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בבא מציעא ד׳
The Chicago Center

OVERVIEW of the Daf

1) The testimony of witnesses for half the claim (cont.)

The Gemara continues to struggle to pinpoint the source of R' Chiya's teaching that a defendant who denies a claim entirely and witnesses testify that he owes half the money must pay half and swear regarding the remainder.

The final conclusion is that the rule of R' Chiya is based on a צד השוה.

The support that R' Chiya cited from our Mishnah is successfully challenged.

The Gemara concludes that the support R' Chiya derived from our Mishnah was for a different halacha.

2) "Here, it is yours" – הילך

R' Chiya maintains that one who admits to part of a claim and offers to pay (הילך) is still obligated to take the oath of partial admission (מודה במקצת), whereas R' Sheishes maintains that he is exempt from taking an oath.

R' Sheishes's position is unsuccessfully challenged.

An unsuccessful challenge from a Baraisa to R' Chiya's position is presented.

According to a second version the challenge from the Baraisa is developed from the latter ruling of the Baraisa and it constitutes a challenge to R' Sheishes.

The Gemara defends the position of R' Sheishes and cites support for this explanation.

This explanation would seem to present a challenge to R' Chiya.

R' Chiya offers two alternative explanations of the Baraisa.

(Continued on page 2)

REVIEW and Remember

1. Why does a person who denies a loan remain fit to give testimony?

2. What is the point of dispute between R' Chiya and R' Sheishes?

3. What is the dispute between R' Shimon ben Elazar and R' Akiva?

4. Explain זוקקין.

Distinctive INSIGHT

Does הילך apply to loan money that was not used?

דאמר ר׳ חייא מנה לי בידך והלה אומר אין לך בידי אלא חמשים זוז והילך—חייב

The general rule is that if a financial claim is made against a person, and he admits to part of the claim (מודה במקצת), he pays the amount he agrees that he owes, and he must take an oath to confirm that he owes no more. The lesson of R' Chiya is that although someone is, in effect, making a partial admission, if he offers that amount to which he agrees up front and says "here it is (הילך)," we consider that amount as paid, and the remaining amount is now seen as being totally denied, for which there is no oath. Regarding the response of the borrower when he says "here it is," Rashi explains that he says, "I never used that which you gave me, and it is yours wherever it is." Rashba and Ran explain that Rashi understands that the rule of הילך only applies to a deposit (פקדון), which, if not used, can be returned to its owner by informing him that it was not taken. However, a loan is, by definition, given to be spent. Even if the borrower does not use the money and he returns the same coins he received, the halacha considers the original money as having been spent, and the money being paid back is not in the possession of the lender until it is actually repaid.

אמרי בינה to Choshen Mishpat (טוען ונטען כ״ז) explains that if the borrower is returning new money, it would be considered הילך even according to Rashi provided that he returns the money in Beis din. If the borrower did not use the original money, and he states his intention to return those same coins he received, it would be הילך even without bringing the money to Beis din, just as we find regarding an item deposited with him.

Rabbi Akiva Eiger (to Mishna, Shevuos 7:2) asks a question regarding the opinion of Rashi that הילך applies to the return of a deposit wherever it is. What would we say in a case where the one guarding the object denied that he had it, and witnesses came and testified that he, in fact, had it? In this case, the owner would not be able to consecrate the object, so we would perhaps say that the item is not automatically in the possession of the owner with a promise of its being returned. (Even though Rav Nachman [later, 7a] says that if a person can consecrate an item once he has a legal power to gain possession of it, this is not the case when the item is stolen.)

It seems that the status of "being in the possession of the owner" might be a function of whether the owner can consecrate the object. ■

HALACHAH Highlight

Qualifying the law of הילך

אין לך בידי אלא נ' זוז והילך

"I don't have any more than fifty zuz of yours, and here they are."

Ketzos HaChoshen[1] writes that for a defendant to qualify for the halacha of הילך it is not necessary for him to literally hold the object in his hand; rather as long as he could quickly return the claimed item the halacha of הילך applies. A limitation that he does apply to the halacha of הילך is that if the defendant cannot point to a specific item and declare "this is yours" it is considered a regular case of מודה במקצת—partial admission and an oath would be required. For example, a customer claims to have purchased two seah of wheat from a distributor and the distributor responds that he only sold one seah of wheat and is prepared to deliver that one seah of wheat. Here, the distributor can deliver any grain that he chooses, as long as it totals a seah. If he would have stated that he sold a particular seah of wheat, it would qualify as a case of הילך that exempts the defendant from taking an oath if he could retrieve it readily.

The difficulty with this qualification is that the Gemara considers the case of the Mishnah of two people claiming ownership of a talis to be an example of הילך and yet the Gemara later on (7a) explains that the Mishnah refers to a talis that has a gold strip on it which is closer to one person's grip rather than the other's. The Mishnah's ruling teaches that although the person who grasps the talis closer to the gold claims that he should be given the entire strip of gold, we say to him, "why should we split the talis along the length when it could also be divided along its width" which would have the two parties split the gold strip. If, however, neither one has a definitive claim to an identifiable object it should not be considered a case of הילך. Ketzos HaChoshen answers that since it is Beis Din who makes the decision how to divide the talis rather than the defendant it does indeed qualify as a case of הילך and it is only when it is up to the discretion of the defendant to decide what item to give to the plaintiff do we exclude the case from being categorized as a case of הילך. ■

1. קצות החושן סי' פ"ז סק"ב ■

(Overview. Continued from page 1)

Another challenge to R' Sheishes is presented.

R' Sheishes begins to defend his position from this challenge. ■

STORIES Off the Daf

Unclaimed possessions

הואיל והודה במקצת הטענה ישבע...אינו אלא כמשיב אבידה ופטור

A certain man passed away and left his close friend in charge of his vast estate. This man had been a trusted business partner of the deceased, and always provided ready cash upon receipt of collateral. Those items left in his keeping were sometimes worth a great deal more than the loan.

After some time, one of the children of the deceased noticed certain expensive garments in this man's possession that looked similar to some garments that had been his father's. He took the executor of his father's estate to beis din and accused him of embezzling the garments from the inheritance.

The accused responded, "Most of the garments you saw are mine. Two of them were actually your father's, but they were given to another man when your father went with him to beis din in a different area many years ago. I am his messenger and have been given explicit instructions regarding these garments. I have no idea what transpired with the remainder of the garments."

The son demanded that the guardian swear, but the executor refused.

The beis din was at a loss as to what to do in this case. First of all, it was possible that the guardian was not obligated to swear. Since there were no witnesses, perhaps he is likened to one who returns a lost object?

Second of all, if he was obligated to swear, was he obligated mid'oraisa or mid'rabbanan? This was highly relevant in this case since if it was a Torah oath, he would either have to swear or beis din would take the garments from him. If this was a rabbinical oath the guardian would not be forced to give up the object although there were other pressures that beis din would bring to bear on him.[1]

They consulted with the Sho'el V'nisha'l, zt"l, regarding this complex matter. "This is definitely not a case of modeh b'miktzas, since the man did not admit to owing the plaintiff anything. He merely admitted that two of the garments were not his. Although he is obligated to take an oath, it is merely d'rabbanan and we cannot confiscate the garments even if he refuses to swear."

He concluded, "However, you mentioned that there were securities in this man's hands. If the son does not believe that he dealt with them in an honest manner he can force him to swear on them and everything else in a single Torah oath."[2] ■

1. עיין חו"מ ס' פ"ז
2. שו"ת שואל ונשאל חו"מ ס' כ"ח

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