, although they entered into no partnership and had never been partners in the past. And the reason is this: Although the brothers [mentioned in the Jerusalem Talmud][130] are partners, it may be presumed that they made no partnership with regard to theft and robbery; nevertheless, they must share with each other, since if one were caught, all would be in danger. So too in the case of two people who go to the marketplace, the second one is in the same danger as the thief, since they were together when the theft was committed.

[128] See below, chap. 5, text at note 153.

[129] In his comments on *Mordekhai* (*Baba Batra* 660, ad fin.), R. Sirkes writes: "It appears to me that they are partners." According to this comment, the two share, because they are partners. In the responsum cited, however, R. Sirkes takes a different approach.

[130] Text at note 115 above.

Thus, R. Sirkes concludes in the matter before him:

> Accordingly, since it is known that the main danger is to the owner of the home where the stolen property was purchased,[131] and it was with his knowledge that they negotiated with the thieves, he is also entitled to a share of the gain.[132]

[131] *Shakh*, *Hoshen Mishpat* 176:27, also disagrees with Rema's ruling (see text at note 121 above). *Shakh* cites an unnamed authority who holds that *Mordekhai's* ruling applies only where the theft involved some danger.

[132] See comments on ruling of *She'erit Yosef* by Maharsham, *Mishpat Shalom* 176:12.

Chapter Four

INSURING ANOTHER'S PROPERTY

The question of the right of a person who insures the property of another to receive compensation from the insurer for damage to or destruction of the property insured has been widely discussed in recent years; and the question was already considered above in Part 2 of the present volume, with reference to profiting from another's property.[133]

A survey of responsa on the subject shows that, according to most authorities, the compensation belongs to whoever pays the premiums. Some rule, however, that under certain circumstances, the compensation belongs to the owner of the property. Among both schools of thought, there have been those who include in their deliberations consideration of the law of division of profits when two parties are jointly instrumental in the creation of gain.

[133] See Part 2.

R. Yosef Sha'ul Nathanson,[134] author of *Resp. Sho'el uMeshiv*, was asked to whom insurance compensation belongs for a house destroyed by fire if the insurance premiums were paid hy the tenant.[135] R. Nathanson quotes an answer written to him concerning the matter by R. Yosef Yehudah Strassburg, rabbi of Kosow (Galicia), apparently agreeing with the latter's opinion that the ruling will depend on whether, under the (non-Jewish) law of the land, it is permitted to insure another person's property.[136] If so,

[134] R. Yosef Sha'ul Nathanson (1808-1875) served as head of the rabbinic court of Lvov (Lemberg).

[135] *Resp. Sho'el uMeshiv, Mahadura Tinyana* III:129.

[136] In another responsum, ibid., R. Nathanson considers the case of a tenant who asked his landlord to insure the property he was renting. Although the landlord originally refused, once the tenant had purchased the insurance himself, the landlord agreed to reimburse him but delayed paying on a number of occasions. In the meantime, the property was destroyed by fire, and the rabbinic authorities of Brody ruled that the landlord was entitled to two thirds of the compensation and the tenant one third.

R. Nathanson opens by stating that the entire sum of compensation would appear to belong to the landlord, since it may be presumed that the tenant's intention was to transfer all rights arising from the insurance. However, since R. Nathanson is uncertain, he asserts that it is proper that the authorities persuade the parties to agree to a compromise.

Further on in his discussion, supporting a decision of the rabbis of Brody, R. Nathanson cites a passage from Tractate *Ketubot* 65b, where it is ruled that, if one embarrasses a woman in private, the woman is entitled to two thirds of the compensation and her husband to one third, since the embarrassment is "mostly hers." Similarly, R. Nathanson asserts, since the tenant benefits from the property of the landlord, while the landlord loses his entire property, given that it was, after all, the tenant who paid for the insurance, two thirds of the compensation are due to the landlord and one third to the tenant. If, however, the compensation is greater than the actual value of the property, landlord and tenant divide the surplus equally.

then clearly the compensation belongs to the tenant, who paid the premiums. If, however, it is not permitted to insure another person's property, then the ruling would be as explained in the case of an agent in *Shulhan Arukh* – that wherever someone's property is instrumental in creating benefit, he is entitled to a share of the benefit. So, in the present case, since the right to receive the compensation belongs to the landlord, and since his right to compensation was created by the tenant's payment of premiums, tenant and landlord must divide the compensation.

The opposite conclusion is reached by R. Tzvi Hirsch Te'omim,[137] who was asked concerning a partner who paid to insure his part of a jointly owned structure. By mistake, the insurance was registered as covering the entire structure. R. Te'omim rules that the compensation is not divided in this case, and that the entire sum belongs to the partner who purchased the insurance. He bases his ruling on his understanding that the principle of division by agent and principal is based upon the intentions of the parties. Where an agent makes his purchase with money supplied by the principal, he realizes from the outset that he must divide any unanticipated gain, and the principal, knowing this, acquires his share in the unanticipated gain. In the present instance, however, this is not the case. A did not know that B had purchased insurance. B, moreover, paid the premiums from his own pocket with intention to insure only his own portion. A had no interest in B's insurance, since he wished to insure his own portion. Thus A is not entitled to a share of the compensation paid to B.

The principle of division of gain is also discussed by R.

[137] R. Tzvi Hirsch Te'omim served as head of the rabbinic court of Chorostkow. The responsum appears in his *Resp. Eretz Tzvi, Hoshen Mishpat* 15. See text in Part 2, note 87 above.

Refa'el Mordekhai haLevi Solovei,[138] who rejects its application in instances where one insures the property of another. R. Solovei first shows that, according to the principle that one may not "do business with his neighbor's cow," it would appear that the compensation belongs to the owner of the property.[139] Accordingly, since the compensation was paid for the destruction of the landlord's property, the tenant, although he paid the premiums, has no share in the compensation. The reason for this is that in the case of an agent in *Shulhan Arukh*, the unanticipated gain is shared only because it was granted to the agent and not to the principal (and even so, the principal is entitled to a share). Here, however,

> it is not the intention of the insurance company to give compensation specifically to him in return for the premiums he paid, for had he wished to insure the house of any other person, he would have been prevented from doing so by the law of the land. Only because [as a tenant] the house is registered in his name, do they believe the house to be his. Hence, all the compensation that they give is given only on the presumption that the house is his. It emerges, therefore, that all the compensation he receives, he receives by virtue of a house that belongs to his landlord, and he is, therefore, not a partner in this at all, and all must be awarded to the owner of the house.[140]

[138] *Resp. Yad Ramah, Hoshen Mishpat* 80.

[139] See Part 2, text at note 109.

[140] R. Solovei, op. cit. (note 138 above), holds, however, that the property's owner must reimburse the tenant for the insurance premiums.

Chapter Six

SUBLETTING

1. PERMISSION TO SUBLET, AND THE RIGHT TO REVENUES RECEIVED

Further application of R. Yosi's principle was made by R. Yosef Haviva,[53] in his *Nimmukei Yosef*,[54] to situations where a tenant profits by subletting the property he has rented. Considering the case of a person who rents a house and sublets it for a higher rent than he himself pays, R. Haviva distinguishes between a tenant who was permitted to sublet the property and one who was not: if the tenant received permission (be it explicit or implied) to sublet, then the profit belongs to him; if not, the profit belongs to the property's owner. In support of his ruling, *Nimmukei Yosef* cites R. Yosi's principle.

Not only does *Nimmukei Yosef* use R. Yosi's principle to support his ruling that when the tenant does not have permission to sublet, profits must go to the owner, he also goes

[53] R. Yosef Haviva was an important rabbinic authority who lived in Spain near the end of the fifteenth century.

[54] *Nimmukei Yosef*, *Baba Kama*, chap. 2 (ed. Vilna, p. 9a).

to considerable length to demonstrate that, when the tenant does have permission to sublet, the profits belong to him. R. Haviva argues that, since the tenant is acting within the bounds of what he is permitted to do, the simple fact that he shows a net gain by collecting a higher rent than he is paying is not sufficient to entitle the owner to his profits; and since permission to sublet was part of the original agreement, the owner has no claim against the tenant's doing so. Neither is the profit itself sufficient cause for action by the owner. This is comparable to renting to the tenant for less than the going rate. Here, too, the tenant "profits" from the owner's property, yet, clearly, the owner has no cause for action to recover the difference between the rent charged and the going rate. He concludes by adding that, where there has been permission, it is a case where one person benefits while the other sustains no loss.[55]

[55] One problem noted by various commentators with regard to *Nimmukei Yosef*'s opinion is that, in the original case concerning which R. Yosi formulates his principle, the Talmud (*Baba Metzia* 36a) asserts that the owner of the cow had granted permission to the hirer to lend it to others. This being the case, why, in the present case of subletting real property, should the owner's permission grant the tenant the right to the profits realized by subletting – would it not appear that in both cases one person profits from the property of another? Apparently, *Nimmukei Yosef* takes the Talmud's assertion, that our case is one where the owner had granted his permission to lend the cow, to be a temporary conclusion, ultimately rejected. See *Resp. Benei Aharon* (Lapapa) 1, p. 2, col. 2; *Mahaneh Efrayim*, *Hilkhot Sekhirut* 19; *Sema*, *Hoshen Mishpat* 307:5; *Shakh* (in response to the opinion of *Sema*), *Hoshen Mishpat* 307:2; *Ketzot haHoshen* 363:8; *Be'ur haGra*, *Hoshen Mishpat* 363:30; and *Minhat Pitim* (Arik), *Hoshen Mishpat* 307:5.

In his comments on *Shulhan Arukh*, Rema[56] rules in accordance with the opinion of *Nimmukei Yosef* as law.[57]

2. THE RIGHT TO SUBLET BY LAW AND BY OWNER'S CONSENT

Basing himself on a distinction between the legal right to sublet and the owner's permission to sublet, R. Aharon Lapapa (a noted Turkish rabbinic authority)[58] seeks to restrict the application of R. Yosi's principle.

This problem figures in the opinion of R. Aharon Lapapa, cited in sub-section 2 of the present chapter.

[56] Rema, *Hoshen Mishpat* 363:10. See also *Beit haMelekh* (Hason) 7, p. 47, col. 3.
Shulhan Arukh, Hoshen Mishpat 307:5, rules: "If one hired a cow from another and loaned it to a third, and the cow died a natural death or as the result of some *force majeure*, since the latter is liable, it [the cow's value] returns to the owner, since one may not profit from the other's cow. And if he [the owner] said to the hirer, 'Lend it out if you wish, and you will deal with the borrower, and I will deal with you,' then the borrower compensates the hirer." According to the emphasized passage, then, the possibility exists that compensation for the cow will be paid to the hirer; however, simple permission to lend the cow is not sufficient, since it must be stipulated that the hirer will deal with the borrower and the owner with the hirer. Hence it seems clear that *Shulhan Arukh* does not accept the ruling of *Nimmukei Yosef*. See also *Beit haMelekh*, loc. cit., who suggests that *Nimmukei Yosef*'s opinion should not be understood at face value, since "I have not found a single authority who accepts it...."

[57] See *Netivot haMishpat*, *Hoshen Mishpat* 356, *be'urim* 4: "And if [the thief] sells [what he has stolen] for more than its value, and the owner is agreeable to the sale and claims the money received by the thief, the thief cannot argue that he must surrender only the value [and not the profit] in the manner that all thieves pay only the worth of an object at the time it was stolen. For how can one do business with his neighbor's cow?"

[58] R. Aharon Lapapa was active during the seventeenth century.

R. Lapapa opens[59] by questioning *Nimmukei Yosef*'s opinion, asking what difference there is between a tenant who has the owner's permission to sublet and the case in the Mishnah concerning which R. Yosi concluded that one may not profit from another's property (given[60] that the Talmud concludes that in R. Yosi's case as well the owner had given his permission to lend the cow to others). He concludes that there is indeed a difference between the two cases. In the case of R. Yosi, the hirer is not permitted to lend the cow without the owner's permission, an indication that the object held in bailment (i.e., the cow) does not belong to the hirer. In the present case of immovable property, however, the tenant is permitted by law to sublet the premises even without permission of the owner. The tenant's right to sublet without permission shows that he actually acquires rights in the property – that for the rental period, the property belongs to the tenant. On the other hand, where the object of hire can he hired or loaned out by the hirer only by permission of the owner, the hirer does not acquire such rights in the object for the agreed period, and where the hirer does not acquire such rights, R. Yosi's principle, which prohibits profiting from the property of another, will apply. On the other hand, in the case of immovable property, where the tenant actually acquires the property that he rents, R. Yosi's principle is not relevant.[61]

R. Lapapa's approach requires further study, however, particularly since he presents it in explanation of the opinion of *Nimmukei Yosef*, who speaks explicitly of a case

[59] *Resp. Benei Aharon* 1:3, p. 2, col. 3.

[60] See above, note 55.

[61] Further on in the responsum, R. Lapapa relates to a possible objection to his approach based on the talmudic discussion in *Baba Metzia* 96. See also his discussion, *Resp. Benei Aharon* 1:2, p. 5, of a responsum of R. Mordekhai Kalai. See also R. Lapapa's remarks, ibid. 3, p. 7.

where the tenant is not permitted by law to sublet (that is, to a bigger family than his), but the owner allowed him to sublet. In this case, *Nimmukei Yosef* still says that the profit belongs to the tenant.[62]

In his *Mahaneh Efrayim*,[63] R. Efrayim Navon[64] discusses sub-hiring of chattels, adopting R. Aharon Lapapa's distinction, though, for the reason mentioned, he does not attribute it to *Nimmukei Yosef*. Nor does R. Navon argue that where a legal right to sublet exists that this indicates acquisition by the tenant.

3. PROFIT FROM THE OWNER'S PROPERTY AND PROFIT FROM THE TENANT'S RIGHTS

R. Efrayim Navon goes further still, introducing a new distinction between the situation concerning which R. Yosi formulated his principle, on the one hand, and profits on rental revenues, on the other. R. Yosi, of course, is concerned with who will receive compensation from the borrower for the dead cow. In this case, the body of the cow remains the property of the original owner, and thus it is relevant to ask how one person may be permitted to profit from the property of another. In rental of immovable property, however, the tenant acquires the usufruct, the right to whatever earnings the property may yield, for the duration

[62] Against the opinion of R. Lapapa, R. Me'ir Simhah of Dvinsk (below, note 65) argues that since the *mishnah* presenting R. Yosi's principle contains no qualifications, it must certainly apply in all cases, including one where the hirer has stipulated that he be permitted to lend the property to others. Here, although the hirer clearly lends out that which is his to lend, R. Yosi's principle still applies. Hence R. Lapapa's distinction is not valid.

[63] *Mahaneh Efrayim*, *Hilkhot Sekhirut* 19.

[64] R. Efrayim Navon was born in Constantinople in 1677 and died in 1753.

of the rental period. This being the case, whether the property is used by the renter himself or by a third party, the renter's profits are a function of the right that he has acquired.[65]

While *Mahaneh Efrayim* agrees with *Nimmukei Yosef* that, where the owner of immovable property grants permission to sublet, the profits belong to the tenant, *Mahaneh Efrayim* rules that even where the subletting is without the owner's permission, the profits belong to the tenant.

4. PROFIT FROM THE VALUE OF THE PROPERTY AND PROFIT BEYOND THE VALUE OF THE PROPERTY

Mahaneh Efrayim seeks further to restrict application of R. Yosi's principle with regard to immovable property, asserting that *Nimmukei Yosef*'s opinion applies only to situations where the property was originally rented for less than the going rate. In such a case, when the tenant sublets it for more than he pays, his profit is a function of the value of the property, and thus, in accordance with R. Yosi's principle, it is the owner who is entitled to it. Where the property has been rented for the going rate for such properties, however, then any profit realized by subletting is not based upon the value of the property. In such instances, the profit belongs rightfully to the tenant, for this is a situation where the tenant benefits and the owner sustains no loss. *Mahaneh Efrayim*

[65] A similar explanation is advanced by *Ketzot haHoshen* 363:8. See also *Taba'at haHoshen*, ad loc.; *Hiddushei haRim*, *Baba Metzia* 35b (ed. Tel Aviv, 1959), p. 106, col. 1, p. 107, p. 122, ad fin., and above, note 10; *Resp. Beit Yitzhak*, *Hoshen Mishpat* 55:3; and *Or Same'ah*, *Hilkhot Sekhirut* 5:6, ad fin.
For the distinction offered by R. Me'ir Simhah of Dvinsk between delivery of a cow to a borrower on the one hand and subletting of real property on the other, see *Or Same'ah*, ibid.

goes to some length attempting to show that this approach does not contradict *Nimmukei Yosef*.

It appears, however, that this is not in fact *Nimmukei Yosef*'s intention, since *Nimmukei Yosef* reasoned that when the tenant has permission to rent, he is exempt from remitting his profit to the owner, just as he would be exempt from any further obligations if he himself had rented the property at less than the going rate. Thus, it seems apparent that in discussing tenants who sublet with or without permission, *Nimmukei Yosef* was not referring specifically (or even primarily) to tenants who were renting for less than the going rate.[66]

5. WHEN THE OWNER SUSTAINS LOSS

R. Yosef ibn Hason[67] discusses the case of A, who lets his house to B who, in turn, sublets it to C at a higher rate. After citing the opinion of *Nimmukei Yosef*, R. Yosef ibn Hason distinguishes between situations where the original owner sustains loss and those where he does not. He concludes that where the owner sustains some loss, the tenant will be obliged to remit his profits to him. In so ruling, R. ibn Hason cites the opinion of Ramakh quoted in *Shitah Mekubetzet*:[68]

> It is not proper that the hirer should do business with his neighbor's cow and benefit from the owner's [property] while the owner loses.

In the case under consideration, R. Yosef ibn Hason rules

[66] See *Erekh Shai*, *Hoshen Mishpat* 316:1.

[67] *Beit haMelekh* (Hason), *Hoshen Mishpat* 7.

[68] *Shitah Mekubetzet*, *Baba Metzia* 35b, s.v. *uleInyan Pesak*. See above, text at note 29.

that since the owner has not sustained a loss, the tenant is not obliged to turn over his profits to him.

His reasoning is somewhat similar to that of *Mahaneh Efrayim*. *Mahaneh Efrayim*, however, emphasizes profiting from the property of the owner, whereas R. Yosef ibn Hason is concerned with whether or not the owner suffers a loss.

Chapter Seven

INSURING ANOTHER'S PROPERTY

1. INTRODUCTION

Nearly every aspect of R. Yossi's principle has been examined in connection with an issue widely discussed during the last hundred years – the issue of insurance.

