

23 Elul 5776
Sept. 26, 2016



Bava Kamma Daf 118

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Where to Pay

The Mishna states that if one incurred a monetary obligation (whether due to theft, borrowing money, or guarding an item) in a settled area, he may not pay the obligation back in the desert, an unsettled area. If he does so, the payment is not considered complete, and if the payment is lost, he must pay again. However, if he incurred the obligation on condition that he goes to the desert, he may pay it back in the desert. (118a)

Loans

The Gemora brings a braisa which contradicts the Mishna on where a loan may be paid back. The Mishna stated that a loan may not be paid back in the desert, but the braisa states that a loan may be paid back anywhere (including a desert).

Abaye explains that the braisa is not discussing where the loan may be paid, but where the one claiming the money may demand payment. Since a loan is an obligation to pay money, but not a specific item, it can be claimed anywhere by the creditor. A lost item, or a guarded item, are specific items, where the one paying typically will only keep in their original location, and therefore cannot be claimed anywhere else. (118a)

Conditions

The Gemora discusses the latter part of the Mishna. The simple reading of the Mishna is too simple – if a condition

was explicitly made, it’s obvious that the payment can be made anywhere. Instead, the case of the Mishna is where the owner of the item told the guard that he would like him to watch this item, since he will be going to the desert. In response, the guard told him that he’s also going to the desert, but if the owner would like, he can return it to him in the desert. The Mishna is teaching us that such a conversation is tantamount to a condition, even though nothing was explicitly stipulated. (118a)

Maybe or Maybe Not

The Mishna describes two cases where a person is unsure of a monetary obligation he incurred. If the person tells someone that he knows that he owed him money (by stealing, borrowing, or watching an item), but he doesn’t remember if he paid it, he must pay him. If he is unsure if the initial obligation was incurred at all – i.e., he’s unsure if he stole, borrowed, or agreed to watch – he is not obligated. (118a)

Certainty vs. Possession

The Gemora cites a dispute in a case where one claims that a person owes him money, and the defendant says he doesn’t know if he owes it. Rav Huna and Rav Yehudah say that the defendant is liable, since his unsure claim is overridden by the claimant’s sure position. Rav Nachman and Rabbi Yochanan say that the defendant is not liable, since we cannot remove the money from his current possession without a clear proof.

The Gemora says that the latter part of the Mishna seems to prove Rav Nachman and Rabbi Yochanan's position. Since the first case of the Mishna obligates the unsure person, the Mishna must be referring to a case where the one owed the money is claiming it, and therefore, the second case of the Mishna is the case of the dispute. The Mishna rules that in this case, the unsure person is not liable, in accord with Rav Nachman and Rabbi Yochanan's opinion.

The Gemora deflects this proof by saying that the Mishna may be referring to a case where the person to whom the money was owed did not make any claims. Without a claim, no obligation can be enforced by a court, but the Mishna is discussing the unsure person's personal obligation to pay, if he wants to discharge his true religious responsibility. Only if he is sure of the original obligation does he have any personal religious responsibility to pay.

The Gemora supports this reading from a statement by Rabbi Yochanan, that in the case of the dispute, even though the court cannot force the unsure person to pay, he is obligated to pay, to address his religious obligation. (118a)

Here it is

The Mishna discusses whether a theft victim must know his item was returned in order for the thief to discharge his obligation.

The Mishna seems to make two statements:

1. If one steals a sheep from a flock, and then returns it, if the sheep dies or is stolen, the thief is liable.
2. If the owner did not know about the theft or the return, then counted the flock and found none missing, the thief is not liable.

The Gemora discusses two types of knowledge the victim can have of the theft – explicit knowledge of the theft and the return, or implicit knowledge of the return, due to counting and not finding any missing sheep.

The Gemora brings four opinions on what type of knowledge the victim must have for the thief to not be liable:

	Victim Aware of Theft	Victim Unaware of Theft
Rav	Explicit	Implicit
Shmuel	Implicit	Implicit
Rabbi Yochanan	Implicit	None
Rav Chisda	Implicit	Explicit

The Gemora explains the reading of the Mishna according to each opinion, focusing especially on the scope of the statement about counting.

