

OVERVIEW of the Daf

1) Claims of certainty (cont.)

Rava's ruling that was cited to support R' Nachman is presented.

The Gemara elaborates on how the Mishnah could be understood in light of Rava's ruling.

A second way of explaining the Mishnah in light of Rava's ruling, this time in accordance with Rami bar Chama, is presented.

2) Clarifying the Mishnah

The Gemara questions the Mishnah's ruling that the borrower/renter must swear when there is a disagreement which of two cows died.

Ulla explains that the oath is imposed through the mechanism of גלגול.

The Mishnah's ruling that disputed money is split is explained as following the ruling of Sumchus regarding money that is in doubt.

3) Borrower/renter

R' Abba bar Mamal inquires about the application of the halacha of בעליו עמו when someone is a borrower/renter.

The essence of the question is explained.

Two further applications of this question are presented and explained.

These inquiries are left unresolved.

4) MISHNAH: The Mishnah discusses who has liability when an animal is sent from the lender to the borrower or the borrower to the lender. ■

REVIEW and Remember

1. What was Rava's ruling that formed the basis of the explanation of the Mishnah?

2. What is Rami bar Chama's position that forces the Gemara to come up with a new explanation of the Mishnah?

3. What גלגול שבועה is used to get the borrower/renter to swear that it was the rented cow that died?

4. Who is responsible for an animal that is in transit?

Distinctive INSIGHT

The watchman claims, "I do not know"

מתוך שאינו יכול לישבע משלם

The Mishnah stated that the defendant must pay in a case where Reuven claims that Shimon owes him reimbursement for a cow which he gave him, and Shimon responds by saying "I am not sure if I owe you money." The Gemara notes that the halacha in this scenario is disputed by Rav Huna and Rav Yehuda who say the defendant is liable, and Rav Nachman and Rav Yochanan who say the defendant is exempt. It seems, therefore, that our Mishnah shows that Rav Nachman is incorrect.

The Gemara explains that, according to Rav Nachman, the third case of the Mishnah is discussing a case where Reuven gave three animals to Shimon. Reuven, the owner, claims that two were lent, while the third was rented. Shimon admitted that one cow was borrowed, it died, and that he will pay for it. Shimon explains that a second animal also died, but he is not sure if it was borrowed, for which he would have to pay, or if it was rented, in case he would be exempt. In effect, the case is מודה במקצת, a partial admission to pay for one out of the two animals which Reuven claimed. The halacha here is that Shimon pays the one animal about which he admitted, and Shimon would normally have to take an oath to exempt himself from further payment. However, since his counterclaim to Reuven is "I do not know if I owe you," Shimon cannot swear that he does not know. Here, even according to R' Nachman, Shimon must pay. The rule is "מתוך שאינו יכול לישבע משלם—since he cannot swear, he pays instead."

The Rishonim discuss how this rule affects a person whose reputation is legally tainted, and who is suspect (חשוד) regarding oaths. It seems that since he cannot take an oath, he would automatically have to pay anytime he is involved in a case where an oath would be appropriate. Tosafos (ד"ה (מתוך), however, notes that the Gemara in Shevu'os (44b) says that there is a rabbinic injunction to protect the one who is suspect regarding oaths, and the one claiming against him must take the oath, and he can then collect (התובע נשבע) (ונוטל). The reason is that the חשוד would be too vulnerable to loss. Someone would lend him a small sum, and then claim a larger sum. When the חשוד would claim מודה במקצת, he would not be able to swear and he would immediately have to pay.

In our case, the rabbis did not have to protect the watchman who claims "I do not know" by reversing the oath to the owner. Here, the watchman is not categorized as vulnerable as we found regarding the חשוד. It is only in this case where he claimed "I do not know" where he cannot swear. ■

HALACHAH Highlight

Becoming a borrower upon transfer to the delivery person או ביד בנך ביד עבדך ביד שלוחך

Send in the hand of your son, the hand of your slave or the hand of your agent

The Gemara relates that when the borrower asks for a cow to be sent with the owner's son, slave or agent the borrower becomes responsible for that cow when it is given to the person assigned with the task of making the delivery. The question many of the commentators ask is that although the borrower wants someone to deliver the cow to him, nevertheless, if he did not appoint that person as his agent how does he become responsible as a borrower for the cow when it is given to the delivery person? Ra'avad¹ answers that the Gemara refers to a circumstance in which the lender told the agent to acquire the cow on behalf of the borrower. Once the delivery person accepts the cow he becomes the agent of the borrower. Even though there is a negative outcome to this, i.e. the borrower is responsible if something happens to the cow, nevertheless it stands because halacha allows for something that has a negative impact as long as it is done with his consent

(חבין לאדם שלא בפניו, מדעתו).

Ran² asserts that the borrower's responsibility is not a function of the delivery person acting as his agent; rather it is a function of the concept of ערב. Once the borrower instructs the owner to let the animal out of his domain he becomes responsible for that item. Nesivos Hamishpat³ challenges the application of the ערב principle to our case. The normal case of ערב involves one person spending money on the instruction of another and that person takes responsibility for that money. In our case it is difficult to understand why the borrower should be responsible for the death of the cow. If it was time for the animal to die why should the borrower be liable since it was not due to his instructions that the animal died? He answers that it is clear that the borrower becomes a watchman since he instructs the owner to forgo watching the animal personally and hand over the responsibility to watch the cow to someone else. Once he has entered into the category of a watchman he can obligate himself like a borrower and it is that stipulation that places upon him the liability of a borrower.

1. דברי הראב"ד מובא בשיטמ"ק ד"ה עוד.

2. ר"ן ד"ה שלחה.

3. נתיבות המשפט חו"מ סי' ש"מ ס"ק י"א.

STORIES Off the Daf

A Shomer by default

"שאלה בבעלים שכרה שלא בבעלים
מהו..."

A certain man wished to hire a melamed for his son, but the cost of bringing a melamed to his little hometown was too expensive for him to even contemplate. The only option he had was to send his son away to learn where it would not be so costly.

After much searching, he found an affordable melamed in the closest city who graciously agreed to allow the young man to sleep at his house, but would not supply him with covers or pillows of any kind since he did not have any to spare. They agreed upon the tuition for a certain amount of

time, and the young man arrived with his own linen and learned diligently for the extended period.

When it came time for this young man to travel home he forgot to take his bedding with him. When he arrived, his father was quite upset at this; since he had lagged in paying tuition, he was afraid that the melamed had seized the pillows and covers as a security and most likely would refuse to return them before he received his entire wages. Since the poor man could not yet pay, he bided his time.

Several weeks later, a thief broke into the tutor's home. Among the stolen objects was the student's bedding. The melamed claimed that he was a שומר חנם and as such had no obligation for the stolen items, but the father pointed out that he had surely held them as security and as such he

was a שומר שכר and was responsible for theft.

When this question was brought before the Maharsham, zt"l, he ruled that the melamed was correct. "This is clear from the Ritva in Bava Metzia 88. There we find that Rabbi Elazar bar Mamal questioned the halachic status of something borrowed with the owner present and then rented without the owner's presence. If this object was stolen or lost was the borrower obligated or not? The Ritva writes that this question is only regarding if the man rented the object during the tenure of his borrowing. But if his time as a borrower is complete, it is as if he returned the object to the owner and renting is a new phenomenon. The same is true in our case."¹

1. שו"ת מהרש"ם, ח"ז, סי' ב.