Many questions have arisen with regard to a person who pays insurance premiums upon a house belonging to someone else, the usual case being that of a tenant[69] who insures the house he is renting.[70]

It must be emphasized that payment of insurance premiums by someone who does not own the property may some-

[69] Where someone insures a property against which he holds a mortgage, R. Yitzhak Schmelkes holds that R. Yosi's principle does not apply (although in the case mentioned of a tenant who insures property that

times obligate the owner to return the amount of the premiums to the person who paid them – for example, when one partner paid the insurance on property owned jointly with another, or when a tenant insured a property based upon the owner's undertaking to reimburse him for his expenditure. In such situations, it may be assumed that the one purchasing the insurance acts as the agent of the owner, and thus, the rights arising from the insurance are the owner's.[71] When, on the other hand, the tenant who purchases insurance is not entitled to be reimbursed for his expenditure, it may be asked whether his payment of the premiums entitles him to whatever profits may arise as a consequence. Or would the tenant be considered as one who profits from his neighbor's property, in which case profits will go to the owner and the tenant will be entitled only to the return of his expenses?

As we shall see, Jewish legal authorities examined such questions in light of the rationales offered by the early post-talmudic authorities for R. Yosi's principle – to dis-

he rents, R. Schmelkes expresses uncertainty). See *Resp. Beit Yitzhak, Hoshen Mishpat* 55:5; and below, text at note 113.

[70] There is a distinction, of course, between coverage purchased by the tenant for the purpose of insuring the structure and coverage purchased by him with intention of protecting his own chattels. The author of *Resp. Divrei Malki'el* (V:128) was asked concerning a case where a tenant asked his landlord to pay a higher premium and purchase more insurance on the house he was renting in order that the existing policy cover the tenant's chattels as well, the tenant reimbursing the landlord for the additional expense. After the tenant left the dwelling, it was destroyed by fire, and the tenant claimed his share of the compensation. The respondent replied that, having paid his share of the premium, the tenant was indeed entitled to his share of the compensation, in spite of the fact that the policy was registered only as protecting the structure.

[71] See, for instance, *Resp. Beit Shelomoh, Hoshen Mishpat* 48.

cover whether according to these explanations, the principle will apply in insurance cases such as those just described. The authorities also developed certain distinctions between lending out a cow and insuring a structure belonging to someone else, by finding certain factors operative in the lending of a cow to a third party that do not operate in the act of purchasing insurance from an insurance company.

The similarities between lending property to a third party and insuring the property of another have been well set forth by R. Yitzhak Aharon Ettinger.[72]

He was asked[73] concerning a house insured by its tenant and subsequently destroyed by fire. The house's owner claimed that the compensation paid by the insurer was rightfully his. The tenant, on the other hand, argued that since he had paid the premiums, and since if there had been no fire, he would not have been reimbursed for his expenditure, once the house was destroyed and his payments had secured a profit, the profit should belong to him only.

In his responsum, R. Ettinger emphasizes that the similarities between the present case and that of R. Yosi go beyond the fact that, in the case of the cow, the profit resulted from the hirer's lending of the cow, while in the case of the insured house, profit resulted from the tenant's purchase of insurance. They are similar also in that both cases concern profit that is a consequence of the owners' loss. Another similarity is that in both cases the second party invested in the profit: in R. Yosi's case, the hirer loses by lending the cow without a fee during the period for which he himself has paid for its use; while in the case considered by R.

[72] R. Yitzhak Aharon Ettinger (1827-1891) served as head of the rabbinic court of Przemysl and later of the rabbinic court of Lvov.

[73] *Resp. Maharia haLevi* II:77.

Ettinger, the insurance policy was purchased at the tenant's expense (with no agreement by the owner to reimburse). Thus, the increased liability of the borrower[74] arises from an expense incurred by the hirer, and the potential insurance payment arises from an expense incurred by the tenant. In R. Ettinger's words: "[the case of R. Yosi] is truly comparable to the case under discussion, for what difference is there between the borrower's acceptance of responsibility in cases of *force majeure* and the insurance company's acceptance of responsibility for damage by fire, which is also a *force majeure*?"

Thus, it would seem that, in view of the close parallels between the two cases, compensation for the insured house destroyed by fire, like the compensation for the cow loaned by the hirer to a third party, is due the original owner. As we shall see, however, R. Ettinger does not rule this way.

In the following subsections, we first examine the opinions of those authorities who do not apply R. Yosi's principle to cases where one insures the property of another, and then the opinions of those who do invoke R. Yosi's principle in such cases.[75]

2. DISTINCTIONS BETWEEN PROFITS FROM LENDING AND PROFITS FROM INSURANCE

A. Lending Without Permission; B. The Borrower Uses the Property

R. Yitzhak Aharon Ettinger asserts that the outcome of the

[74] Unlike hirers, borrowers are obliged to compensate even in cases of *force majeure*.

[75] In Part 3, chap. 4, we cite responsa of authorities who hold that compensation is to be divided between the person purchasing the insurance and the owner of the property, since the profit that arose as a result of the purchase of insurance was in some way dependent upon each.

case under his consideration will depend upon a disagreement between *Shakh* and *Sema*.[76] Whereas *Sema* is of the opinion that R. Yosi's case in the Mishnah is one where the owner had not given permission to lend the cow to a third party, *Shakh* holds that the case is one where the owner's permission to lend had been granted. Since R. Ettinger leans towards acceptance of *Sema*'s opinion,[77] he asserts that there is a distinction between the loan of property without the owner's consent and the purchase of insurance by the tenant, which represents no negligence on the tenant's part, since there is no loss whatsoever to the owner. Thus, R. Ettinger concludes, in the present case, R. Yosi would admit that the compensation is due the tenant and not the owner.[78]

R. Ettinger goes on to demonstrate that in the present case, the ruling will be the same even according to *Shakh*'s opinion that R. Yosi's case was one where the cow was lent with permission. This, R. Ettinger asserts, is because there is a distinction between lending, in which the property is delivered to the borrower in order for him to use it,[79] and

[76] See note 55 above.

[77] In this, he relies upon the opinion of *Nimmukei Yosef* (see note 54 above) accepted as authoritative by *Shulhan Arukh*; Ritba's opinion (*Baba Metzia* 35b, ed. Halperin) as quoted by *Shitah Mekubetzet* (*Baba Metzia* 35b); and Ramakh's opinion, also quoted by *Shitah Mekubetzet* (loc. cit.), according to which it appears that, had the owner granted permission to lend the cow, R. Yosi would have admitted that the compensation belongs to the hirer.

[78] See also *Resp. Maharia haLevi* II:126, where R. Ettinger discusses another case of a tenant who insured a structure belonging to his landlord and repeats the basic principles set forth in the responsum cited here.

[79] Based upon the opinion of the *Tosafot*, *Baba Kama* 11b, s.v. *La*

insurance, where the insurance company does not receive the use of the house but only assumes responsibility for whatever damages may be incurred:

> Only where [the hirer] loaned the cow to another or sublet the house to a third party is this considered profiting from the property of another, because the second bailee uses the thing itself. This is not true, however, of the present case, since the insurance company never had the use of the thing itself, but only accepted responsibility for destruction by fire, [and therefore] this is not considered making profit. And R. Yosi would admit that the compensation is due to the tenant.

C. The Owner's Property is in the Borrower's Possession; D. The Borrower's Undertaking is to the Owner

Whereas R. Ettinger's distinction was based upon use of the owner's property, R. Shelomoh Drimer,[80] in a responsum concerning insurance, emphasizes possession. R. Drimer was asked[81] concerning A and B, who were neighbors in a two-family dwelling. A paid to have only his portion of the structure insured, but, unbeknownst to him or the insurance agent, the coverage was recorded as applying to the entire structure. When B went to insure his portion of the property, he was informed that this was impossible, but not knowing that his portion was already insured, he did not understand the insurer's refusal. In any case, the structure was destroyed by fire, and A claimed that the entire amount

mibaya, that R. Yosi's principle applies also where an unpaid bailee entrusts the cow to a paid bailee, *Minhat Pitim* (Arik), *Hoshen Mishpat* 307:5, disagrees with R. Ettinger's line of reasoning. See note 12 above.

[80] See Part 1, note 80 above.

[81] *Resp. Beit Shelomoh, Hoshen Mishpat* 122 (the responsum is dated 1865).

of the compensation belonged to him, while B claimed that the compensation ought to be divided between the two, since they had equal shares in the property.

R. Drimer opens by asserting that although initially it might appear that a decision in this case must be based upon R. Yosi's principle, in fact, R. Yosi's principle is not relevant.[82] This, he explains, is because the various reasons suggested by the early post-talmudic authorities for R. Yosi's principle do not apply in the present situation.

R. Drimer explains that, according to *Tosafot*'s understanding of the basis for R. Yosi's ruling, it is clear that there is no relevance to the present case.[83] Moreover, even according to Ritba's explanation,[84] that a direct adversary relationship is created between the cow's owner and the borrower, because the owner's property was delivered to the borrower, R. Yosi's principle will not apply to the present case, where the property was never delivered to the possession of the insurer.[85] This reasoning is relevant to all cases of insurance.

As regards the case under discussion, R. Drimer relates

[82] In another responsum written some twenty years later on a question of insurance, R. Drimer does not mention R. Yosi's principle at all. There he rules that if the person who purchased the insurance had no intention of requesting that the owner share in the expense, then the entire compensation is due to him as having purchased the insurance. In the case before him, however, R. Drimer doubts the tenant's claim that he had no intention of requesting that the owner reimburse him for any portion of the premium. See *Resp. Beit Shelomoh, Hoshen Mishpat* 48 (the responsum is dated 1883).

[83] Since the plaintiff is not in a position here to say, "remove yourself and your oath." See text at note 13 above.

[84] See text at note 25 above.

[85] See *Minhat Pitim* (Arik), *Hoshen Mishpat* 307:5, the responsum of R. Shalom Yosef, head of the rabbinic court of Lakacz, Russia. R. Shalom Yosef agrees with R. Drimer but adds that if, according to the

to the fact that B was prevented from insuring his portion of the property. Here it would seem that since B's loss was caused by an act of A, A ought to be obliged to divide the compensation with B. To this proposition, however, R. Drimer does not agree. Since A's act carried with it no advantage for B, R. Drimer believes that Ritba's invocation of agency as the mechanism for creating a direct relationship between owner and borrower will not apply. Agency can be created not at the owner's behest only when doing so entails some advantage to him, as when the hirer extends liability for the property by delivering it to a borrower.

R. Drimer's conclusion concerning agency in the present case seems to be based upon a misreading of Ritba, however, for he paraphrases Ritba as stating that agency is created in R. Yosi's case, because "from this time forth" (i.e., from delivery of the cow to the borrower) there is an advantage to the property's owner (which is clearly not true in the insurance case under discussion). What Ritba writes, however, is that when the hirer lends the property, it is as though he does so as an agent for the owner as regards any advantage as may pertain to the owner from this time forth. Such a mechanism, it may be argued, does apply to the present case, since the advantage to the owner may be ascertained now that the insurer is obliged to compensate, and it is clear (in retrospect) that it was to B's advantage that the house was insured.[86]

R. Avraham Mordekhai Landau of Makilinitz, who originally addressed this query to R. Shelomoh Drimer, head of the rabbinic court of Skala, addressed the same question to

law of the land, the compensation belongs to the owner, then the law of the land is certainly to be followed.

[86] See R. Drimer's opinion cited in Part 1, text at note 83 above.

R. Tzvi Hirsch Te'omim, head of the rabbinic court of Haraskow.[87] R. Te'omim, does not relate to R. Yosi's principle, but, for other reasons, finds in favor of the person who insured the property. R. Te'omim also considers whether the insurer ought to be obliged to compensate B, since it was his action that prevented B from insuring his share of the property. He rejects this possibility, however, since the damage to B was caused by the insurer indirectly and unintentionally.

E. The Basis of the Borrower's Obligations in the Laws of Bailment

The responsa cited thus far have focused on certain distinctive features of the cow-borrowing case, namely, the borrower's use of the cow and his possession of it. We next consider a new point of view, which emphasizes the source of the borrower's obligations and disregards R. Yosi's principle entirely in questions of insurance.

R. Shelomoh Yehudah Tabak[88] considered[89] the case of a person who insured his house and subsequently sold it. After the sale, the house was destroyed by fire. The question here is, who is entitled to the compensation, the original owner, who payed the premiums, or the second owner, whose house was destroyed?

R. Tabak finds in favor of the first owner, based on the fact that he did not sell the buyer of his property his rights to compensation by the insurer.[90] R. Tabak considers

[87] *Resp. Eretz Tzvi, Hoshen Mishpat* 15.

[88] R. Shelomoh Yehudah Tabak served as head of the rabbinic court of Sighet from 1858 until his death in 1908.

[89] *Resp. Teshurat Shai* 106.

[90] In support of this ruling, R. Tabak cites the opinion of Nahmanides quoted by Rema, *Sh. Ar., Hoshen Mishpat* 241:12. For similar use of the same source, see *Resp. Eretz Tzvi* (Te'omim), *Hoshen Mishpat* 15; and *Resp. Maharsham* II:211. A concurrent opinion is expressed by

whether R. Yosi's principle effects a transfer of such rights, and concludes that it does not. He explains that, even according to the opinion that in lending the property to a third party the hirer acts as an agent of the owner, there is an essential difference between that case, where the hirer loaned the property itself to the borrower, and the present case, where the insurer does nothing at all to the house of the insured. Here it is only the payment of the premium that gives rise to the compensation:

> And support for this may be found in the writings of *Tosafot*, Rosh. and *Hagahot Oshri* on the third chapter of *Baba Metzia*, according to which the reason for [R. Yosi's principle] would not apply here. There, [the hirer] loaned the owner's cow itself, and the borrower, by taking delivery for the purpose of using it [*mashakh gufah lehishtamesh bah*], obligated himself in cases of *force majeure*. In insurance, however, nothing was done to the house itself, and the insurer obligates himself in return for the premiums paid to him. Compensation, thus, belongs to the one who paid them.

In other words, the obligations of the borrower (to pay the owner) are a function of the laws of bailment. In the case of insurance, however, there is no cause to apply the laws of bailment, and, therefore, no obligation towards the owner of the house simply by virtue of his ownership.

R. Yosef Sha'ul Nathanson, *Resp. Sho'el uMeshiv, Mahadura Talita'ah* I:305.

R. Tzvi Pesah Frank (*haPardes*, 33 [Tevet, 5719], 6-7) considered whether one who commits a tort against insured property is liable for damages. For additional responsa on this issue, see *Resp. Harei Besamim, Mahadura Tinyana* 245; *Resp. Maharsham* IV:7; *Or Same'ah, Hilkhot Sekhirut* 7:1; and *Resp. Minhat Yitzhak* (Weiss) II:88.

F. The Basis of the Hirer's Obligations in the Laws of Bailment

A similar approach, with emphasis upon the laws of bailment as the basis for R. Yosi's principle, is taken by R. Shemu'el Engel.[91] R. Engel, however, does not discuss the obligations of the borrower, but rather those of the hirer. R. Engel advances an original explanation of the obligations of bailees.[92] According to the opinion that bailees' obligations originate upon their taking delivery of the object of bailment, R. Engel asserts that upon delivery, the bailee immediately incurs the obligation of returning the object to its owner. In cases of *force majeure*, a hirer is exempted from this obligation as long as its fulfillment would entail a loss for him. When returning the object entails no loss to the hirer, however, his obligation remains in force even in cases of *force majeure*. Therefore, when a hirer lends a cow which then dies a natural death, since the borrower must pay, return of the cow's value will entail no loss to the hirer, and thus, he remains obligated. Since R. Engel sees R. Yosi's principle as a direct function of the laws of bailment, clearly there is no basis for applying it to the relationship of insured and insurer, where the insurer in no way assumes the role of bailee (or his obligations).[93]

R. Engel goes ou to show that a distinction will also exist between bailment and insurance according to the opinion that a bailee's obligations do not arise upon his accepting delivery, but only when he is actually negligent in his duties towards the object of bailment. According to this view of bailment, R. Yosi holds that the original owner is enti-

[91] R. Shemu'el Engel was born in Tarnow (western Galicia) in 1853 and died in Kosice (Czechoslovakia) in 1935. He served as rabbi of Bilgoray (Poland), Dukla (Galicia), and Radomysl (Ukraine).

[92] *Resp. Maharash* VI:103.

[93] Cf. the explanation of *Hiddushei R. Me'ir Simhah*, *Baba Metzia* 35b.

tled to the borrower's compensation for the cow, because the borrower is acting as bailee for the original owner, whereas the insurer does not assume the role of bailee at all:

> And to those who hold that the bailee's property becomes encumbered [only] from the moment of negligence – that as long as the object of bailment exists, it remains in the possession of the original owner, with the bailee having no obligation, [since the object never leaves the possession of the original owner,] the Torah obligates the borrower to take proper care of the object for the original owner. Hence, R. Yosi's remark, "How shall one profit from his neighbor's cow?" is logical. In the case of insurance, however, the insurer has no obligation to care for the house. The insurer has rather obligated himself to the owner of the funds paid him that, should the house be destroyed by fire, he will compensate. If so, what right does the owner have in this?

G. Profit Is Not the Purpose of the Lending

A new outlook on the distinction between R. Yosi's case and a tenant who insures his landlord's property is suggested by R. Me'ir Simhah haKohen of Dvinsk.[94]

R. Me'ir Simhah sees the purpose of the purchase of insurance as pivotal.[95] When a person pays insurance premiums, it is with the intention of enjoying the profits that such payments may ultimately yield. A hirer who lends a cow, however, does not do so with the intention of profiting from the borrower's obligations should the cow not survive the experience. The hirer's intention is rather that the cow

[94] R. Me'ir Simhah haKohen of Dvinsk was born in 1843 and died in 1926.

[95] *Or Same'ah, Hilkhot Sekhirut* 5:6.

be returned to him as he delivered it.[96] The cow's death is not anticipated. Since the object of paying insurance premiums is to receive compensation in the event of fire, "It is not logical to say that the house's owner [who did not pay the premiums] will have any part of the compensation – that one should pay and the other receive;[97] is that why he bought insurance?" Thus, while in the case of the hirer who lent the cow to a third party, it may be claimed "How can one profit from the cow of another," in the case of insurance, it may be argued that it is unthinkable that one person should pay the premiums and another receive compensation.[98]

[96] Moreover, even the money paid when he hired the cow on condition that he be permitted to lend it to others, was not paid to the owner for the purpose of acquiring the right to whatever compensation might result from the cow's death, but rather for the right to use the cow and lend it.

[97] See *Pit'hei Teshuvah*, *Hoshen Mishpat* 307:1, with regard to a gratuitous bailee who pays another to care for the animal entrusted to him, and the animal dies under circumstances in which the gratuitous bailee is exempt and the paid bailee liable. According to those authorities who hold that here, too, the paid bailee pays the owner (see references cited in note 12 above), will the owner be obliged to reimburse the gratuitous bailee for his expenses in paying for the animal's care? See Part 3.