Rav: The counting statement is referring to the latter part of the Mishna only, and the Mishna reads:

When the victim was aware of the theft, the thief must notify the victim of the return, and until that is done, the thief is liable for any loss of the item.

If the victim was unaware, as long as he counted the flock after the return, the thief is not liable.

Shmuel: The counting statement refers to the whole Mishna, and the Mishna reads:

Whether the victim is aware or unaware of the theft, if the thief returned the item without the victim realizing, he is still liable for the item.

In all cases, if the victim counted his flock after the return, and found none missing, this is full knowledge, and the thief is not liable.



Rabbi Yochanan: The counting statement is referring to the first part of the Mishna only, and the Mishna reads: When the victim was aware of the theft, but didn't know of the return, the thief is liable.

If the victim was unaware, once the thief returns it, he is not liable.

If the victim counted the flock and found none missing, this is the same as knowledge.

Rav Chisda: The counting statement is referring to the first part of the Mishna only, and the Mishna reads:

If one steals a sheep, the thief is liable until he notifies the victim of the returned item. This is the requirement if the victim did not know of the theft.

If the victim was aware of the theft, and then counted it after the return, and found none missing, the thief is not liable

Rav Chisda is the only opinion that holds that an unaware victim requires more knowledge than an aware victim. Rava explains that this is because the unaware victim must be notified that his flock is wont to stray, so that he may watch them better. This statement of Rava implies that Rava agrees with Rav Chisda.

Rava also says that if one saw a thief grabbing a sheep from his flock, and he scared the thief away, but was unsure if the thief returned the sheep, the thief is still liable.

The Gemora assumed that this was even if the flock owner counted his sheep, which contradicts Rav Chisda's position in the case of an aware victim.

The Gemora deflects this contradiction by saying that in Rava's case, the owner did not count the flock.

The Gemora raises a seeming contradiction in Rav's statements. Rav said that if one returned a sheep to a

flock in the desert, he fulfilled his obligation. The Gemora assumes that in the desert, the owner is not aware of the return, and has not even counted his flock.

The Gemora answers that Rav said this only in the case of a sheep with a distinctive appearance, which the owner readily identifies. Therefore, as soon as the sheep is returned, the owner is aware. (118a – 118b)

Tannaic Opinions

The Gemora suggests that the dispute among these Amoraim is actually a dispute of Tannaim. The braisa states that if one stole a sheep from a flock or a coin from one's pocket, Rabbi Yishmael says that the thief must return the object to the place from where he stole it, while Rabbi Akiva says that the thief must notify the owner of the return. The Gemora explains that we assume that both opinions in the braisa hold (as Rav Yitzchak says) that one constantly checks his pockets. Therefore, stealing a coin is a case of an aware victim, and returning a coin to a pocket is tantamount to the victim counting his flock.

The Gemora suggests that the braisa encompasses two cases:

A stolen coin, which is an aware victim. In this case, Rabbi Yishmael holds like Shmuel, that counting is sufficient, while Rabbi Akiva holds like Rav, that the owner must be notified

A stolen sheep, which is an unaware victim. In this case, Rabbi Yishmael holds like Rabbi Yochanan, who says an unaware victim needs no knowledge (including counting), while Rabbi Akiva holds like Rav Chisda, that the owner must be notified.

The Gemora offers an alternate reading of the braisa. Both agree that if one stole a sheep directly from the owner, he must notify the unaware owner, like Rav Chisda. Rabbi Yishmael and Rabbi Akiva debate only a

case where the guard stole it once it was in his domain. Rabbi Yishmael says that this theft has not ended his term of guarding, and once he returns it to the proper care of guarding, he has reversed his theft. Rabbi Akiva holds that the theft ends his guarding position, and he must now return it directly to the owner.

The Gemora suggests that the statement of the Mishna that counting is sufficient is a dispute of Tannaim. Two braisos discuss one who steals from his friend, and then disguises his return payment in the form of extra payment in a later sale. One braisa says that this fulfills the obligation to pay, and one says it does not. The Gemora suggests that both braisos agree with Rav Yitzchak's statement that one constantly checks his pockets, and therefore when the thief paid extra, the victim will count it.

