

9 Elul 5776
Sept. 12, 2016



Bava Kamma Daf 104

Produced by Rabbi Avrohom Adler, Kollel Boker Beachwood

Daf Notes is currently being dedicated to the neshamot of

Moshe Raphael ben Yehoshua (Morris Stadtmauer) o”h

Tzvi Gershon ben Yoel (Harvey Felsen) o”h

May the studying of the Daf Notes be a zechus for their neshamot and may their souls find peace in Gan Eden and be bound up in the Bond of life

Who's an Agent

When one person sends an item to another, each of the parties – the sender and the receiver – have the power to appoint an agent to do their action. The sender's agent is an extension of the sender, while the receiver's agent is an extension of the receiver. The distinction between these agents is relevant when the agent lost the item on the way to the receiver. If the agent is the receiver's agent, the transfer has already occurred, and the sender has no further obligation. However, if the agent is the sender's agent, the loss occurred in the realm of the sender, and is the responsibility of the sender. The *Gemora* cites a dispute whether an agent appointed by the receiver in front of witnesses is considered his agent. Rav Chisda says that such an agent is fully authorized as the receiver's agent. According to Rav Chisda, the reason the person bothered to appoint the agent in front of witnesses was to empower him to receive payment in place of him. Rabbah says that this agent is not fully empowered, and payments that are given to him are not considered completed until the appointer receives it. According to Rabbah, the only reason the person appointed the agent was to indicate that he trusts him to not steal the money paid, but not to make him his true representative.

The *Gemora* first tries to use a *Mishna* in Bava Metzia to resolve this dispute. If one borrows an item, he is liable for any damage or loss of the item, unless these are a result of using the item. However, this liability only begins once the borrower receives the item, and his borrowing

thus begins. The *Mishna* states that if one borrows a cow, and the lender gives the cow to his or the borrower's son or agent, the borrowing has not begun, and the borrower is not liable if the cow dies. The *Gemora* states that the borrower's agent mentioned in this *Mishna* must one who was appointed by the borrower, because we would otherwise have no reason to consider him an agent. The *Mishna* therefore seems to indicate that such an agent does not fully represent the appointer. The *Gemora* says that we can deflect this proof, by using Rav Chisda's statement (*below*) that the agent is the borrower's worker or tenant. Since such a person is a close confidant of the borrower, we may have thought that he is authorized to receive the cow.

The *Gemora* then tries to use our *Mishna* to resolve the dispute. The *Mishna* (102b) had stated that if one stole an item, he must repay the stolen item himself, and may not fulfill his obligation by giving it to the victim's son or agent. Once again, the *Gemora* states that the agent discussed is one appointed in front of witnesses, since we would otherwise have no reason to consider him an agent. Rav Chisda answers that the agent is the borrower's worker or tenant, who we may have considered his full representative. The *Gemora* challenges this reading from the continuation of the *Mishna*. The *Mishna* later states that if one submits payment to an agent appointed by the court, he *has* fulfilled his obligation. If Rav Chisda is correct, and an agent appointed in front of witnesses is sufficiently authorized, the *Mishna* should have listed such an agent in this latter section. The *Gemora* answers that the *Mishna* preferred

the case of an agent of the court, since such an agent can be created by the thief or the victim, while only the victim can create an authorized agent through witnesses. The *Gemora* says that the *Mishna*, which allows both the victim and the thief to create a fully authorized agent via the court, is in dispute with Rabbi Shimon ben Elozar. Rabbi Shimon ben Elozar says that a thief has discharged his obligation to pay, either if he paid a court agent appointed by the victim, or if the victim retrieved the payment from a court agent appointed by the thief. The second option indicates that a court agent appointed by the thief is not fully authorized, and is no different than any other agent appointed by the thief.