[98] How would R. Me'ir Simhah of Dvinsk relate to the various arguments thus far presented that base the owner's rights upon the obligations of the hirer or the borrower? It appears that R. Me'ir Simhah would deem such considerations inadequate when they would result in an injustice to the hirer. For instance, if the hirer invested money with intention of gain, then it is not proper that someone else should enjoy the profits. Therefore, when the hirer delivers the object of hire to another for the purpose of profiting and incurs expense in doing so, R. Yosi's principle will not apply. For a discussion of R. Me'ir Simhah's opinion, see the chapter, "Gidrei Hiyyuvei Shomerim," in: R. Yehoshua Yagel, *Netivot Yehoshua* (1984), pp. 200-204.

H. Payment of the Borrower in Exchange for the Owner's Property

Another interesting approach distinguishing between lending and insuring the property of another is that of R. Refa'el Mordekhai haLevi Solovei.[99] R. Solovei's view turns on the claim, "My cow is in your possession." Such a claim, R. Solovei explains, is available only to the cow's owner. In the case of insurance, however, the owner of the house was never the owner of the money paid by the insurance company in benefits and is, therefore, unable to claim the equivalent of "My cow is in your possession":

> There the reason is that one may not profit from "his neighbor's cow." That is to say that, since the borrower compensates the hirer, the cow of the hirer's neighbor [i.e., the original owner] is, in effect, still in the hirer's possession. Thus, R. Yosi holds that against the hirer in such a case, the original owner can claim, "My cow is in your possession." This is not true, however, in our case [i.e., insurance], where the tenant does not hold "his neighbor's cow." Here the owner cannot claim "My money is in your possession," since this money [i.e., compensation paid by the insurer] was never his. The money derives, rather, from an outside source, and the tenant profits from his original expenditure on the purchase of insurance.[100]

In his conclusion, however, R. Solovei shows that R. Yosi's principle has broader application than simply "profiting

[99] *Resp. Yad Ramah, Hoshen Mishpat* 80:3.

[100] R. Solovei goes on to assert that even according to the *Tosafot*'s explanation of R. Yosi's principle, there is certainly no reason to find in favor of the owner of a structure insured by a tenant: "According to the *Tosafot*, who hold that R. Yosi's reason is that the hirer is obliged to swear or bring witnesses... there is certainly no room in the present case [to apply R. Yosi's principle]...."

from one's neighbor's cow."[101] R. Solovei's reasoning requires careful study, though, since it is based upon the claim, "My cow is in your possession," rejected by the *Tosafot*.[102] It would appear that he bases himself on those authorities who do not accept the opinion of *Tosafot* with regard to a different point. The *Tosafot*, as shown above, argue that if the original owner is present when the cow dies while in the borrower's possession, then R. Yosi would admit that compensation goes to the hirer and not to the owner. Various authorities reject this conclusion, and it is apparently for this reason that R. Solovei attributes to them the view that the owner's case is based upon the claim of "My cow is in your possession." In fact, however, those who disagree with the *Tosafot*, as we saw with regard to Ritba and Rosh, base their opinions on their conclusion that, in lending the cow, the hirer is acting as the original owner's agent.[103]

3. SIMILARITIES BETWEEN R. YOSI'S PRINCIPLE AND INSURANCE

Alongside those authorities who hold that R. Yosi's principle does not apply to situations where one insures the property of another, other authorities are convinced that it indeed applies.

R. Shelomoh Kluger[104] was asked[105] concerning A, a partner in a jointly owned two-family dwelling, who had paid to insure the entire structure. When he was compen-

[101] See below, text at note 108.
[102] See above, text at note 13.
[103] See above, text at notes 25 and 28.
[104] R. Shelomoh Kluger (1786-1869) was one of the most widely recognized rabbinic authorities of his time. He served as rabbi of a number of communities in Galicia and as preacher of Brody.
[105] *Hokhmat Shelomoh*, *Hoshen Mishpat* 176:41.

sated for the structure's destruction, B, his partner, claimed his share, but A refused to divide the payment with him. R. Kluger opens by establishing that the purchase of insurance is not an automatic function of such a partnership, but rather a matter to be agreed upon by the partners. On the question of who is actually entitled to the compensation, R. Kluger rules that this depends upon the law of the land.[106] If the law permits one partner to insure the other's property, then the partner who paid the premiums is entitled to collect the full amount of compensation. If, on the other hand, the law does not permit one to insure the property of another, then the compensation for the uninsured partner's property belongs to the uninsured partner, since one may not profit from his another person's property.[107]

R. Refa'el Mordekhai haLevi Solovei, although disagreeing with R. Shelomoh Kluger's reasoning,[108] nevertheless finds support for the view that one may not profit from insuring the property of another.[109] His source is Ramah's ruling in

[106] "Thus, here is how the law appears to me: Let them ask what is the law of the land. If one person can insure the property of another and collect compensation in the event of fire, then the other partner has no share of this. If, however, it is the law of the land that one cannot insure another's house, then the one who bought the insurance can do so only as a function of his partnership in the property, and he is not permitted to profit from his neighbor's property...."

[107] The distinction between whether it is permitted to insure the property of another or not is found also in *Resp. Sho'el uMeshiv, Mahadura Tinyana* III:129 (see below, Part 3, text at note 136). According to R. Kluger, however, if it is not permitted to insure the property of another, the entire compensation belongs to the owner, whereas R. Yosef Sha'ul Nathanson, author of *Resp. Sho'el uMeshiv*, rules that compensation must be divided between owner and tenant.

[108] *Resp. Yad Ramah, Hoshen Mishpat* 80:3. See above, text at note 99.

[109] Ibid., 80:4.

the case of the agent who hired workers for another.[110] As mentioned, Ramah concluded that the agent may collect no more than the sum he paid to the workers, even if this sum is less than the benefit received by the person for whom the agent hired them. Thus, R. Solovei concludes:

> Also in our case, he who insured the house cannot claim, "I entered into this transaction on my own and at my own expense, having risked my own money. For had the house not been destroyed by fire, I would have lost all my expenses, and now, the profits are mine." The reason [that he has no such claim] is that we say to him, "Were it not for the other's house, from where would you have profited?" No one may profit from something that belongs to his neighbor, and therefore, the profits belong to the owner.[111]

A case where the person insuring the property holds a mortgage against it is considered by R. Moshe Te'omim.[112] R. Te'omim concludes that although his interest[113] in the property might suggest that he is not "profiting from his neighbor's cow," R. Yosi's principle will, in any case, bar him from collecting insurance compensation.[114] Nevertheless, R. Te'omim concludes, the owner must divide the insurance money with the mortgage holder who insured the property. The principle here is that of an agent sent to buy merchan-

[110] See above, text at note 33.

[111] For an explanation of why the owner and the one who purchases insurance do not divide the compensation in accordance with the ruling in *Sh. Ar., Hoshen Mishpat* 183, see below, Part 3, text at note 138.

[112] R. Moshe Te'omim (1819-1887) served as head of the rabbinic court of Gorodenka.

[113] See the opinion of R. Yitzhak Schmelkes, *Beit Yitzhak, Hoshen Mishpat* 55:5, cited above in note 69.

[114] *Resp. Oryan Talita'i* 156.

dise at a known price. If the vendor supplied more merchandise than the going rate would have called for, the agent may not keep the windfall for himself. Rather he must divide it with the person who sent him, since it was the latter's money that brought about the unexpected profit.[115] Here, it is the mortgage holder who is equivalent to the agent, as it is the property of the owner that brought about the compensation paid by the insurer.[116, 117]

A responsum that needs clarification is that of R. Yekuti'el Asher Zalman Tzuzmir[118] concerning A, who insured his own dwelling and that of his brother, B, both dwellings being registered under the same number. When the structure in which both lived was destroyed by fire, B demanded that A surrender B's share of the compensation.

R. Tzuzmir[119] found in favor of B and ordered A to divide the compensation with him. Thus, it would seem that

[115] See *Ketubot* 95b; and Maimonides, *M.T.*, *Sheluhin veShutafin* 1:5.

[116] For R. Te'omim's objection to the opinion of R. Yosef Sha'ul Nathanson, see below, Part 3, note 136.

[117] *Hiddushei haRim*, *Baba Metzia* 35b (ed. Tel Aviv, 1959, p. 108) discusses R. Yosi's principle in light of the rule in the case of the agent, wondering why hirer and owner should not divide the borrower's payment for the value of the cow, given that the hirer has paid for his use of the animal. In answer to this question, the author of *Hiddushei haRim* distinguishes between profit and loss. Where there was a windfall profit, as in the case of the agent who received more merchandise than would have been expected according to the going rate, then the agent and the person who sent him divide it. Here, where there is only compensation for loss and the entire loss is that of the owner, all compensation belongs to him. This approach, however, requires further clarification.

[118] R. Yekuti'el Asher Zalman Tzuzmir (d. 1858), who was a disciple of the author of *Ketzot haHoshen*, served as head of the rabbinic courts of Prezmysl and Stryj.

[119] *Resp. Mahariaz Enzil* 72 (the responsum is dated 1847).

R. Tzuzmir disagrees with those authorities who hold that compensation belongs to whomever pays the premiums (whether or not he owns the property).[120] Upon further study, however, this does not seem to be the case. In his responsum, R. Tzuzmir cites a responsum of Rashakh[121] concerning A and B, who sent merchandise to C with instructions to ship it to a particular destination. Only A instructed C to insure his shipment, but C mistakenly insured only the merchandise of B. In his ruling, Rashakh reasons that since B, not having instructed C to purchase insurance, had not obligated himself to reimburse C for the premiums, he was not entitled to benefit from the compensation. C, on the other hand, as a result of his negligence towards A's shipment, was obligated to restore its value to A who had previously obligated himself to reimburse C for his outlay on the premiums by instructing him to purchase insurance. Thus the compensation was to be paid to A. From this precedent, R. Tzuzmir concludes that

> a person who has become obligated to pay insurance premiums is entitled to whatever advantage may be consequent, even if he has not yet paid. Since in the present case [that of the two brothers], B became obligated to pay his share, he is also entitled to his share of the compensation.

Thus, it is not clear that R. Tzuzmir would always hold that compensation belongs only to the owner of the property (as opposed to another party who paid the premiums).

[120] This is the conclusion of B. Z. Eliash, "Al Dinei haBitu'ah baMishpat haIvri," *Iyyunei Mishpat*, 1, 359 (at 367).

[121] *Resp. Maharshakh* II:159. Rashakh (d. 1602) was one of the most widely recognized rabbinic scholars in Turkey during the sixteenth century. For a discussion of this responsum and its bearing on our topic, see R. David Pipano, *Resp. Hoshen haEfod* I (Salonika-Sofia, 1915), 36.

Chapter Eight

CONCLUSION

The basis for the Jewish legal treatment of situations where one person profits from the property of another is R. Yosi's pronouncement, in the case of a cow, which having been hired and subsequently loaned to a third party, died a natural death. To the possibility that the hirer in this case might profit from the death of the cow that he has hired, R. Yosi responds, "How shall one [i.e., the hirer] profit from another person's cow? The cow must be returned to its owner."

What is the legal basis of R. Yosi's principle? Some commentators have emphasized the injustice of one person's profiting from the property of another when this entails the owner's losing the property altogether. Others explain the principle in more formal legal terms, positing that, in the paradigmatic case of R. Yosi, the hirer, by lending the cow to the third party, is acting as the owner's agent or quasi-agent. This latter approach seems to be characteristic of commentators who were not satisfied with the simple affirmation of a principle which, in effect, transfers rights

from one party to another. These commentators felt constrained, rather, to explicate in detail the legal mechanism of such transfer.

Though R. Yosi's ruling was made with respect to a particular case, certain early post-talmudic commentators applied it by analogy to a broad range of similar situations. So, for instance, when one person lets a property that does not belong to him, the early post-talmudic commentators rule that the rent belongs to the property's owner. So, too, when one person sublets property without the owner's permission, if the rent received by the tenant is greater than that which he himself is paying, profits must be turned over to the owner. However, if the subletting is done with the owner's permission, the profits will belong to the tenant.

Other authorities, however, sought to restrict the applicability of this latter ruling, arguing that subletting without permission should not entitle the owner to the profits unless he sustains some loss as a result.

The Later Authorities do not seem to have extended R. Yosi's principle significantly beyond the bounds set by the Earlier Authorities. In recent generations, R. Yosi's principle has been considered with regard to situations where one person insures the property of another, such as when a tenant insures the property of his landlord. Here it was asked, who is entitled to collect in the event that compensation is paid? The case of insurance is similar to R. Yosi's case. In R. Yosi's case, benefit arises from the hirer's lending the owner's cow to a third party, and in the situation of insurance, benefit arises from the tenant's insuring the property. Another similarity is that, in both cases, profit is conditional upon a prior loss by the hirer or tenant: the hirer in that he receives no compensation for the borrower's use of

the cow, although he himself has paid for its hire; the tenant in his payment of the insurance premiums.

In spite of such similarities, the majority of respondents dealing with such questions have held that the comparison is not adequate and that R. Yosi's principle will not operate to entitle the property owner to payment in the event that the insurer is required to compensate. The respondents emphasize certain elements of R. Yosi's case which do not exist where one person insures the property of another, and although a number of approaches have been taken, it appears that the main distinction between the two situations turns upon the original owner's link with the compensation paid by the borrower. This link arises from the hirer's obligation to return the object of hire, from the borrower's use of the object of hire, or from the fact that the object of hire entered the possession of the borrower. In insurance, on the other hand, the transaction between tenant and insurer is a personal one, completely separate from the actual rental of the property. Thus, the tenant does not profit from "the owner's cow," and the owner has no link with any compensation paid by the insurer. Or, as may be concluded from the approach of one of the respondents, whereas in R. Yosi's case, it would not be proper for the hirer to profit from the owner's property, in the insurance situation, it would not be proper for the tenant to pay the premiums and the owner receive compensation.

In consideration of the applicability of R. Yosi's principle in modern times, various distinctions have been drawn, some substantive, relating to the question of unjust enrichment, and others seemingly of a formal nature only. Whatever the case may be, it is critical to remember that when a party lays claim to profits derived from his property, it is his obligation to demonstrate that the property is in fact the

source of the profits in question. By being subjected to thorough legal analysis, R. Yosi's principle has been removed from the realm of abstract theory and given application in day-to-day questions of equity and justice. Such analysis, as well as careful application, has prevented the principle from being stretched to the extent that concern for the interests of property owners would result in injustice to others.

Part Three

AGENT WHO RECEIVES BENEFIT IN CONSEQUENCE OF AGENCY

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Chapter One

INTRODUCTION

When benefit arises from the activity of one person who represents another, to whom does such benefit rightfully belong, to the principal or his representative? The question can be considered from a number of perspectives.

1. AGENCY

The first perspective that has to be considered is the institution of agency. In such situations, is the agency broadened to include acquisition of the benefit? If it is, the benefit will belong to the principal even though the original agreement of agency carried no such stipulation. Is the agent viewed as the representative of the principal also with regard to (unanticipated) advantages arising from the agency, or is the activity of the agent viewed as his own independent activity, unrelated to the agency?

Some activities must certainly not be considered part of the agent's activity as an agent. So, for instauce, if during the discharge of his agency, the agent commits a theft, the theft is not attributed to the principal, even where it was

the agency that enabled the agent to commit the theft.[1] On the other hand, there are some activities concerning which it is difficult to determine whether they are an integral part of the agency or not. An example might be when the third party, with whom the agent must transact his appointed task, gives a gift to the agent. Here, perhaps, we must distinguish between instances where the third party specifies for whom the gift is meant (agent or principal) and instances where he does not.

2. UNJUST ENRICHMENT

From a different perspective, it may be asked whether the fact that the advantages derived from an agent's actions (regardless of whether the particular actions may technically be classed as part of the agency) is sufficient to determine the rights of the parties to the advantages created. Even if the agency itself does not secure the rights to the advantages for the principal, perhaps he is entitled to them or to a share of them because he was instrumental in their creation. Or, on the other hand, even when the principal acquires the advantages, perhaps the agent is entitled to a share, since if the agent had not acted, the principal would not have received the advantages – given that they were not part of the agency. If, in principle, we recognize one's right to the advantages received by the other, then we must de-

[1] We are not concerned here with one's claim to benefit from a theft on the basis of his participation in the theft or on the basis of a general partnership that would entitle one partner to his share of benefits received by the other by any means. Concerning a claim to a share of stolen property on the basis of participation in the risk incurred by the thief, see below, chap. 3; and Nahum Rakover, *Anishah beMa'aseh haBa baAveirah*, monograph no. 2 of *Sidrat Mehkarim uSekirot baMishpat halvri* (Jerusalem, 1970).

termine criteria for deciding when one party may be considered instrumental in the other's acquisition to the extent that he is entitled to a share of the advantages he helped create. Such questions belong to the category of unjust enrichment,[2] the field of law that regulates enrichment due to the property or actions of another, when the party enriched has no legal claim to the benefit received.[3]

3. BREACH OF TRUST

Another aspect of our question concerns acceptance by the agent of some benefit without the principal's knowledge. In such cases, personal interests may be created that bring the agent to violate his obligations to the principal.[4] The benefit conveyed to the agent may be tantamount to bribery and may prejudice the agent against the best interests of the principal (whether or not this is the intention of the agent or his benefactor).[5] Moreover, such benefit may actually be part of the transaction, artificially separated from it only for the sake of appearances. An example of this may be when an item could have been sold to the principal at a lower price, were it not for the "commission" granted to the agent. The question is whether such matters (in addition to any prohibition against the agent's acceptance of some benefit without the knowledge of the principal) bear upon the

[2] See D. Friedman, *Dinei Asiyat Osher veLo beMishpat* (2nd ed., Jerusalem, 1998), p. 43; and A. Barak, *Hok haShelihut*, 1965 (2nd ed., Jerusalem, 1996), p. 92.

[3] See the end of the present chapter.

[4] See Barak, op. cit. (above, note 2), pp. 1067-1069.

[5] Concerning a guardian who let his ward's property for a low price as the result of a bribe he received from the tenant, see R. Hayyim of Tzanz (Nowy Sacz, Poland), *Resp. Divrei Hayyim* II:46. R. Hayyim of Tzanz rules that if the ward sues the guardian, the ward is entitled to the amount of the bribe.

rights of the parties to the advantages that arise in consequence of the agency. Or perhaps sanctions under such circumstances belong exclusively to some other field of law, such as the penal code.

The Israeli Agency Law, 1965[6] contains a number of provisions relevant to our question. Section 8(4) stipulates that "[an agent] may receive no benefit connected to the subject of his agency without the agreement of the principal." Section 10(2) provides that "the principal is entitled to any profit or benefit accruing to the agent in connection with the subject of the agency."[7]

The Trust Law, 1979[8] contains similar provisions relating to benefit derived by trustees in consequence of their trusteeship. Section 13(1) states: "A trustee... may not derive for himself or his relative any other benefit from the property entrusted to him or from the activities connected with it." In addition to the prohibition stated, the statute, in Section 15, awards all such benefit to the property held in trust: "Profit unlawfully derived by the trustee, has the same status as the property and is considered as part of the property held in trust."

As regards public servants, section 2(1) of the Public Service (Gifts) Law provides that any gift received by a public servant as a public servant becomes the property of the state.[9]

The previous parts of the present work dealt with various aspects of unjust enrichment. We saw that where one person benefits while the other sustains no loss, the beneficiary

6 *Sefer haHukkim*, 1965, p. 220.
7 See Barak, op. cit. (above, note 2), pp. 1128-1131.
8 *Sefer haHukkim*, 1979, p. 128.
9 *Sefer haHukkim*, 1980, p. 2.

is exempt from compensating the benefactor for benefit received.[10] We also learned that where one person profits from his neighbor's property, the owner is entitled to any profits realized from his property.[11] In the present part, we discuss benefit received by an agent in consequence of his agency.

[10] See Part 1.
[11] See Part 2.

Chapter Two

AGENT RECEIVING BENEFIT

I. THE TALMUDIC BASIS

1. A Third Party Who Grants Added Consideration

A. Views of the Tanna'im

In the *Tosefta*[12] we find various opinions of *Tanna'im* concerning an agent sent to purchase something, who received from the vendor more than anticipated for the price paid: "If they gave him one more, R. Yehudah says: '[It belongs] to the agent.' R. Yosi says: 'To the common advantage [i.e., they divide it].'"

B. Distinction between Merchandise that Has a Fixed Price and Merchandise that Does Not

The passage quoted is cited by the Talmud[13] in connection

[12] *Tosefta Demai* 8:3.
[13] *Ketubot* 98b.

with a *mishnah*[14] in *Ketubot* dealing with a widow who, in order to collect what she is owed by virtue of her *ketubah*,[15] sells her children's property for more than its value:

> [If] a widow whose *ketubah* was at the sum of two hundred sold property valued at one hundred for two hundred or property valued at two hundred for one hundred, her *ketubah* has been paid in full.

On this *mishnah*, the Talmud asks why, if the widow is held responsible for any property she sells at a loss, she does not receive the profit of property that she sells at a price higher than the market value. To this the Talmud answers that here the editor of the Mishnah rules in accordance with the opinion that, if a vendor grants added consideration to an agent (*hosifu lashali'ah*), the profit belongs to the principal who appointed him. In support of this explanation, the Talmud cites the two opinions contained in the *Tosefta*: that of R. Yehudah – all belongs to the agent; and that of R. Yosi – they divide it. Concerning R. Yosi's opinion, the Talmud goes on to point out that elsewhere R. Yosi apparently rules that the entire unanticipated gain belongs to the principal. The apparent contradiction in R. Yosi's opinion is then resolved by introducing a distinction between something that has a fixed price (*davar sheyesh lo kitzbah*) and something

[14] *Mishnah Ketubot* 11:4 (*TB Ketubot* 98a).

[15] According to Jewish law, when a man marries, he must give his wife a promissory note, known as a *ketubah*, guaranteeing her a sum of money in the event that he divorces or predeceases her. In the latter instance, the note is paid from the late husband's estate, which normally passes on to his children. In the case under discussion, a widow sells property belonging to the estate for the purpose of collecting that which is owed her under the provisions of the *ketubah*. The *mishnah* establishes that if the widow sells the property at a loss, the loss is hers, and that if she sells it at a profit, the profit belongs to the children.

that does not (*davar she'ein lo kitzbah*). Thus, the Talmud concludes, it is the opinion of R. Yosi that the unanticipated gain is divided only when the merchandise purchased has a fixed price. In such a case, it may be presumed that the vendor did not lower the price, but rather gave extra merchandise as a gift. Where there is no fixed price, however, it may be presumed that the merchandise was simply sold at a lower price, in which case, R. Yosi holds that the entire saving belongs to the principal and not to the agent. At the conclusion of the talmudic discussion, R. Papa declares that the law is in accordance with the opinion of R. Yosi – that where merchandise has no fixed price, the unanticipated gain belongs to the principal.

To summarize, when an agent receives more than anticipated for the price paid, the Talmud recognizes three possible approaches: (1) the unanticipated gain belongs to the agent – R. Yehudah's opinion; (2) agent and principal divide the unanticipated gain – the opinion of R. Yosi concerning merchandise that has a fixed price; (3) the entire unanticipated gain belongs to the principal – the opinion of R. Yosi concerning merchandise that does not have a fixed price.

Comparison Between Added Consideration Granted to an Agent and a Mistake in Sale: Since the passage of the *Tosefta* which discusses added consideration granted to an agent is cited by the Talmud in connection with sale by an agent of property for a price higher than its valuation, it appears that the two cases are equivalent. That is to say, the law concerning an agent's sale of property for a price higher than expected is the same as the law concerning added consideration granted to an agent. If so, just as in the latter case, where R. Yehudah holds that the unanticipated

gain belongs to the agent, in the former case as well, R. Yehudah would hold that the unanticipated profit on the sale belongs to the agent.

What caused the sale of the property at a price higher than anticipated? The discussion in the Babylonian Talmud does not specify. From the discussion in the Jerusalem Talmud,[16] however, it emerges that the higher price resulted from an error in the evaluation of the property. This is clear from the Jerusalem Talmud's question, "When property worth one hundred is sold for two hundred, will not the property return in the end, seeing as how this is a purchase in error [*mikkah ta'ut*]?"

Since the case is one of error, one may ask what is the law in other matters of error, such as a transaction where too great a quantity is delivered, too little payment is exacted, or there is a mistake in calculation? When the mistake can be corrected by return of merchandise or by additional payment, there is clearly no question. The question does arise, however, when the mistake cannot be corrected, as when the vendor cannot be found. In such a case, who is entitled to the unanticipated gain, the principal or his agent? As we shall see below, this question occasioned a far-reaching difference of opinions among the early post-talmudic authorities.[17]

C. Jerusalem Talmud: Division of Unanticipated Gain Based on the Agent's Share

Why, in R. Yosi's opinion, is an unanticipated gain to be divided between agent and principal when the price of the merchandise is fixed? The Babylonian Talmud does not

[16] *TJ Ketubot* 11:4.
[17] See text at note 50 below.

suggest what R. Yosi's reasoning might be, but the Jerusalem Talmud does:[18]

> R. Yehudah says that the vendor meant to transfer ownership only to the buyer [i.e., the agent]. R. Yosi says that the vendor meant to transfer ownership only to the owner of the money [i.e., the principal]. Therefore, if one extra was given, R. Yehudah holds [that it belongs] to the agent, and R. Yosi holds [that it belongs] to both. R. Yosi's opinion [as quoted] is reversed! Elsewhere he says that the vendor meant to transfer ownership only to the owner of the money, and here he says thus?[19] Here, [where the transaction is] by means of the money of one and the feet [i.e., the action] of the other, they divide [the unanticipated gain].

In other words, although it was the vendor's intention to transfer ownership only to the principal, the agent is entitled to half, because the gain is the product of two factors: (1) the principal's money and (2) the agent's action.[20]

2. An Agent Who Deviates from Instructions

A. Disagreement of Tanna'im

The reason given by the Jerusalem Talmud for dividing unanticipated gain, then, is that since the gain was in part caused by the action of the agent, the agent is entitled to a share. Therefore, although the third party meant to transfer ownership only to the principal, the agent is entitled to half

[18] *TJ Demai* 6:8 (25d).

[19] If R. Yosi holds that the vendor meant to benefit only the principal, how can he rule that principal and agent divide the unexpected gain? Surely R. Yosi's opinion must be misquoted.

[20] The Jerusalem Talmud does not distinguish between merchandise that has a fixed price and merchandise that does not. Nor is it explained under what circumstances R. Yosi rules that all belongs to the principal.

the gain. In another discussion in the Jerusalem Talmud, we find that profits are divided, but there the point of departure is the opposite – that the principal is entitled to gains that accrue to his agent. Thus, the reverse of the previous rule is applied: where the principal shares responsibility for the gain, he is entitled to share the gain as well (this rule as well is recorded only in the Jerusalem Talmud, with no mention whatsoever in the Babylonian Talmud).

The basis for this ruling is a *baraita* concerned not with the rights of the principal as instrumental in gain that accrues to the agent, but simply with the laws of agency. The *baraita* in *Baba Kama*,[21] deals with an agent who deviates from instructions and profits thereby. When this happens, it may be asked: Who is entitled to the unanticipated gain resulting from the agent's disregard for instructions?:

> Our Rabbis taught: Where money was given to an agent to buy wheat and he bought with it barley, or barley and he bought with it wheat, it was taught in one *baraita* that if there was a loss, the loss would be sustained by him, and so also if there was a profit, the profit would be enjoyed by him, but in another *baraita* it was taught that if there was a loss, he would sustain the loss, but if there was a profit, the profit would be divided between them.

B. Recourse to the Laws of Agency

In its discussion of the above *baraita*, the Talmud in tractate *Baba Kama*[22] attempts to identify the two opinions cited with a known disagreement between R. Yehudah and R. Me'ir, concerning whether an agent, by deviating from his instructions, acquires the merchandise that he purchases

[21] *TB Baba Kama* 102a-b.
[22] *Baba Kama* 102b.

for himself rather than for the principal.[23] The Talmud concludes, however, that both views expressed in the *baraita* reflect the opinion of R. Me'ir. The first opinion cited is R. Me'ir's opinion regarding the purchase of food for the principal's own consumption, where it may be presumed that the principal is particular about what is to be purchased, and the second opinion is R. Me'ir's ruling where the purchase is for resale at a profit, where it may be presumed that it makes no difference to the principal:

> Said R. Yohanan, "There is no difficulty, as one opinion was in accordance with R. Me'ir and the other opinion with R. Yehudah; the former opinion was in accordance with R. Me'ir who said that a change transfers ownership,[24] whereas the latter was in accordance with R. Yehudah who said that a change does not transfer ownership." R. Elazar objected: "From where [do you know this]? May it not be perhaps that R. Me'ir meant his view to apply only to a matter which was intended to be used by the owner personally, but in regard to matters of merchandise, he would not say so?" R. Elazar therefore said that one opinion as well as the other might be in accordance with R. Me'ir, and there would still be no difficulty, as the former dealt with a case where the grain was bought for domestic food, whereas in the latter it was bought for merchandise.

In other words, according to R. Yehudah, who holds that an agent, by deviating from instructions, does not acquire

[23] R. Yehudah holds that an agent who deviates from instructions does not acquire the object of his agency for himself. R. Me'ir, subject to certain qualifications, holds that he does.

[24] According to the opinion that a change transfers ownership, the change in the merchandise purchased transferred ownership to the agent. Since the merchandise acquired was acquired by the agent, any gain involved would belong to him.

the merchandise purchased for himself, if the agent varies his agency and this results in unanticipated gain, the gain is divided between agent and principal. The same will apply, according to R. Me'ir, when the act that the agent was instructed to perform is such that the principal does not care if he deviates from his instructions. Even according to R. Me'ir, where the principal does not care, an agent who deviates from his agency does not acquire the merchandise purchased for himself, and therefore unanticipated gain is divided.

Here it must be asked: what is the reason for the division of profits? After all, it would appear that there are only two possibilities: (1) the principal is entitled to all gains; (2) the agent is entitled to all gains. What, then, is the legal basis for the division?

The Babylonian Talmud does not explain, and some commentators, therefore, go so far as to suggest that the transaction under discussion was one in which such a division was stipulated from the outset.[25] The Jerusalem Talmud, however, associates the division of profits with the principle that whoever was instrumental in creation of an advantage is entitled to enjoy that advantage.

C. The Jerusalem Talmud: Division Based on the Agent's Share

The Jerusalem Talmud[26] also cites the two sources which seem to give contradictory answers to the question of whether unanticipated gains belong to an agent who varies his agency or must be shared with the principal:

> Whose opinion is it that if there is loss, the loss is his [i.e., the agent must suffer the loss]?

[25] See text at note 96 below.
[26] *TJ Baba Kama* 9:5.

R. Me'ir's.

What is R. Me'ir's reason?
[R. Me'ir's reason is] that the vendor meant to transfer ownership only to the agent.

Whose opinion[27] is it that if there is loss, the loss is his [i.e., the agent], whereas if there is gain, it is to the common advantage [i.e., they divide it]?
R. Yehudah's.

What is R. Yehudah's reason?
[R. Yehudah's reason is] that the vendor meant to transfer ownership only to the owner of the money.

Why,[28] then, must he divide it?
Because it is prohibited to benefit from something that belongs to another [i.e., it is prohibited for the principal to benefit from the agent's action without compensating him].

In other words, according to R. Yehudah, although the vendor intended to transfer ownership only to the principal,[29] the principal is obliged to share the profit with his agent, because he is not permitted to derive benefit from his agent without compensating him.

Division Based on the Principal's Share. According to the explanation just cited, the unanticipated gain belongs to

[27] Text as emended in *Or Zaru'a*, *Baba Kama* 413.

[28] See Sha'ul Lieberman, *Talmudah Shel Keisarin*, p. 39, n. 43; cf. the opinion of R. Yehudah cited in Part 1, text at note 89.

[29] In the passage from the Jerusalem Talmud cited above (text at note 18), R. Yehudah holds that the vendor wished to transfer ownership to the agent (*loke'ah*). *No'am Yerushalmi* suggests emending the text. Lieberman as well declares that "it is clear that the reading of the Jerusalem Talmud there does not fit the opinion of the Jerusalem Talmud here." See also *Mishkenot haRo'im*, letter *shin*, 114, *ad fin.*

the principal who is nevertheless obliged to share it with his agent. As the discussion continues, however, the Jerusalem Talmud cites an opinion of R. Nisa, who holds that the gain belongs to the agent, but that he is obliged to share it with the principal since he is deriving benefit from the principal's money:

> Said R. Nisa. When the agent discharged his agency, did the seller of the produce not intend to pass ownership to the principal? [Of course he did.] Now, when the agent did not discharge his agency, the seller intended to pass ownership to the agent. [If so,] why must he [the agent] divide it with him [the principal]? Since he [the agent] derived benefit from him [the principal], he must divide it with him.

Division of the unanticipated gain, then, is not the result of some prior stipulation between partners, as certain commentators on the Babylonian Talmud have explained;[30] it is rather the result of an obligation to divide profits with the party whose funds were instrumental in their creation.

II. ANALYSIS OF OPINIONS AND RULING

1. Third Party Who Gave Added Consideration (*Hosifu laShali'ah*)

Having surveyed tannaitic and talmudic sources, it remains to examine the opinions of the earlier and later post-talmudic authorities. As we have seen, the approach of the Babylonian Talmud to the right of a person instrumental in the creation of a benefit to share that benefit is not necessarily the same as the approach of the Jerusalem Talmud to the same question. Thus, it must be asked how the various commentators and legal authorities have dealt with the

[30] See text at note 96 below.

sources. As we shall see, the authorities are not unanimous; there are two main approaches.

A. The Division is Based On Uncertainty

A departure from the Jerusalem Talmud's approach concerning the case where a third party gave an agent one more item than expected may already be found among the *Geonim*. Rather than explaining that the division results from the principal's being instrumental in the benefit that accrued to the agent, Rav Hai Gaon, in his *Sefer haMikkah vehaMimkar*, explains that the division results from our uncertainty as to whom the vendor wished to benefit.

The Opinion of Rav Hai and Rashi: Rav Hai Gaon writes:[31]

> As regards something that has a fixed price..., when the vendor adds [to the merchandise that he delivers], we can say that it was his desire to add, as though he personally gave [the additional merchandise] to the agent. Or we can say that he added only because this merchandise was purchased from him, and thus, [the addition] belongs to the owner of the money. Therefore [as a result of this uncertainty], we divide it.

Rashi adopts the same approach with a small modification:[32]

> If they added one extra item, it is divided, for it is a gift, and it may be said that it was given to the agent, or it may be said that it was given to the principal.

Rashi, in explaining the second half of the uncertainty, dispenses with the explanation that the addition may have been

[31] *Sefer haMikkah vehaMimkar* 6.
[32] Rashi, *Ketubot* 98b, s.v. *sheYesh*.

"because this merchandise was purchased from him," explaining simply that, just as it is logical to conclude that the gift was meant for the agent, it is equally logical to conclude that it was meant for the principal.

When the Addition is Given Explicitly to the Agent: This small difference in wording between Rashi and Rav Hai Gaon may be important. Accordiug to Rashi, where the vendor makes it clear that the gift is given specifically to the agent, the entire gift will belong to the agent, for here there is no room for uncertainty.[33] According to Rav Hai Gaon, however, even where the vendor makes it clear that the gift is given specifically to the agent, the agent may be obliged to share it with the principal who appointed him. This is because, according to Rav Hai Gaon, the uncertainty may be whether it is possible at all to view such a gift as separate from the transaction, or whether, on the contrary, the vendor is in all cases considered to be adding to the merchandise delivered in recognition of the purchase. If, as in the second possibility, the vendor is always considered to be adding in recognition of the purchase, then the addition would rightfully belong to the principal. According to this view of R. Hai Gaon's opinion, Rav Hai believes the uncertainty to be objective rather than subjective, hence the vendor's intention is not relevant.

[33] So Ran understands Rashi's opinion. See note 46 below. See also R. Uzi'el Alha'ikh, *Mishkenot haRo'im*, letter *shin*, 114, p. 346, col. 1. R. Alha'ikh poses two questions concerning Rashi's approach: (1) Is the vendor's indication of intention effective only at the time of the transaction or also subsequently? (2) Does the uncertainty of to whom the vendor wished to transfer ownership apply only when the vendor is aware that the agent is an agent or also when he has no knowledge of this?

Possibly, Rashba[34] too distinguished between the opinions of Rashi and Rav Hai. Rashba was asked about an agent appointed by the Jewish community to collect taxes and deliver them to the minister in charge of taxation. When the agent received a certain benefit from the minister, the agent claimed that the benefit was granted independently of his collection of taxes:[35]

> If the members of the community appointed A their agent to collect taxes and convey to the minister all he collects, and the minister received the payment and rewarded the agent with his own [i.e., the minister's] funds, and the community says to A, "That which the minister gave you, we have acquired as a gift"; and A claims, "The gift was not granted to me because of you, but rather because [in the past,] I benefitted him and loaned him from my own funds before I had collected any taxes"; whose claim is accepted?