The *Gemora* states that Rabbi Yochanan and Rabbi Elozar agree with Rav Chisda. They have two responses to the seeming proof from our *Mishna*. The first is that our *Mishna* is not a case of an agent, per se, but rather someone who the victim instructed to offer his services to the thief for delivering the payment. Such an agent is only an agent for the thief's delivery, and not an agent for the victim's acceptance. The second response is that the *Mishna* is Rav Chisda's case of a worker or tenant.

Rav Yehudah said in the name of Shmuel that one should not pay back money to his creditor's agent, even if the agent brings a document with the creditor's seal or other identifying signs, since these do not empower the agent to receive the money on behalf of the creditor. This is true even if witnesses attest to the seal belonging to the creditor. Rav Yochanan says that if witnesses signed the document, the agent is authorized, and one may pay the money to him. The *Gemora* questions, according to Shmuel, what option one has to fully empower an agent to receive his money for him. The first option considered is writing a document stating that the creditor will have received the money once the agent receives it. The *Gemora* rejects this as a full solution from a story. Rabbi Abba lent money to Rav Yosef bar Chama. When Rav Safra was traveling to Rav Yosef's area, Rabbi Abba asked him

to retrieve his money from Rav Yosef for him on the way back. When he went to Rav Yosef, Rav Yosef's son, Rava, asked whether Rabbi Abba wrote a document stating that Rav Safra's receiving the money would be considered Rabbi Abba's receiving it. When Rav Safra said that he hadn't written that, Rava told him to go back and get such a document. On further consideration, Rava said that even such a document would not suffice, since if Rabbi Abba would die, his authorization would not obligate his heirs. Instead, the only option is to give the agent ownership of the money from the present time, by using a *kinyan agav* – transferring them as an adjunct to a real estate transfer. Once this is done, the agent actually is a party to the transaction, since he owns the money that he is retrieving. Rav Pappa did this, when he was owed 12000 zuz by people in Bai Chozai. He transferred the money to Rav Shmuel bar Abba along with his door post (*which is real estate*), using *kinyan agav*, and when Rav Shmuel bar Abba returned with the money, Rav Pappa went out to greet him all the way to Tvach.

Is Chomesh Money?

The *Mishna* had stated that if one paid back the principle, but not the one fifth fine (*chomesh*), he need not bring the *chomesh* all the way to the victim. The *Gemora* proves from three sources that *chomesh* is a bona fide monetary obligation:

1. From the fact that our *Mishna* must tell us the exclusion of responsibility to deliver it to the victim, we see that *chomesh* is considered bona fide monetary payment owed by the thief, and if he dies, it must be paid by his heirs.
2. Similarly, we can see this from the continuation of the *Mishna*, which states that if the thief denies owing the *chomesh*, falsely swears, and then admits, he must pay the *chomesh*, with a one fifth fine on the *chomesh*, just as he would on any other money.

3. The *Gemora* also proves this from a braisa which states that if one stole, falsely swore that he didn't, and then died, his heirs must pay the principle and *chomesh*, but not bring the *asham gezeilah* sacrifice.

The *Gemora* then brings a braisa that seems to contradict this concept. The braisa states that an heir does not pay *chomesh* for his late father's theft, whether he and/or his father falsely swore, since the verse says that one pays *chomesh* for the money *asher gazal* – that he stole or *asher ashak* – that he unfairly got, and the heir didn't take any money illegally.

Rav Nachman answers that this *braisa* is a case where the father never admitted the theft, and therefore never was obligated to pay the *chomesh*. The first sources are a case where the father admitted the theft before he died, and therefore was obligated to pay the *chomesh*. Once the father was obligated to pay the *chomesh*, when he dies, his heir must pay it.

The *Gemora* challenges this answer, since the *braisa* that exempts the heir from *chomesh* is only discussing *chomesh* payment, implying that the heir must pay the principle. If the father never admitted his theft, the heir need not pay the principle either. To prove this, the *Gemora* brings another *braisa* that states that an heir must pay principle that was stolen by his father only if both he and his father falsely swore to deny the theft. If either he or his father did not falsely swear, the heir is not obligated to pay the principle. (The *Gemora* parenthetically discusses the end of this braisa. The braisa quotes a verse as a proof to its statement, and then says “yesh talmud” - there is a source. Rav Huna was teaching this braisa, and his son Rabbah asked whether the end of the braisa is read “yishtalmu” - they should be paid, from a purely logical perspective, or “yesh talmud” - we have a textual source, but otherwise, we wouldn't know this. Rav

Huna answered that the correct reading is “yesh talmud”, i.e., this Halacha is derived solely from the verse.)