Rashba rules in favor of the agent, demonstrating that the community cannot make recourse in the present situation to the regulation concerning an agent who receives an extra item of merchandise. In explanation of his ruling, Rashba cites the opinion of R. Hai Gaon, explaining:

> From here [we conclude that] anything given to the agent not as part of a business transaction, and to which the *Gaon*'s [i.e., Rav Hai Gaon] reason does not apply, belongs entirely to the agent.

Rashba goes on to quote the passage from Rashi cited above, and then adds:

> According to this explanation, in the matter before us,

[34] On Rashba, see Part 2, note 46 above.
[35] *Resp. Rashba haMeyuhasot laRamban* 60.

> [when] someone gives something explicitly to the agent, it belongs entirely to the agent.

Only after quoting Rashi does Rashba rule that when something is given explicitly to the agent, it belongs entirely to the agent. This suggests that such a conclusion cannot be reached on the basis of Rav Hai Gaon's opinion alone.[36]

Further on, Rashba shows that his ruling would apply even according to the opinion that the reason that unanticipated gains must be shared is because the principal is instrumental in the benefit that accrues to the agent. Rashba quotes this opinion in the name of *Sefer haIttur*, based on the Jerusalem Talmud,[37] arguing that, according to this approach as well, the agent in the present case is entitled to the gift in its entirety, "seeing he claims that he had [previously] benefitted the minister by lending him money and that he [the minister] gave it explicitly to him [the agent] and not to the community."

Rashba expresses his preference for the approach of Rashi and Rav Hai Gaon,[38] based on the Babylonian Talmud, over the approach of *Sefer haIttur*, based on the Jerusalem Talmud, since the two Talmuds are at odds on this matter.[39]

[36] But see *Darkhei Moshe*, *Hoshen Mishpat* 183:4. See also *Be'ur haGra*, *Hoshen Mishpat* 183:22.

[37] See note 43 below.

[38] However, in *Resp. Rashba* I:671 (=III:25; *Resp. Rashba*, first printing [Rome, 1470], 212; see also ibid., 237), Rashba appears to accept the approach that the division is due to the principal's being instrumental in the gain. See also *Resp. Ba'ei Hayyei*, *Hoshen Mishpat* 133, p. 163, col. 4; *Knesset haGedolah*, *Hoshen Mishpat*, *Mahadura Batra* 183, *Hagahot Beit Yosef* 66.

[39] See text at note 96 below.

B. The Approach that the Agent is Entitled to Half Because he Created the Unanticipated Gain

As against those that explain the division of unanticipated gains on the basis of the uncertainty as to whom the third party wished to benefit, others follow the approach of the Jerusalem Talmud.

Although Rabbenu Hananel, in his explanation of the division, does not mention the Jerusalem Talmud explicitly, his language is similar:[40]

> [Concerning the ruling that] where the price is fixed and known to be such-and-such an amount of money, they divide [unanticipated gains], what share does the owner of the money [i.e., the principal] have in this; after all, he has already received [merchandise] for the known market price? Since the owner of the money was instrumental in the benefit that came to his agent, he [the agent] must divide it with him.

Rif also follows the approach of Rabbenu Hananel:[41]

> Why do agent and principal divide [unanticipated gains]?[42] Since the principal was instrumental in the benefit received by the agent, he [the agent] must divide it with him.[43]

Both Rabbenu Hananel and Rif take the Babylonian and Jerusalem Talmuds to disagree concerning the rightful owner

[40] *Or Zaru'a*, *Baba Kama* 413. Cited also in *Otzar haGe'onim*, *Ketubot*, *Likkutei Perush Rabbenu Hananel*, p. 78.

[41] Rif, *Ketubot* 11 (ed. Vilna, 57b).

[42] *Mishkenot haRo'im*, letter *shin*, 114, p. 346, col. 2, discusses the circumstances to which Rif's opinion applies.

[43] *Sefer halttur*, *Shalishut Mamon* (ed. R. Me'ir Yonah) 43b follows the same logic, citing Rif on the case of an agent granted additional consideration and the Jerusalem Talmud on the case of an agent who varies his agency.

of the benefit, with the Babylonian Talmud holding that legally the benefit belongs to the agent and the Jerusalem Talmud holding that it belongs to the principal.[44] Nevertheless, both authorities adopt the Jerusalem Talmud's explanation for the division and apply it to the Babylonian Talmud's approach. That is to say: just as if the unanticipated gain were to belong to the principal, he would be obliged to share it with his agent, so if the gain rightfully belongs to the agent, he must share it with the principal. Jnst as in the discussion (quoted above) of the agent who deviates from instructions, the approach of the Jerusalem Talmud, as expounded by R. Nisa, is that the agent must share the profits with the principal, since the latter was instrumental in the benefit received by the agent, so too in the case of one extra item of merchandise granted to the agent, the same principle may be applied.[45]

Addition Given Explicitly to the Agent: If the third party states explicitly that the unanticipated gain is meant for the agent and not for the principal, will this have any effect? According to the explanation that the division is a result of uncertainty as to the vendor's intention, such a statement will be effective. According to the explanation that the party to whom the gain rightfully belongs must share it with the other party who was instrumental in its creation, however, it follows that the vendor's statement of intention is not relevant. Thus Ran explains the opinion of Rif:[46]

From the wording of Rif, it appears that when

[44] See *TJ Demai* 6:8 (25d), cited above, text at note 18.

[45] Even though Rif does not accept the approach of the Jerusalem Talmud regarding the matter of an agent who varies his agency. See text at note 98 below, and text at note 37 above.

[46] Ran, ad loc.

something has a fixed price, even if the vendor gave it explicitly to the agent, since the principal was instrumental in the benefit received by the agent, the agent must divide it with him.[47]

C. Transaction Involving a Mistake due to the Agent

One source that is somewhat problematic in this context is a responsum appearing in *Sefer Ra'avan*,[48] attributed by some to R. Tzemah Gaon.[49] The responsum deals with A, who assisted B (the purchaser) in a particular transaction. A succeeded in deceiving the vendor, and as a result the gain realized was greater than anticipated. The question is: to whom does the unanticipated gain belong? The ruling does not mention the talmudic precedent of an agent's receiving additional merchandise; nevertheless, it is established that the unanticipated gain must be shared equally, since both were instrumental in its creation – B by means of his purchase and A by means of his deception. Had there been no purchase, Ra'avan explains, there would have been

[47] Consistency in this approach would, of course, dictate that if the vendor states explicitly that the added consideration is meant for the principal, the principal should still be obliged to divide it with the agent. Nevertheless, a number of Later Authorities explain that in such a case, the entire unanticipated gain will belong to the principal. See *Knesset haGedolah, Hoshen Mishpat, Mahadura Batra* 183, *Hagahot Beit Yosef* 43. *Ketzot haHoshen* agrees that even according to the opinion of Rif, the agent in the case mentioned will have no share and asks rhetorically, "If one person gives a gift to another by means of an agent, will the agent have a share in that gift!?" This is also the opinion of Maharsham, *Mishpat Shalom* 183:7, s.v. *veHinei Yesh leVa'er*.

[48] *Sefer Ra'avan, Resp.* 3. Cited also in *Resp. Maharam ben Barukh* (ed. Prague), 802. See also following note.

[49] So in *Mordekhai, Ketubot* 256; and in *Teshuvot Maimoniyot, Sefer Kinyan* 22.

no deception, and had there been no deception, there would have been no surplus.

What is the basis of the division here? Does the unanticipated gain rightfully belong to the assistant, who is nevertheless obliged to divide it with the purchaser, or vice versa? Ra'avan's language does not clarify the point. As we shall see below, a clearer indication may be found in a responsum of Rabbenu Tam concerning gain that resulted from a mistake.

Mistake in the Value of a Transaction – All Belongs to the Principal: It was noted above[50] that, since the Talmud in tractate *Ketubot* juxtaposes the case of a mistake in the value of a transaction with the case where an agent is granted additional value, it appears that in principle, the two matters are equivalent. Such, in any case, is Rashi's understanding of that discussion.[51]

Rabbenu Tam, however, does not accept this conclusion. According to his view,[52] when there is a mistake in the value of a transaction, even R. Yehudah – who holds that added value granted to an agent belongs entirely to the agent – will admit that all belongs to the principal. Understanding why Rabbenu Tam distinguishes between the cases of a mistake in value of a transaction, on the one hand, and granting of additional value to an agent, on the other, requires careful reading of his opinion. At first Rabbenu Tam explains as follows:

[50] See text at note 17 above.

[51] See Rashi, *Ketubot* 98b, s.v. *Kan shanah Rabbi*; and ibid., s.v. *kedeTanya*. See also *Ketzot haHoshen*, 183:8; and *Karnei Re'em* on Maharsha, *Ketubot* 98b.

[52] *Tosafot*, *Ketubot* 98b, s.v. *Kan shanah Rabbi*. On Rabbenu Tam see note 56 below.

> Where there is no fixed price, they [i.e., R. Yehudah and R. Yosi] disagree only where he [the vendor] gives it [the additional merchandise] as a bonus [*tosefet*], saying, "take this for your purchase, and this I add of my own."

Accordingly, wherever there is a mistake, since it cannot be said that the unanticipated gain was granted as a bonus, R. Yehudah and R. Yosi would not disagree; rather, both would agree that the gain belongs to the principal. Further on, however, Rabbenu Tam asserts:

> But if [the vendor simply] sold it cheaply because of the money, as the case in the our *mishnah*[53] of a property worth one hundred [sold by the widow] for two hundred,[54] even R. Yehudah would admit that all [gain] belongs to the owner of the money.

Here, Rabbenu Tam's opinion is restricted to a mistake similar to the one of the *mishnah*, a mistake of sale for under

[53] I.e., the case of *mishnah Ketubot* 11:4 (*TB*, 98a) cited above, text at note 14: "[If] a widow whose *ketubah* was worth two hundred sold property valued at one hundred for two hundred or property valued at two hundred for one hundred, her *ketubah* has been paid in full."

[54] A case of a vendor's selling merchandise to an agent for less than the market value and a widow's selling property of her deceased husband's estate for more than the market value are parallel for purposes of the present discussion. This is because, in both cases, the unanticipated gain – the rights to which are being debated – accrues to the side of principal and agent. Where the widow sells her deceased husband's property for more than its market value, she acts as the agent of the heirs, and the question arises as to who will enjoy the unexpected profit. Similarly, when a vendor delivers more merchandise to an agent than anticipated, thereby selling it for less than the market value, it must be asked whether the unanticipated gain – in the form of additional merchandise – belongs to the agent or to the principal who appointed him.

the market value.[55] Such a mistake, however, as Rabbenu Tam suggests in the emphasized phrase above, may be considered as caused by the money of the principal, and this would explain why R. Yehudah agrees that the unanticipated gain belongs entirely to the principal. Where a mistake is due to some other factor, such as a mistake in calculation, the disagreement of R. Yehudah and R. Yosi will apply, and R. Yehudah will hold that the unanticipated gain belongs to the agent.

The question of a mistake in the value of a transaction is primarily theoretical, for the law as codified accords with the opinion of R. Yosi that (where there is a fixed price) principal and agent share the unanticipated gain. Nevertheless, as we shall see, the opinions cited figure significantly in questions of unanticipated gain, where the mistake is not in the value of the transaction but rather some other sort of mistake.

Mistake in Calculation – Agent and Principal Share the Unanticipated Gain: Rabbenu Tam[56] was asked with regard to an error not in the value of the transaction but rather in calculation. As we shall see, in answer to this question, every possible course of action was suggested: (1) the entire gain belongs to the principal; (2) the entire gain belongs to the agent; (3) principal and agent divide the gain equally.

The query, addressed to Rabbenu Tam[57] by R. Ya'akov Yisrael,[58] reads as follows:

[55] See previous note.

[56] R. Ya'akov ben R. Me'ir Tam (ca. 1100-1171), son of Rashi's daughter, was the most important of the Tosafists.

[57] *Sefer haYashar leRabbenu Tam*, *Teshuvot* 53:2, and 54:2. See also *Tosafot*, *Ketubot* 98b, s.v. *Amar R. Papa*; *Resp. Maharam ben Barukh* (ed. Prague), 252, 803; *Resp. Maharam ben Barukh* (ed. Cremona) 50;

> A sent B to accept payment due A from the sale of grain.... B... received[59] an extra five *dinar*s. To whom does the extra payment belong? Do we say that it belongs to A, as in the [talmudic] case where an agent received an extra item, [since] A can claim, "You wish to profit from my payment?! It was for my own benefit that I sent you." Or perhaps B can claim, "There is neither benefit nor harm to your interests here; you have received your payment in full, and if I have chanced to 'find a lost object,' what right do you have to it?"

Thus, R. Ya'akov Yisrael raises two possibilities: (1) The entire gain is awarded to the principal, A, as in the case of an agent who receives extra merchandise where there is no fixed price, the principal seeking to incorporate the agent's action in accepting the additional payment as part of the agency ("It was for my own benefit that I sent you"). (2) The entire gain is awarded to B, the agent, who claims that there is no connection whatsoever between the agency and his acceptance of the additional payment; for since the principal has received what was due him, he has no relation to the additional payment, and the additional payment is considered as lost property found by the agent, property in which the principal has no part at all.

Rabbenu Tam, on the other hand, does not adopt either approach suggested by the questioner, ruling, rather, that the additional payment be divided between the parties.

Mordekhai, Ketubot 255; responsum of Maharam ben Barukh cited in *Mordekhai, Baba Kama* 168-169; *Teshuvot Maimoniyot, Sefer Kinyan* 9:20; and *Piskei haRosh, Ketubot* 11:15.

[58] R. Ya'akov Yisrael was one of a group of student-colleagues of Rabbenu Tam. See E. E. Urbach, *Ba'alei haTosafot* (4th ed., Jerusalem, 1980), pp. 116-118.

[59] The question of whether the mistake was spontaneous or the result of the agent's action may have legal implications. See note 90 below.

Rabbenu Tam accepts the analogy with the talmudic case where the agent receives additional merchandise. However, whereas the questioner felt this to be an instance where there is no fixed price, Rabbenu Tam considers it to be an instance where the price is fixed:

> ...It appears to me that they divide it between them, since the money is comparable to something that has a fixed price, as we say, where the agent receives one extra item, R. Yosi holds that they divide it. And it is established that this applies where there is a fixed price, but that where there is no fixed price all belongs to the principal. The reason that it is divided is that once the principal receives what is due him, what connection has he to the mistaken or additional [merchandise] received by the agent? Nevertheless, we hold that since his money was instrumental in the agent's profit, he [the agent] must give him half. And this applies equally to an error in calculation. For when a widow sells property worth one hundred for two hundred this too is an error, and the Jerusalem Talmud establishes that the purchaser agreed to it. The reason that the entire unanticipated gain belongs to the owner of the money is that there is no fixed price and it is his money that lowers the price. Thus, where something does have a fixed price, even in case of an error of calculation, the unanticipated gain is divided [between agent and principal].

From Rabbenu Tam's response, it is apparent that in his opinion the division is based upon the principal's part in creation of the gain. Even his language is similar to that of Rabbenu Hananel, who explains:[60]

> What share does the owner of the money [i.e., the principal] have in this? After all, he has already received

[60] See text at note 40 above.

> [merchandise] for the price known to him! Since the owner of the money was instrumental in the benefit that came to his agent, he [the agent] must divide it with him.

Further on, Rabbenu Tam hints at the existence of a different approach. Nevertheless, he accepts the first explanation as the correct one:

> Although another reason for the division could be advanced, this reason, as explained, is correct, for possession confers the advantage [*demuhzak yado al ha'elyona*], and they must divide the gain.

All Belongs to the Principal: However, Rabbenu Tam reconsidered his ruling that agent and principal share unanticipated gain, finding, rather, that in instances of error the entire gain belongs to the principal:[61]

> And again, he reconsidered, deciding that in all cases of error, whether in the transaction or in counting, all belongs to the principal.

Rabbenu Tam does not abandon the basic reason for the division – that the principal was instrumental in the agent's gain. However, whereas previously he held that legally the unanticipated gain belonged to the agent (who was obliged to share it with the principal, who was instrumental in its creation), Rabbenu Tam now holds that legally the gain belongs not to the agent but to the principal.[62] What was the basis for this change of opinion? Previously, Rabbenu Tam held that an error in calculation – as opposed to an error in the value of the transaction – is analogous to an instance of additional merchandise granted to the agent where the price

[61] *Tosafot, Ketubot* 98b, s.v. *Amar R. Papa.*
[62] Cf. *Sh. Ar., Hoshen Mishpat* 194:2; *Netivot haMishpat, be'urim* 5.

is fixed, where the unanticipated gain is divided between principal and agent. Subsequently, when he reconsidered, he decided that when the unanticipated gain stems from an error, that is to say, it is not known to the third party, the circumstances are not comparable to additional merchandise where the price is fixed. As mentioned above, Rabbenu Tam asserts that when there is a mistake in the value of the transaction, all (including R. Yehudah) will admit that the entire unanticipated gain belongs to the principal. On the other hand, for a transaction to qualify as a situation of "additional merchandise granted to the agent where the price is fixed," the vendor must give the additional merchandise "as a bonus, saying, 'take this for your purchase, and this I add of my own.'" Only where this is the case, then, will agent and principal share the unanticipated gain. In the event of error, this is clearly impossible. In all other situations, according to Rabbenu Tam, as in the case of the widow who sold property from her deceased husband's estate as an agent of the heirs, all unanticipated gain will belong to the principal.[63]

All Belongs to the Agent: The extreme opposite position to that of Rabbenu Tam is taken by Rabbenu Yitzhak,[64] an-

[63] See text at note 52 above.

[64] What the opinion of Rif would be in cases of an error in calculation is a matter of disagreement among legal authorities. R. Yosef Karo, in *Kesef Mishneh*, *Sheluhin veShutafin* 1:5, asserts that Rif would favor division. In *Beit Yosef*, *Hoshen Mishpat* 183:8, however, R. Karo suggests that perhaps Rif would agree with the opinion of Rabbenu Yitzhak, that the unanticipated gain in such instances stands by itself and thus belongs to the agent. That in cases of an error of calculation Rif would award all to the agent is also the opinion of R. Avraham di Boton, *Resp. Lehem Rav* 124; idem, *Lehem Mishneh*, *Sheluhin veShutafin* 1:5; and *Shakh*, *Hoshen Mishpat* 183:13. See also

other Tosafist. To some extent, Rabbenu Yitzhak's opinion can be considered similar to Rabbenu Tam's opinion prior to the latter's change of heart. In his earlier ruling, Rabbenu Tam felt that legally the entire unanticipated gain belongs to the agent, but that he is obliged to share it with the principal, who was instrumental in its creation. Rabbenu Yitzhak agrees that the unanticipated gain belongs to the agent, but believes that he need not share it with the principal, since the latter has no legal connection to it at all:[65]

> To Rabbenu Yitzhak,[66] it appears that all belongs to the agent, for if he stole, robbed[67] and deceived, what has this to do with the principal? And we do not even say that they must divide it on the basis of the principal's being instrumental in the agent's gain. For this is not comparable with other errors [i.e., errors in the value of the transaction], where [the erring party] gives everything because of the money, believing the money [he receives] to be equal in value to all that he gives. Here, however, the error stands by itself.
>
> And know that all of this is hypothetical, for if he wished, he would return it, for it is unreasonable to imagine that he should be unable to inform him and return it to him.

Maharsham, *Mishpat Shalom* 183:6; and *Shimru Mishpat* on *Hukkot haDayanim* 291 (p. 143). See also *Resp. Rashba* I:671 (=III:25).

[65] *Tosafot*, *Ketubot* 98b, s.v. *Amar R. Papa*.

[66] This is the reading of R. Shelomoh Luria (Rashal), ad loc.; and of *Mordekhai*, *Ketubot* 255.

[67] From here, Maharashdam, *Resp. Maharashdam*, *Hoshen Mishpat* 27, concludes that if the agent stole, all authorities would admit that all belongs to the agent. This opinion is also held by R. Yitzhak Diabela in a responsum appearing in *Resp. Torat Hesed* 210. The opinion requires further clarification, however. See also *Shimru Mishpat* on *Hukkot haDayanim* 291, p. 140ff.

A number of other post-talmudic authorities follow the same approach.[68]

The following table summarizes the various opinions:

Source of Gain	Principal	Division	Agent
Additional merchandise granted to the agent:			
Fixed Price		R. Yosi	R. Yehudah
Price Not Fixed	R. Yosi		R. Yehudah
Mistake in value	R. Yosi	R. Yosi (R. Yonah)	R. Yehudah (Rashi)
	R. Yehuda (R. Tam)		
Mistake in calculation	R. Yosi (R. Tam Final Opinion)	R. Yosi (R. Tam 1st Opinion)	R. Yosi (R. Yitzhak)

D. The Law as Codified in Shulhan Arukh

Recourse to the Approach that the Agent is Entitled to Half Because he Created the Gain: The disagreement among the early post-talmudic authorities over the reason for sharing unanticipated gains is apparently at the root of the disagreement between R. Yosef Karo and Rema in *Shulhan Arukh* concerning additional merchandise granted to the agent.

R. Yosef Karo, in his *Beit Yosef*[69] on the *Tur*, quotes the reasoning of Rif, "Since the principal was instrumental in

[68] *Mordekhai, Ketubot* 255, after citing the opinion of Rabbenu Yitzhak says: "So did Rashbam explain in the presence of Rashi." Similarly, Rashba was asked concerning an error, and his response distinguishes between error and deliberately granting added consideration. See *Resp. Rashba* I:671 (=III:25). See also *Resp. Maharil haHadashot* 156.

[69] *Beit Yosef, Hoshen Mishpat* 183:8.

the benefit received by the agent, he [the agent] must divide it with him," as well as Ran's comment that Rif and Rashi would differ where the third party gives additional merchandise explicitly to the agent. R. Karo also notes that Rosh and *Sefer halttur* advance the same reasoning as Rif. In his *Darkhei Moshe* (also on the *Tur*), Rema responds to R. Yosef Karo as follows:[70]

> But Nahmanides [i.e., Rashba in the responsa attributed to Nahmanides] wrote in a responsum that the opinion of Rashi is correct and that Rashi's opinion is also the opinion of Rav Hai Gaon.

It would appear that R. Karo accepts Rif's reasoning, whereas Rema accepts the reasoning of Rashi and Rav Hai Gaon.

This disagreement between R. Karo and Rema is also reflected in their rulings in *Shulhan Arukh*, where R. Yosef Karo writes:[71]

> [If] the price was fixed and known, and he granted additional [merchandise] to the agent in number, weight, or measure, whatever the vendors added belongs to both, and the agent must divide the additional [merchandise] with the principal. And if it was something that did not have a fixed price, all belongs to the owner of the money [i.e., the principal].

Although R. Karo gives no rationale for his ruling, his reasoning may be inferred from his adoption of the wording of Maimonides.[72] Concerning Maimonides' opininion, R. Karo himself, writing in *Kesef Mishneh*, states that according to the opinion of Rif, even if the additional merchandise

[70] *Darkhei Moshe, Hoshen Mishpat* 183:4.
[71] *Hoshen Mishpat* 183:6.
[72] Maimonides, *M.T., Sheluhin veShutafin* 1:5.

is given explicitly to the agent, it must be divided, and that Maimonides' ruling "leans toward this opinion." R. Karo may have inferred this from Maimonides' wording, "whatever the vendors add" – which R. Karo apparently takes to mean: in all cases, even when given explicitly to the agent.[73] From here it may be inferred that, where the vendor grants additional consideration explicitly to the agent, R. Karo will nevertheless require that it be divided. However, R. Karo himself does not rule on such a case in *Shulhan Arukh*.

To R. Yosef Karo's ruling in *Shulhan Arukh*, which makes no explicit mention of the vendor's granting additional consideration explicitly to the agent, Rema adds:[74] "However, if the vendor explicitly gives it to the agent, all belongs to the agent." From here, it seems clear that Rema accepts Rashi's approach and rules accordingly.

Nevertheless, although Rema rules according to Rashi, a number of commentators on *Shulhan Arukh* seek to introduce Rif's opinion as a consideration in such cases. *Sema*, for instance, after summarizing the disagreement among the Earlier Authorities and showing that Rema follows the opinion of Rashi, continues:[75] "And I have in any case recorded the opinion of Rif, Rosh, and *Ittur*, for sometimes, at the judge's discretion, it may be relied upon." Thus, *Sema* gives judges the freedom to divide unanticipated gains between agent and principal even when the vendor gives the added consideration explicitly to the agent.

[73] See *Mishkenot haRo'im*, letter *shin*. 114 (p. 346, col. 3). *Bah*, *Hoshen Mishpat* 183:8, suggests a different basis in the wording of Maimonides for R. Karo's reasoning.

[74] Rema, *Sh. Ar.*, *Hoshen Mishpat* 183:6.

[75] *Sema*, *Hoshen Mishpat* 183:18.

Shakh,[76] as well, expresses his surprise that Rema rules according to Rashi with no reference whatever to the other approach. *Taz*[77] goes one step further, recommending that the opinion of Rif be given precedence. Relating to *Sema*'s statement that a ruling may follow the opinion of Rif, at the judge's discretion, *Taz* writes that this is the proper ruling. He goes on to cite various authorities who accept Rif's approach and asserts that the only proponent of Rashi's approach is Rashi himself. He concludes that Rashi must to some extent recognize the logic of Rif's approach; otherwise, how would Rashi explain division of the unanticipated gain where there has been no specification of for whom it is meant? If it is a matter of pure uncertainty, then the law should be straightforward – the onus of proof rests upon the claimant (*hamotzi mehavero alav hare'ayah*).[78]

Rights of The Person Instrumental in the Unanticipated Gain Based Upon Rabbinic Enactment: *Sema*'s comments also include an important reference to the legal basis for the division of unanticipated gain. Recording the opinion of Rif and those who agree with him, *Sema* writes:[79]

> And when the vendor gives the agent more than one measure per *dinar* [i.e., more merchandise than antici-

[76] *Shakh*, *Hoshen Mishpat* 183:18. *Ketzot haHoshen*, ad loc., 7, explains the basis for Rema's ruling.

[77] *Taz*, ad loc. *Mishkenot haRo'im*, letter *shin*, 114 (p. 346, col. 4), rules in accordance with the opinion of Rif as implied by the language of *Shulhan Arukh*.

[78] It appears that Me'iri, *Beit haBehirah*, *Ketubot* 98b (ed. Avraham Sofer, p. 452), relates to this problem: "And the greatest of the rabbis have explained that this is disputed property [*mamon hamutal besafek*], and where neither has possession, it is divided."

[79] *Sema*, *Hoshen Mishpat* 183:18.

> pated for the amount paid], legally, all should belong to the agent. However, since the principal's money was instrumental in the benefit received by the agent, our Sages said that they must divide the surplus.

In other words, according to *Sema*, the obligation to divide the unanticipated gain is a rabbinic enactment.

Hazon Ish[80] explains that "it appears to be a rabbinic enactment to prevent altercation, since according to the strict law causation such as this should not entitle [the principal] to a share of the profit." According to Hazon Ish, then, although a person instrumental in the creation of gain is entitled to a share, this does not hold when his contribution is remote – as it is here. Here, the division is based, rather, on rabbinic enactment.

Concerning unanticipated gain that arises from error, *Shulhan Arukh* rules in accordance with the opinion of Rabbenu Yitzhak as recorded by the *Tosafot*:[81] "[If] a person sent his agent to accept payment,[82] and the debtor gave more [than anticipated], the entire surplus belongs to the agent."[83, 84]

[80] *Hazon Ish*, *Baba Kama* 22:5.

[81] *Sh. Ar.*, *Hoshen Mishpat* 183:7.

[82] If, however, an agent was sent to pay a creditor and deceived him into accepting less, the entire saving belongs to the principal. So rules Rema in *Sh. Ar.*, *Hoshen Mishpat*, 183:9. *Sema*, *Hoshen Mishpat* 183:26, explains that the money belongs to the principal and the portion which was not paid remains in his possession. This, however, he explains, is not the case where an agent deceives another into paying more, since there he receives money from the other and thus acquires it.
See also *Resp. Lehem Rav* 125; *Resp. Ba'ei Hayyei*, *Hoshen Mishpat* 133; but see notes 84 and 87 below; and *Resp. Karnei Re'em* 177.

[83] Rema, ad loc., adds: "Only when the agent knows of the error before transferring the unanticipated gain to the principal. If, however, he [i.e., the agent] did not know of the error and the entire gain was

As mentioned above,[85] where another person aids the purchaser in deceiving a third party, Ra'avan rules that assistant and purchaser share the surplus. Rema accepts this ruling in his comments on *Shulhan Arukh*,[86, 87] but in so doing seems to be inconsistent with a previous ruling. As shown, Ra'avan's ruling that assistant and purchaser share is based upon the principle that a person instrumental in creating a gain is entitled to enjoy the gain that he helped create;[88] but this principle was apparently rejected (or at least restricted) by Rema,[89] in his ruling that, where a vendor specifies that additional merchandise is meant for the agent, the agent

transferred to the principal, then all belongs to the principal...." See also *Shakh*, *Hoshen Mishpat* 183:14; *Ketzot haHoshen* 183:9; *Netivot haMishpat* 183, *be'urim* 12.

See also *Resp. Maharashdam*, *Hoshen Mishpat* 26; R. Mikha'el Ya'akov Yisrael, *Resp. Yad Yemin*, *Hoshen Mishpat* 34 (p. 135, col. 3); and *Resp. Sho'el uMeshiv*, *Mahadura Talita'ah* III:37.

[84] R. Yitzhak Adarbi, *Resp. Divrei Rivot* 111; and the author of *Resp. Rashakh* II:3 (=91), were asked concerning an agent who concealed merchandise from the customs. They ruled in accordance with the opinion of Rabbenu Yitzhak that the entire unanticipated gain belonged to the agent. See, however, Rema's ruling, cited in note 82 above, and *Sema*'s explanation of that ruling. See also *Resp. Maharashdam*, *Hoshen Mishpat* 26-27; R. Petahyah Mordekhai Birdugo, *Resp. Nofet Tzufim*, *Hoshen Mishpat* 134.

[85] See text at note 48 above.

[86] Rema, *Hoshen Mishpat* 183:7.

[87] *Shakh*, *Hoshen Mishpat* 183:15, also discusses the case of an agent who manages to evade customs. See also *Resp. Beit Yitzhak*, *Hoshen Mishpat* 55:6, concerning *Shakh*'s ruling in this matter. See also Maharsham, *Mishpat Shalom* 183:7, p. 30, col. 3; and note 84 above.

[88] See the end of the explanation of Ra'avan's responsum, text at note 49 above. *Be'ur haGra*, *Hoshen Mishpat* 183:25, explains that this ruling is in accordance with the approach of Rif and *Ittur* regarding merchandise that has a fixed price (see text at notes 41 and 43 above).

[89] See text at note 74 above.

need not share it with the principal. It may be possible, however, to explain the inconsistency by suggesting that in Ra'avan's case, Rema recognizes that the two parties participated equally in an action that created a gain, and must, therefore, be considered partners with equal rights in the gain received.[90]

R. Shelomoh Kluger, in a responsum,[91] also distinguishes between Ra'avan's case and the talmudic case where additional consideration is granted to an agent. According to R. Kluger,[92] it appears that Ra'avan's ruling, dealing as it does with a case of error, is not subject to the disagreement concerning additional consideration given to an agent, and that all would agree that the unanticipated gain must be shared. R. Kluger emphasizes, however, that this is so only when both purchaser and assistant are present, thus acquiring equal rights to the unanticipated gain as though they had simultaneously picked up some lost property:

> For this is not a function of the merchandise [provided by the principal]. Rather, this is a different matter similar to an instance where two persons pick up lost property simultaneously and must, therefore, divide it equally. And this is not analogous to where a vendor gives additional merchandise to an agent, concerning which there exists a disagreement among rabbinic authorities. There, the person granting the additional merchandise knows what he is adding[93] and he does so be-

[90] *Sema*, *Hoshen Mishpat* 183:24, substantiates this explanation of Rema's opinion by quoting Rema's *Darkhei Moshe*: "Since both were involved with the merchandise, they divide it, although only one actually carried out the deception."

[91] *Kuntres Yosif Da'at* (*Nidrei Zerizin*, ad fin.), responsum 13, ad fin.

[92] On R. Shelomoh Kluger, see above, Part 2, note 104.

[93] This approach requires clarification in light of the opinions of those Earlier Authorities who hold that cases of error and cases of granting

> cause of the transaction, and the authorities disagree over who is entitled to it. And in such a case it may also be argued that since only the agent was present at the time of the transaction, the unanticipated gain belongs entirely to the agent.
>
> In the present case, however, since both were present, and the third party had no intention of giving additional consideration, but rather they deceived him in the calculation, this is a different matter altogether, not dependent on the [principal's] merchandise, and it is like lost property [i.e., unanticipated and unrelated to anything else]....

R. Kluger bases his opinion on two factors. First, since, in Ra'avan's case, the additional consideration was given in error, R. Kluger does not consider it to be part of the transaction. Second, since both purchaser and assistant were present, both acquired equal rights to the additional consideration. According to this explanation, then, there is no room for uncertainty concerning whom the vendor meant to benefit – the basis for Rashi's approach in the case of "one additional item granted to the agent." If we posit that Rema accepts this line of reasoning, there will be no inconsistency. Where a vendor knowingly grants additional consideration, Rema would argue, together with Rashi, that an uncertainty as to whom he wished to benefit is created and the gain is, therefore, shared. Where the vendor specifies for whom the additional consideration is meant, the uncertainty is resolved, and the gain belongs to the person for whom it was designated. In Ra'avan's case, however, where principal and agent were both involved in and present at the deception that earned the unanticipated gain,

additional consideration are equivalent. See the opinions of R. Ya'akov Yisrael and Rabbenu Tam cited above.

Rema can rule that (for the reasons mentioned by R. Shelomoh Kluger) both are equally eutitled to a share of the unanticipated gain.

2. An Agent Who Deviates from Instructions

As we saw above,[94] the Jerusalem Talmud links the ruling in the case of an agent who varies his agency, thereby creating an unanticipated gain, with the principle that a person who is instrumental in creating a gain is entitled to enjoy the gain that he helped create. We also saw that the Babylonian Talmud remains silent on the matter.[95]

A. The Approach that Awards All to the Principal

The early post-talmudic commentators are divided over how to interpret the Babylonian Talmud. Rashi[96] and the *Tosafot*[97] believe that the transaction under discussion is one where principal and agent agreed to share the profits equally, and therefore, even if the agent varies his agency, they still share the profits. Rif[98] comes to the same conclusion, distinguishing between an agent who enters into partnership with the principal and one who does not:

> And since it is established that the law is in accordance with R. Yehudah,[99] we must ascertain whether money was given to the agent [to acquire merchandise] for resale as part of a partnership arrangement – in which case a loss would be sustained by him [the agent], be-

[94] See text at note 26 above.
[95] See text at note 25 above.
[96] Rashi, *Baba Kama* 102b, s.v. *Likah*.
[97] *Tosafot*, *Baba Kama* 102a, s.v. *Noten*.
[98] Rif, *Baba Kama*, chap. 9 (ed. Vilna, 36a). See also *Shimru Mishpat* on *Hukkot haDayanim* 291 (ed. Jerusalem, 1974, p. 137).
[99] R. Yehudah holds that an agent who deviates from instructions does not thereby acquire for himself the merchandise he purchases.

> cause he deviated from instructions, and a profit would be divided between them. For even according to R. Me'ir,[100] since [the principal] gave him money to purchase for resale, the deviation from instructions does not acquire the merchandise for the agent. And if the money was not given to the agent as part of a partnership arrangement, but only to purchase wheat for resale, the agent receives nothing – if there is a loss he sustains it, because he has deviated from instructions, and if there is a gain, it belongs to the owner of the money. Similarly if he gave him money to purchase wheat for his [the principal's] personal consumption, if there is a loss, the agent sustains it, and if there is a profit, it belongs to the owner of the money, since we do not say that they divide the profit unless the principal gives him money to buy wheat as part of a partnership arrangement, and he [the agent] bought barley with it....

Thus Rif explains the discussion in the Babylonian Talmud. Only if a partnership agreement is stipulated from the outset do agent and principal share the unanticipated gain when an agent deviates from instructions. When no such agreement is stipulated, however, an agent who deviates from instructions must compensate for any loss but is not entitled to a share of unanticipated gain.

B. The Approach that Awards a Share to Whoever Was Instrumental in Creating the Gain

Some of the Earlier Authorities chose the approach of the Jerusalem Talmud. In *Sefer haIttur*,[101] the talmudic discus-

[100] R. Me'ir, who holds that an agent who deviates from instructions acquires the merchandise he purchases for himself, holds this only in cases, such as purchase for personal consumption, where the principal will be particular about what is purchased.