The *Gemora* clarifies that Rav Nachman meant that the *braisa* is a case where the father didn't admit the theft, but the heir did. Therefore, the heir must pay the principle, but not the *chomesh*. The *Gemora* asks why the heir is not then obligated to pay the *chomesh* for his own false oath, as the *braisa* included a case where the heir himself swore falsely. The *Gemora* says that the case is where the stolen item does not exist. In this case, even if the heir admits his father's theft, he is not obligated to pay, so his denial did not cause any monetary loss. Even so, if he has real estate that he inherited, the principle must be paid from the estate, as long as his father's theft was adjudicated before his death. Once it was adjudicated, it can be collected from real estate, even from someone who bought and inherited it. The heir does not pay *chomesh* on this money, since *chomesh* (similarly to *kefel*) is not paid on real estate.

Rava answers that the case of the *braisa* is when the stolen item still exists, but was in someone else's possession when the heir falsely swore. Since the item exists, the principle (i.e., the item) must be returned, but since the heir didn't knowingly swear falsely, he need not pay *chomesh*.

INSIGHTS TO THE DAF

Agent authorization

The *Gemora* discussed a number of different types of appointments of agents. Below is a summary of the points cited in the *Gemora*:

Case	Opinions	Why
In front of witnesses	Rav Chisda, Rabbi Yochanan, and Rabbi Elozar:— authorized	The use of witnesses was for authorization
	Rabbah – not authorized	Witnesses simply established the agent as trustworthy
Court agent, appointed by victim	Authorized	Power of court
Court agent, appointed by thief	<i>Mishna</i> -authorized	Power of court
	Rabbi Shimon ben Elozar – not authorized	Court can't act for victim
Dyukni – symbol, with witnesses identifying the symbol	Shmuel – not valid	Not proper authorization
	Rabbi Yochanan – valid	Tantamount to witness authorization

The Rishonim discuss what exactly are the details of the first case. Rashi says that the case is where the victim said to the agent, in front of witnesses, that he should act as his proxy and receive the money from the thief. Even in such a case, Rabbah holds that the agent is not authorized, since only directly telling the thief to give the

money to his agent is full authorization. According to Rashi, if the victim simply told the agent to offer his services as a proxy, this would not suffice, and this is the explanation Rabbi Yochanan and Rabbi Elozar gave for the misna – *mamtzi lo* – when the agent makes himself available. The Rosh, however, says that the case is also where the victim told the agent, in front of witnesses, to offer his services as a proxy to the thief. Since he instructed the agent in front of witnesses, Rav Chisda and Rabbi Yochanan hold that this empowered him to act on the victim's behalf. Rabbah, however, holds that this format is incorrect. The case of *mamtzi lo* is limited to a situation where the victim told the proxy to go to the thief, in the hopes that he will send it with him, but not explicitly telling the thief of this plan. According to both opinions, if the victim explicitly commanded the agent, in the presence of witnesses, to tell the thief that he is his proxy to receive the money, even Rabbah would agree that he is authorized.

In the first case, the Shulchan Aruch (421:1-2) rules like Rav Chisda, since Rabbi Yochanan concurs. The Shulchan Aruch follows the Rosh's explanation, and therefore only excludes the case of where the victim tells the proxy to go to the vicinity of the thief, in the hopes of bringing the money back. In the second case, the Shulchan Aruch rules like Shmuel, since the *Gemora* discusses Shmuel's opinion at length.

See Shach 421:10 for a discussion of the various opinions about *mamtzi lo*.