[101] *Sefer haIttur*, *Shalishut Mamon* (ed. R. Me'ir Yonah, p. 43d).

sion is understood to refer to a conventional agent – not one who has entered into a partnership arrangement – and to rule that, if an agent deviates from instructions and is instrumental in an unanticipated gain, the agent is entitled to his share:

> And it is logical to conclude that the *Tana* is not discussing a partnership arrangement, but rather conventional agency. And as regards agency for the purchase of merchandise for resale, there is no disagreement. If the principal gave him money to purchase wheat, and he did not find wheat and bought barley instead, since, if the agent had returned the money, there would have been no profit, now that he spent it on barley and there was a profit, it is like merchandise with a fixed price, and they divide [the unanticipated gain]. The disagreement [concerning an agent who varies his agency] is over [merchandise purchased for the principal's] personal consumption. And the law is established in accordance with the opinion of R. Yehudah, that even in agency for [the principal's] personal consumption, they divide.
>
> And we do not say that where there is profit it belongs entirely to the owner of the money, except where the agent does not deviate from instructions, but rather is sent to purchase wheat and purchases wheat or to purchase barley and purchases barley, and where the vendor adds one item where the price is not fixed.[102]

According to *Ittur*, then, whenever an agent deviates from instructions (regardless of whether there is a partnership agreement), he is entitled to a share of the unanticipated gain. Further on, *Ittur* notes that the author of *Metivot* concurs with this interpretation.

[102] See *Ittur*'s further comments, ibid.

An interesting opinion is that of R. Aharon haLevi, cited in *Nimmukei Yosef*.[103] R. Aharon haLevi quotes the approach of the Jerusalem Talmud[104] but then appears to quote that of Rif,[105] concluding that Rif's approach is established as law. However, it seems probable that R. Aharon haLevi agreed with the approach of the Jerusalem Talmud and that the quotation of Rif and ruling should be attributed to *Nimmukei Yosef*.

C. The Approach of Shulhan Arukh – All Belongs to the Principal

Maimonides and *Shulhan Arukh* rule according to the opinion of Rif. Maimonides writes:[106]

> If he gave him money to purchase wheat, whether for [the principal's] personal consumption or for resale, and he went and purchased barley with it, then, should the value of the merchandise he bought fall, the agent bears the loss, because he deviated from his instructions. If the price increases, the increase goes to him who invested the money.

Shulhan Arukh[107] issues a similar ruling, to which Rema[108]

[103] *Nimmukei Yosef*, *Baba Kama*, chap. 9 (ed. Vilna, 36a).

[104] That a person instrumental in creating a gain is entitled to a share of the gain he helped create.

[105] That an agent who varies his agency is entitled to a share of unanticipated gain only when a partnership agreement was stipulated from the outset.

[106] Maimonides, *M.T.*, *Sheluhin veShutafin* 1:5.

[107] *Hoshen Mishpat* 183:5. The reason for this is that the merchandise purchased belongs to the principal and it is, therefore, proper that he benefit from changes in the value of the transaction. Possibly, if the agent possesses specialized knowledge and it was that knowledge that resulted in gain, the agent is entitled to compensation for his action, even though his action was contrary to his instructions.

adds: "And that is also the law if [the principal] gave [the agent] the money under a partnership arrangement." In other words, if the money was given to the agent under a partnership arrangement, and the agent varies his agency, producing an unanticipated gain, agent and principal share it.[109]

R. Yosef ben Lev[110] discusses the disagreement among the Earlier Authorities and concludes that the opinion of R. Aharon haLevi, according to which the unanticipated gain is shared even when there is no partnership arrangement (so R. Yosef ben Lev understands R. Aharon haLevi) is not to be relied upon. R. Yosef ben Lev goes further, asserting that even if the agent remains in possession of the unanticipated gain, the court may seize it, and the agent does not have the right to claim that he accepts the ruling of R. Aharon haLevi,[111] since such a claim (the claim of *kim li*) is not recognized where virtually all authorities disagree with the minority opinion.

D. Commentators on Shulhan Arukh Favor the Approach that the Agent is Entitled to Half because he Created the Gain

Shakh[112] objects to the ruling of *Shulhan Arukh*, citing the opinions of *Sefer haIttur* and *Metivot*, who hold that, where the agent deviates from his instructions, unanticipated gain is shared even where there is no fixed price. *Shakh* asserts that this is also the opinion of R. Aharon haLevi as quoted

[108] Rema, ad loc.
[109] See Rema's further comments, ibid.
[110] R. Yosef ben Lev (1500-1580) was a widely recognized rabbinic authority who lived in Turkey.
[111] *Resp. Mahari ben Lev* I:114.
[112] *Shakh, Hoshen Mishpat* 183:10.

in *Nimmukei Yosef*, adding:[113] "And this appears to be the correct ruling according to the Talmud. And although it is established that, in accordance with the opinion of R. Yehudah, a deviation from instructions does not acquire the merchandise for the agent, nevertheless, where the agent who deviated from instructions was instrumental in creating a gain, it is divided." According to *Shakh*'s conclusion, in spite of the many authorities who rule as does *Shulhan Arukh*, an agent in possession of unanticipated gain does have a claim of *kim li* – that is to say, he may claim that the view of the dissenting authorities is the correct one.[114]

[113] *Shakh* takes the opinion of R. Aharon haLevi to be identical with that of the Jerusalem Talmud. This is disputed, however, by *Mareh haPanim* on the Jerusalem Talmud, *Baba Kama* 9:5 (7a). See also text at note 103 above.

[114] *Mareh haPanim* (cited in the previous note) disagrees with *Shakh*, arguing that the claim of *kim li* cannot be made against so large a number of authorities as he enumerates.

Chapter Three

PARTICIPATION IN RISK AS GROUND FOR SHARING PROFITS

An interesting extension of the right of one person to share the profits of another came about with the recognition that risk incurred by one person as a consequence of the action of another entitles the former to a share of the profits created as a result of the risk.

The basis for this principle is a strange passage in the Jerusalem Talmud, which reads:[115]

> A person went on a mission of agency, his brother wished to divide with him. The matter came before R. Ami, who said, "This is how we rule, when a person becomes a thief, his brothers divide with him."[116]

[115] *TJ Baba Kama* 9:3 (17a).

[116] See comments of Gedaliah Alon, *Mehkarim beToledot Yisrael*, vol. 2, pp. 91-92.

The early post-talmudic authorities are divided over the meaning of the passage. According to *Sefer halttur*,[117] R. Ami's words were meant to be followed by a question mark, and his decision, therefore, is that when one person steals, his partner is not entitled to divide the theft with him. *Mordekhai*,[118] on the other hand, does not place a question mark at the end of R. Ami's remark, and hence, R. Ami's decision is that a thief's partner is entitled to his share of the theft. *Mordekhai* writes:

> ...Brothers, one of whom goes out to rob or steal without the knowledge of the others, must divide. From here it should be ruled in the case of two people who go to the marketplace, and one sees a wallet lying unattended and steals it, he must divide it [its contents] with the other.

If this is indeed the proper interpretation of the passage, we have another indication of the Jerusalem Talmud's position that a person instrumental in creating a gain has the right to share that gain.[119] The disagreement among Earlier Authorities is reflected in *Shulhan Arukh* where Rema accepts the approach of *Mordekhai* and rules:[120] "If one partner steals or robs, he must divide [his gain] with his partner." *Shakh*[121] and *Taz*,[122] on the other hand, disagree, explaining that R. Ami's remark was a question and not a statement.

[117] *Ittur, Shittuf* (ed. Venice) 26:1, also cited in *Mordekhai, Baba Batra* 660, ad fin.

[118] *Mordekhai, Baba Batra*, 660, ad fin., cited also in *Hagahot Maimoniyot, Sheluhin* 5:4.

[119] See text at note 18 above.

[120] Rema, *Sh. Ar., Hoshen Mishpat* 176:12.

[121] *Shakh, Hoshen Mishpat* 176:27.

[122] *Taz*, ad loc. *Taz* writes that even if the two have agreed to share any lost property they may find, the partnership does not extend to cases

What is the basis of *Mordekhai's* ruling concerning two people who go to the marketplace? What legal connection is there between the two that will entitle one to share the theft of the other? An instructive discussion of this point appears in the writings of R. Yosef Katz.[123]

He received the following query:[124]

> [Concerning] a person who had the opportunity to buy something at a very low price from a non-Jew, something that was almost certainly stolen. The buyer and the non-Jew went to the home of another Jew and there [the first Jew] bought it at a very low price. During the bargaining with the non-Jew, before a price was fixed and the transaction finalized, the wife of the second Jew [in whose home all this took place] said, "What are you doing? I want to buy it, and since it is in my house, it is mine." The buyer [i.e., the first Jew] then answered her, "Do not worry, I will come to an understanding with your husband." And now the questioner [i.e., the second Jew in whose home the negotiations took place] comes to ask whether his premises acquired the entire thing for him, half of it, or nothing at all.

R. Katz opens by discussing the disagreement among rabbinic authorities concerning the rights of a home owner to

such as the present one: "Since it is prohibited to steal..., it may be presumed that the other partner is not interested in this gain...." For discussion of the opinion of *Taz*, see *Shimru Mishpat*, on *Hukkot haDayanim* 291 (ed. Jerusalem, 1974, p. 150); and R. Mikha'el Ya'akov Yisrael, *Resp. Yad Yemin*, *Hoshen Mishpat* 34.

[123] R. Yosef Katz (ca. 1510-1591), one of the most widely recognized rabbinic authorities in sixteenth-century Poland, was Rema's brother-in-law and served as head of the yeshiva of Cracow.

[124] *Resp. She'erit Yosef* 7.

inexpensive merchandise that comes to his home.[125] He then rules that in the present case, all would agree that the home owner is entitled to half, since the buyer told the home owner's wife that he would come to an understanding with her husband. This is as though he had said to the husband, "You acquire half." To this, R. Katz asserts, all will admit.

R. Katz then goes on to introduce a surprising new point: "Moreover, since in the present case, the home owner incurred great danger – should the thief be caught – and it was the buyer who brought this danger upon him, the home owner, to some small extent [*ketzat*], becomes the buyer's partner." In support of this argument, R. Katz cites the ruling of *Mordekhai* quoted above concerning two persons who go to the marketplace. R. Katz argues that *Mordekhai's* ruling does not deal with two people who had established a partnership from the outset. Such would be the case discussed in the Jerusalem Talmud. Had *Mordekhai's* case been precisely parallel to that of the Jerusalem Talmud, he would not have written, "...from here it should be ruled," a phrase indicative of the application of a principle to a new set of circumstances. Hence even when the two are not partners, if one was endangered thereby, he is entitled to his share of the other's theft:

> Therefore, it appears to me that he [i.e., *Mordekhai*] is discussing two persons who go together but are not partners, and nevertheless, the one is obliged to share with the other. How does *Mordekhai* learn this from the Jerusalem Talmud? The Jerusalem Talmud, after all, is discussing partners, for it describes brothers, who may be presumed to be partners! Clearly, *Mordekhai* must

[125] See the dispute of Ra'avya and Ra'avan discussed below, in chap. 5.

> hold that partnership makes no difference with regard to theft. Thus, the Jerusalem Talmud's ruling to obligate the one person to share his theft with the other, is because when one brother steals and does not share, although the others are not present at the time of the theft, they and their property are in danger. And since he endangered them together with himself, he is obligated to share the gain. And from here he learns that this applies to two persons who are not partners, but who go together – that if one of them steals, the other is in as much danger as the thief.... And therefore, he is obliged to share with his friend who went with him.

From here, R. Katz concludes that a person endangered by merchandise brought to his house is entitled to participate in its purchase.

A similar view is taken by R. Yo'el Sirkes,[126] author of *Bah*. R. Sirkes received the following query:[127]

> Two Jews standing in the marketplace were approached by some non-Jews and asked if they were interested in buying silver. The two Jews went with the non-Jews to the home of a third Jew, where they saw the silver and entered into negotiations with the non-Jews. The Jew in whose home this occurred, aided them [in the negotiation] and, when the transaction was finalized took out his own money, gave it to the non-Jew and took the silver into his own possession. The Jewish home owner now wishes to acquire all the silver for himself, claiming that his premises and his money acquired it for him.

R. Sirkes opens with a discussion of whether a home owner

[126] R. Yo'el Sirkes was born in Lublin towards the middle of the 16th century and died in 1640.

[127] *Resp. Bah (haYeshanot)* 12.

acquires merchandise that enters his premises[128] and concludes with consideration of the right to share a theft:

> And it appears that the gain would belong to the home owner even if he had not given his own money. Since most such purchases are stolen property, and it is against the home owner that accusations will be brought, he stands in greater danger than the two who do not live in the house where the stolen property was purchased.

In support of his conclusion, R. Sirkes cites our passage from the Jerusalem Talmud and *Mordekhai's* ruling based on it and shows that when discussing the "two people who go to the marketplace" *Mordekhai* could not have been referring only to partners:[129]

> It is implied in his wording, "two people who go to the marketplace," that [this applies] even if it were just two people who had to travel together, although they entered into no partnership and had never been partners in the past. And the reason is this: Although the brothers [mentioned in the Jerusalem Talmud][130] are partners, it may be presumed that they made no partnership with regard to theft and robbery; nevertheless, they must share with each other, since if one were caught, all would be in danger. So too in the case of two people who go to the marketplace, the second one is in the same danger as the thief, since they were together when the theft was committed.

[128] See below, chap. 5, text at note 153.

[129] In his comments on *Mordekhai* (*Baba Batra* 660, ad fin.), R. Sirkes writes: "It appears to me that they are partners." According to this comment, the two share, because they are partners. In the responsum cited, however, R. Sirkes takes a different approach.

[130] Text at note 115 above.

Thus, R. Sirkes concludes in the matter before him:

> Accordingly, since it is known that the main danger is to the owner of the home where the stolen property was purchased,[131] and it was with his knowledge that they negotiated with the thieves, he is also entitled to a share of the gain.[132]

[131] *Shakh*, *Hoshen Mishpat* 176:27, also disagrees with Rema's ruling (see text at note 121 above). *Shakh* cites an unnamed authority who holds that *Mordekhai's* ruling applies only where the theft involved some danger.

[132] See comments on ruling of *She'erit Yosef* by Maharsham, *Mishpat Shalom* 176:12.

Chapter Four

INSURING ANOTHER'S PROPERTY

The question of the right of a person who insures the property of another to receive compensation from the insurer for damage to or destruction of the property insured has been widely discussed in recent years; and the question was already considered above in Part 2 of the present volume, with reference to profiting from another's property.[133]

A survey of responsa on the subject shows that, according to most authorities, the compensation belongs to whoever pays the premiums. Some rule, however, that under certain circumstances, the compensation belongs to the owner of the property. Among both schools of thought, there have been those who include in their deliberations consideration of the law of division of profits when two parties are jointly instrumental in the creation of gain.

[133] See Part 2.

R. Yosef Sha'ul Nathanson,[134] author of *Resp. Sho'el uMeshiv*, was asked to whom insurance compensation belongs for a house destroyed by fire if the insurance premiums were paid hy the tenant.[135] R. Nathanson quotes an answer written to him concerning the matter by R. Yosef Yehudah Strassburg, rabbi of Kosow (Galicia), apparently agreeing with the latter's opinion that the ruling will depend on whether, under the (non-Jewish) law of the land, it is permitted to insure another person's property.[136] If so,

[134] R. Yosef Sha'ul Nathanson (1808-1875) served as head of the rabbinic court of Lvov (Lemberg).

[135] *Resp. Sho'el uMeshiv, Mahadura Tinyana* III:129.

[136] In another responsum, ibid., R. Nathanson considers the case of a tenant who asked his landlord to insure the property he was renting. Although the landlord originally refused, once the tenant had purchased the insurance himself, the landlord agreed to reimburse him but delayed paying on a number of occasions. In the meantime, the property was destroyed by fire, and the rabbinic authorities of Brody ruled that the landlord was entitled to two thirds of the compensation and the tenant one third.

R. Nathanson opens by stating that the entire sum of compensation would appear to belong to the landlord, since it may be presumed that the tenant's intention was to transfer all rights arising from the insurance. However, since R. Nathanson is uncertain, he asserts that it is proper that the authorities persuade the parties to agree to a compromise.

Further on in his discussion, supporting a decision of the rabbis of Brody, R. Nathanson cites a passage from Tractate *Ketubot* 65b, where it is ruled that, if one embarrasses a woman in private, the woman is entitled to two thirds of the compensation and her husband to one third, since the embarrassment is "mostly hers." Similarly, R. Nathanson asserts, since the tenant benefits from the property of the landlord, while the landlord loses his entire property, given that it was, after all, the tenant who paid for the insurance, two thirds of the compensation are due to the landlord and one third to the tenant. If, however, the compensation is greater than the actual value of the property, landlord and tenant divide the surplus equally.

then clearly the compensation belongs to the tenant, who paid the premiums. If, however, it is not permitted to insure another person's property, then the ruling would be as explained in the case of an agent in *Shulhan Arukh* – that wherever someone's property is instrumental in creating benefit, he is entitled to a share of the benefit. So, in the present case, since the right to receive the compensation belongs to the landlord, and since his right to compensation was created by the tenant's payment of premiums, tenant and landlord must divide the compensation.

The opposite conclusion is reached by R. Tzvi Hirsch Te'omim,[137] who was asked concerning a partner who paid to insure his part of a jointly owned structure. By mistake, the insurance was registered as covering the entire structure. R. Te'omim rules that the compensation is not divided in this case, and that the entire sum belongs to the partner who purchased the insurance. He bases his ruling on his understanding that the principle of division by agent and principal is based upon the intentions of the parties. Where an agent makes his purchase with money supplied by the principal, he realizes from the outset that he must divide any unanticipated gain, and the principal, knowing this, acquires his share in the unanticipated gain. In the present instance, however, this is not the case. A did not know that B had purchased insurance. B, moreover, paid the premiums from his own pocket with intention to insure only his own portion. A had no interest in B's insurance, since he wished to insure his own portion. Thus A is not entitled to a share of the compensation paid to B.

The principle of division of gain is also discussed by R.

[137] R. Tzvi Hirsch Te'omim served as head of the rabbinic court of Chorostkow. The responsum appears in his *Resp. Eretz Tzvi, Hoshen Mishpat* 15. See text in Part 2, note 87 above.

Refa'el Mordekhai haLevi Solovei,[138] who rejects its application in instances where one insures the property of another. R. Solovei first shows that, according to the principle that one may not "do business with his neighbor's cow," it would appear that the compensation belongs to the owner of the property.[139] Accordingly, since the compensation was paid for the destruction of the landlord's property, the tenant, although he paid the premiums, has no share in the compensation. The reason for this is that in the case of an agent in *Shulhan Arukh*, the unanticipated gain is shared only because it was granted to the agent and not to the principal (and even so, the principal is entitled to a share). Here, however,

> it is not the intention of the insurance company to give compensation specifically to him in return for the premiums he paid, for had he wished to insure the house of any other person, he would have been prevented from doing so by the law of the land. Only because [as a tenant] the house is registered in his name, do they believe the house to be his. Hence, all the compensation that they give is given only on the presumption that the house is his. It emerges, therefore, that all the compensation he receives, he receives by virtue of a house that belongs to his landlord, and he is, therefore, not a partner in this at all, and all must be awarded to the owner of the house.[140]

[138] *Resp. Yad Ramah, Hoshen Mishpat* 80.

[139] See Part 2, text at note 109.

[140] R. Solovei, op. cit. (note 138 above), holds, however, that the property's owner must reimburse the tenant for the insurance premiums.

Chapter Five

APPENDIX

RIGHTS AS IF ONE FOUND LOST PROPERTY

The question of rights in a transaction where the gain is unanticipated to the extent that it may be considered as the finding of lost property was discussed by the early post-talmudic authorities. While some authorities wished to consider such a transaction equivalent in all respects to the finding of lost property, others rejected this view, claiming that the gain realized in the transaction never was ownerless (as is lost property) and cannot, therefore, be acquired as lost property is acquired.

Sefer Ra'avan[141] contains the following case:[142]

[141] The acronym Ra'avan stands for R. Eliezer ben Natan. On Ra'avan, see above, Part 1, note 71.

[142] *Sefer Ra'avan*, *Baba Metzia* 11a (ed. Ehrenreich p. 197b); cited also in *Or Zaru'a*, *Baba Metzia* 2:69; and in *Mordekhai*, *Baba Metzia* (chap. 1) 238.

A number of merchants took lodging in the home of A. B sought out the merchants for the purpose of purchasing their merchandise. A said to B, "I wish to acquire the merchandise for myself, and my house acquires it for me." B did not listen to him and purchased the merchandise at a time when A was not at home. A demands that B return the merchandise (and has payment available as he has agreed to the price).

This matter is decided upon the basis of a *mishnah* in tractate *Baba Metzia* [11a], "If a man sees people running after a lost article... and says, 'My field acquires possession for me,' it acquires possession for him." For his home is guarded [that is to say fenced] and he is present.[143] So here, does A's home acquire for him the merchandise that is in it. Also in keeping with the biblical verse [Deut. 6:18], "And you shall do that which is right and good in the sight of the Lord...," B is obliged to return the merchandise to A, as in the right of pre-emption.[144]

[143] The *mishnah* excerpted reads as follows: "If a man sees people running after an injured stag [or] after unfledged pigeons, and says, 'My field acquires possession for me,' it acquires possession for him. But if the stag is running normally, or the pigeons are flying and he says, 'My field acquires possession for me,' there is nothing in what he says." The ensuing talmudic discussion explains that a man's field can acquire property for him if it is "guarded," or if the owner is present by his field. In the case of a healthy stag or pigeons that fly, however, even the owner's presence is not sufficient, since he cannot exercise any control over them.

Thus, one's field, yard, or house can acquire ownerless chattels, provided the chattels cannot escape.

[144] The right of pre-emption means that when real property is sold, the owner of adjoining property has the right to pay the purchase price, acquire the land for himself and evict the purchaser. The Talmud (*Baba Metzia* 108a) bases this right on Deuteronomy 6:18. See Maimonides, *M.T.*, *Shekhenim* 12:5; and *Sh. Ar.*, *Hoshen Mishpat* 175:6.

Ra'avan bases his ruling on two principles: (1) acquisition of lost property; (2) the biblical imperative, "And you shall do that which is right and good in the sight of the Lord...," as it operates in the right of pre-emption.

Ra'avan's grandson, Ravya,[145] however, holds that the legal mechanism of acquisition of lost property is not applicable beyond its original meaning:[146] "Lost property is different, for it can be acquired without an act of acquisition or money. Here, however, perhaps he will not have the money to purchase...." Ravya goes on to show that a purchaser does not acquire property until the vendor agrees to the transaction. According to Ravya, in the present instance, the normal principles governing acquisitions and sales are determinative.

Rosh[147] also considers acquisition through sale and distinguishes between acquisition through sale and through the finding of lost property:[148]

> When one purchases property from a thief, it is not ownerless property, concerning which it may be said that one's land [or one's home] acquires it; for if the original owner has despaired of recovering it,[149] then it belongs to the thief, and if we hold in accordance with R. Shimon, that an owner does not normally despair of recovering a theft, the stolen property still belongs to

[145] Ra'avya, R. Eliezer ben R. Yo'el haLevi, was born in Mainz, ca. 1140 and died in Wuerzburg, ca. 1225. He was a widely recognized authority in Germany.

[146] *Or Zaru'a*, loc. cit., and *Mordekhai*, loc. cit. (note 142 above).

[147] R. Asher ben Yehi'el, one of the most distinguished of the early post-talmudic commentators, was born in Germany, ca. 1250 and died in Spain in 1327.

[148] *Resp. Rosh* 1:1.

[149] According to Jewish law, when property is lost or stolen, it belongs to the original owner until such time as he despairs of recovering it.

> the original owner. In either case, then, the stolen property is not ownerless, and one's land cannot acquire it. And even if it were ownerless, as long as it is in the physical possession of the thief, one's land cannot acquire it until it is placed on the ground....

In light of the disagreement between Ra'avan and Ravya, R. Israel Isserlein[150] rules[151] that the law in such cases is doubtful and that consequently the court may not seize property in the possession of one of the parties and award it to the other.

R. Yosef Katz[152] favors the opinion of Ra'avan.[153] Basing himself on the rulings of Rosh and R. Israel Isserlein, R. Katz first establishes that land cannot acquire chattels in a transaction as it acquires lost property. Nevertheless, in the matter before him, he rules that the home owner has rights in the purchase for several reasons. In conclusion, R. Katz favors the ruling of Ra'avan, because of the latter's decision was an actual ruling, whereas Ravya's discussion was theoretical.[154]

There is a responsum by R. Yo'el Sirkes that is similar in several respects to that of R. Yosef Katz.[155] R. Sirkes too cites Rosh's remarks on purchase from a thief and notes

[150] R. Israel (Mahari) Isserlein was the most widely respected Ashkenazi authority of his generation. He was born ca. 1390 and died in 1460.

[151] *Terumat haDeshen*, responsa 310.

[152] See note 123 above.

[153] *Resp. She'erit Yosef* 7. See text at note 124 above.

[154] R. Katz's additional reason is interesting: Since this is the accepted way of doing things, it is what the parties must have had in mind: "Since 'The gain goes to the common advantage' is a common expression, it may be presumed that he acquired it with this in mind, and that this constitutes the [other's] acquisition."

[155] R. Yo'el Sirkes was the author of *Bah*, a gloss on *Tur*. See note 126 above.

that this accords with Ravya's interpretation of *Mordekhai*. He then goes on to add:[156]

> It may be that Ra'avan did not consider the case to be one of property that was lost and, therefore, ownerless, but rather one of guests who brought merchandise with them and laid it on the floor of the house [thus permitting it to be acquired by the house]. As regards property in the possession of a thief, however, even Ra'avan would agree that a home owner cannot claim, "my house acquired it."

Shulhan Arukh cites the opinion of Rosh as authoritative:[157] "Where A lives together with B in the home of B and pays him rent, if one of them purchased property from a thief, the other has no rights to it." In the matter discussed by Ra'avan and Ravya, of a home owner who wished to acquire merchandise cheaply, Rema, in his comments on *Shulhan Arukh*,[158] cites both opinions without deciding between them.[159]

[156] *Resp. Bah (haYeshanot)* 12. See text at note 127 above.
[157] *Hoshen Mishpat* 260:3.
[158] Rema, *Hoshen Mishpat* 268:3
[159] Cf. Rema's rulings in *Sh. Ar., Hoshen Mishpat* 269:6; and ibid., 183:4. See also standard commentators on whether the rulings are contradictory. See also *Resp. Bah (haYeshanot)* 19.

Chapter Six

CONCLUSION

The laws concerning the rights of agent and principal to unanticipated gain created by the agency have been examined from two perspectives. One perspective was from the laws of agency, and alongside that, we examined the right of a person to share a gain that he was instrumental in creating, and we found that, even where the laws of agency do not award a share in the gain to the principal where he was instrumental in its creation, the principal's right to enjoyment of a gain is recognized. The principle originated in the Jerusalem Talmud and was adopted by a number of the early post-talmudic authorities.

Of particular interest is the development of this principle in *Shulhan Arukh* and the standard commentaries. The approach that entitles whoever is instrumental in a gain to a share of that gain is not mentioned explicitly in *Shulhan Arukh*, but the commentators re-introduce it as a consideration available to judges where warranted by circumstances. This applies in cases where added consideration is granted to an agent, as well as in cases where the agent, by deviat-

ing from his instructions. has produced an unanticipated gain.

Discussion of the principle yielded distinctions between various cases according to the strength of the connection between the unanticipated gain and the agency. This test was applied to the possibility of invoking the principle in instances where an unanticipated gain resulted from an error in the transaction.

Later authorities suggest that the rights of a party instrumental in an unanticipated gain do not arise in strict law but rather in rabbinic legislation.

The approach that a person instrumental in creating a gain is entitled to share that gain was not applied to the classical cases in which one person benefits while the other sustains no loss.[160] In such cases, the beneficiary is exempt from all obligations. Nor was it applied to circumstances where one person profits from "his neighbor's cow,"[161] where the owner is entitled to the entire benefit.

In cases such as those discussed in the present part, the agent does not simply benefit from his agency in the sense of avoiding expenses; rather, he profits from it by receiving a real gain.[162] His level of obligation is, therefore, greater than that of one person who merely benefits. On the other hand, by contrast to profiting from "one's neighbor's cow," the agent does not derive his profit at the expense of some loss to the principal. Therefore, one cannot say here that the entire profit belongs to the principal. The situation is thus one where the rights of principal and agent are deemed to be equal, seeing that both were instrumental in

[160] See Part 1.
[161] See Part 2.
[162] See *Helkat Yo'av, Hoshen Mishpat* 9.

creating the gain – one through his property and the other by his action.

Had our principle been extended so as to grant rights to everyone instrumental in creating gain, the consequences would have bordered on the absurd. As shown, however, the principle does not apply to those whose instrumentality is remote.

The legal status of an agent who received benefit in consequence of his agency was examined in light of the laws of agency and the laws of a person who benefits from the property of another. Under certain circumstances, however, the action of an agent may constitute a breach of the trust placed in him and even reach criminal proportions. In such instances, he may be subject to criminal proceedings and compelled to surrender all gains received in consequence of his agency.[163]

[163] See Nahum Rakover, *Anishah beMa'aseh haBa baAveirah*, monograph no. 2 of *Sidrat Mehkarim uSekirot baMishpat haIvri* (Jerusalem, 1970).

Appendix One

The Talmudic Discussion on Unjust Enrichment - by Stages

Baba Kama 20a-21a

	Stage		Act	Loss
Presentation of the problem	1	One who resided in his neighbor's premises unbeknown to his neighbor, does he have to pay rent?	BY	
Three categories	2	(a) Premises that are not for hire, and a tenant who does not normally rent = no loss to the owner and no benefit to the tenant: No obligation to pay.		
	3	(b) Premises that are for hire and a tenant who normally rents = the tenant derives benefit and the owner sustains loss: he must pay.		Y
	4	(c) Premises that are not for hire, and a tenant who would normally rent = The tenant derives benefit and the owner sustains no loss: what is the law?	BY	N
The problem	5	The beneficiary says to the benefactor: "What loss have I caused you?" He replies: "You have derived benefit."		
Opinion that he must pay	6	Opinion held by Rami Bar Hama		
Proof that he must pay	7	Our Mishnah: If an animal eats produce in the public domain, the animal's owner must pay for the benefit to the animal.	BY	[N]
Rejection	8	In our *mishnah*, one derives benefit while the other sustains loss.		Y
Proof that he must pay	9	If A erects a fence on four sides of B's property, B must pay.	BR	[N]
Rejection	10	The benefactor says to the beneficiary, "You caused me a greater circumference."		Y
Proof that he is exempt	11	According to R. Yosi, B must pay only if B erects a fence on the fourth side, not if A does.	BY, BR	[N]
Rejection	12	B argues that he would have been satisfied with a fence costing 1 *zuz*.		
Proof that he is exempt	13	A two-story house collapses. The owner of the second story (B) may rebuild the first story and live there without having to pay rent.	BY	[N]
Rejection	14	The first story is responsible for the upper story.		
Proof that he must pay	15	According to R. Yehudah, B must pay rent.		N

	Stage		Act	Loss
Rejection	16	A suffers a loss: the walls are blackened.		Y
Opinion that he is exempt	17	R. Ami: "What harm has B done to A? What loss has he caused him? What damage has he done?"		
Expression of doubt	18	R. Hiyya son of R. Abba: "We must consider the matter carefully."		
Opinion that he is exempt	19	R. Kahane in the name of R. Yohanan: "B is not obliged to pay rent."		
Opinion that he must pay	20	R. Abahu in the name of R. Yohanan: "B is obliged to pay rent."		
Proof that he must pay	21	Dwelling in or benefit from Temple property constitutes *me'ilah*.	BY	N
Rejection	22	Use of Temple property unbeknown to Temple authorities is equivalent to use of private property with its owner's knowledge.		
Opinion that he is exempt	23	In the name of Rav: he is exempt from payment.		
Proof that he must pay	24	In the name of Rav: If A rents a house from B, and later it is discovered that the house belongs to C, A must pay rent to C.	BY	
Rejection	25	That applies to a dwelling that was for hire.		Y
Proof that he is exempt	26	In the name of Rav (or R. Huna): he does not have to pay rent.		
Proof that he must pay	27	In the name of Rav: One who rents a house from the city residents, etc., must pay rent to the owner.	BY	N
Rejection	28	There the dwelling was for hire.		Y
A reason for exempting him	29	R. Sehorah in the name of Rav: Because it is written: "*She'iyyah* smites the gate".		
A reason for exempting him	30	R. Yosef: Property that is inhabited is cared for.		
Difference between the reasons	31	Where the property's owner stores wood and straw on the property.		
Proof that he must pay	32	R. Nahman compelled a person who built on an orphans' dung heap to pay.	BR	Y
Rejection	33	The orphans could have earned a small amount from others.		Y

Legend: BY = Act of the beneficiary. BR = Act of the benefactor. Y = One derives benefit and the other sustains loss. N = One derives benefit and the other sustains no loss. [N] = Classification as "one derives benefit and the other sustains no loss" is rejected in the Talmud's conclusion.

Appendix Two

UNJUST ENRICHMENT LAW, 5739-1979

Duty of restitution

1. (a) Where a person obtains any property, service or other benefit from another person without legal cause (the two persons hereinafter respectively referred to as "the beneficiary" and "the benefactor"), the beneficiary shall make restitution to the benefactor, and if restitution in kind is impossible or unreasonable, shall pay him the value of the benefit.

(b) It shall be immaterial whether the benefit was obtained through an act of the beneficiary or an act of the benefactor or in any other way.

Exemption from restitution

2. The Court may exempt the beneficiary from the whole or part of the duty of restitution under section 1 if it considers that the receipt of the benefit did not involve a loss to the benefactor or that other circumstances render restitution unjust.

Deduction of expenses

3. The beneficiary may, in making restitution, deduct what he has reasonably expended or undertaken to expend or invested in order to obtain the benefit.

Person who pays another person's debt

4. A person who pays another person's debt without being under duty towards him to do so is not entitled to restitution nnless the other person has no reasonable cause to object to the payment of the whole or part of the debt and not beyond the amount paid.

Person who acts to protect another person's interest

5. (a) Where a person, in good faith and reasonably, does any act to protect the life, physical integrity, health, honor or property of another person without being under duty toward him to do so and in that connection incurs or undertakes to incur any expenses, the beneficiary shall indemnify him for his reasonable expenses, including obligations incurred by him toward a third party, and if damage is caused to the property of the benefactor in consequence of the act, the Court may order the beneficiary to pay compensation to the benefactor if it considers it just to do so in the circumstances of the case.

(b) For the purpose of the obligation to pay compensation under subsection (a), a person whose property is used for the protection of any of the above values shall be treated as a person who does an act for the protection of those values.
(c) The duty of indemnification or compensation under this Section shall not fall on a beneficiary who objects or has reasonable cause to object to the act or the use of property or to the amount of the expenses, unless the act was done or the property used to protect his life, physical integrity or health.

Scope of application and saving of remedies

6. (a) The provisions of this Law shall apply where no other Law contains special provisions as to the matter in question and no agreement between the parties provides otherwise.
(b) This Law shall apply also to the State.
(c) This Law shall not derogate from any other available remedy.

Repeal

7. Section 3 of the Law of Torts Amendment (Repair of Bodily Harm) Law, 5724-1963, is hereby repealed.

Menahem Begin
Prime Minister

Shmuel Tamir
Minister of Justice

Yitzchak Navon
President of the State

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Bibliography

Albeck, S. "HaOseh Tovah laHavero sheLo miDa'ato," *Sinai* 71 (1972), 98-111

Alon, G. *Mehkarim beToledot Yisrael,* vol. 2, pp. 91-92

Barak, A. *Hok haShelihut*, 1965 (2nd ed., Jerusalem, 1996), p. 92; pp. 1067-1069, 1128-1131

Blas, Y. *Asiyat Osher veLo beMishpat.* Hok leYisrael, ed. Nahum Rakover, Jerusalem, 1992, pp. 11, 21, 30, 53, 185

Corinaldi, M. "Shomer sheMasar leShomer baMishpat haIvri uveHok haShomerim, 1967," *Shenaton haMishpat haIvri,* 2 (1975), 452

Dawson, J. P. Unjust Enrichment (1951), chap. 1

Eliash, B. Z. "Al Dinei haBitu'ah baMishpat haIvri," *Iyyunei Mishpat,* 1, 359 (at 367)

Friedman, D. *Dinei Asiyat Osher veLo beMishpat* (2nd ed., Jerusalem, 1998), pt. 1, pp. 7, 43, 429

Goff and Jones, Law of Restitution (3rd ed., 1987)

Kahane, B. *Shomerim.* Hok leYisrael, ed. Nahum Rakover, Jerusalem, 1999, pp. 466-469

Lichtenstein, A. "LeVerur 'Kofin Al Midat Sedom,'" *Hagut Ivrit baAmerikah* 1, Tel Aviv, 1972, 362

Lieberman, S. *Talmudah Shel Keisarin*, p. 39, n. 43

Rakover, N. A Bibliography of Jewish Law – Otzar haMishpat, s.v. *Yored lenikhsei havero, Me'en hozeh* and s.v. *Zeh neheneh vezeh lo haser*, vol. 1, Jerusalem, 1975, p. 436; vol. 2, Jerusalem, 1990, pp. 453-454