The Gemora offers three alternate explanations of this dispute of braisos, all of which agree that counting is sufficient.

The braisos are in dispute about Rav Yitzchak's statement, and therefore the argument is whether the extra payment is considered counting.

The braisos both agree with Rav Yizchak's statement, but the braisa that obligates the thief is a case where the thief placed the extra payment in the victim's hand. Since he may not put it in his pocket, he won't even count it.

The braisos agree with Rav Yitachak's statement, but the braisa that obligates the thief is a case where the victim had other money in his pocket, and won't realize that he's received extra from the thief. (118b)

Buyer Beware

The Mishna lists situations where a buyer may suspect that the seller is selling stolen merchandise. If the merchandise is stolen, the buyer may not purchase it.

Item	Seller	Purchase?	Why?
Wool, milk, kids	Shepherd	Forbidden	Suspected of stealing from the flock owner
Fruit, wood	Orchard guard	Forbidden	Suspected of stealing from the orchard owner
Woolen items in Yehudah; Linen items in Galil	Women	Permitted	Husbands allow wives to make and sell these
Calves in Sharon (has many calves)	Shepherd	Permitted	Likely they were raised by the shepherd
Anything	Tells the buyer to hide it	Forbidden	The seller wants to hide the theft
Eggs, chickens		Permitted	No reason to think they're stolen

The Gemora begins with a braisa that discusses in more detail the rules of buying from shepherds. The braisa states that one may not buy goats, kids, or sheared or torn wool. He may buy sewn wool, since, even if the wool was stolen, the shepherd has acquired ownership through a change. One may buy milk and cheese from a shepherd only in the desert, since the sheep's owner does not expect to take his flock's milk in the desert. In a settled area, however, the sheep's owner does want the milk, and therefore one may not buy milk products from a shepherd there. The braisa says that one may buy four or five sheep or shearings of wool, but not two of these.



Since large quantities are noticeable in their absence, a shepherd who is stealing will steal only small amounts, and the buyer must avoid buying those amounts. Rabbi Yehudah says that one may only buy sheep that return to their owner's at night, since the owner will notice if they've been stolen. The braisa summarizes that one may only buy things that an owner will notice when missing, since the shepherd would not steal such items. (118b)

How much is a lot?

The braisa had stated that one may buy four or five sheep or wool shearings, but not two. The Gemora first questions why the braisa said four or five – if four are allowed, then of course five will be? Rav Chisda explains that the braisa means that out of a flock of five, one may buy four, but any less is forbidden. Another version of Rav Chisda is that from a large flock, one may buy five or more, and from a small flock, one may buy four or more. The Gemora then points out a contradiction of implications. The statement that one may buy four or five implies that buying three is not allowed, but the statement that buying two is forbidden implies that buying three is allowed. The Gemora explains that from a healthy flock, one may only buy three, since the owner meticulously checks his flock, and will notice three missing. From a sickly flock, one may not buy three, since the owner is not as careful with this flock and will not notice the missing sheep.

The Gemora discusses whether Rabbi Yehudah is limiting the permission to buy four or five (and limiting that to home bound sheep), or the prohibition to buy two (and limiting that to sheep who sleep in the wild). The Gemora proves that Rabbi Yehudah is limiting the prohibition to buy two from a braisa where Rabbi Yehudah concludes by saying that one may buy four or five anywhere. (118b – 119a)

INSIGHTS TO THE DAF

Where to Return?

The Mishna stated that one who incurred an obligation to pay in a settled area may not pay in a desert. The Shitah quotes the Rema that explains that the rule is that if the obligation was incurred in a secure area, one must pay back in a secure area. If the original place of the obligation is now not secure, the payment may not be made there, even though it was incurred there. The Meiri states that if the receiver of the payment agrees to accept the payment in the desert, it is then a valid payment, and releases the debtor from his obligation.

Where to Claim?

The Gemora explained that in all cases but a loan, the creditor may not claim the object from the debtor anywhere besides the original place. The Meiri explains that this is because generally items that are not fungible as a loan is will only be in their original place, and we do not force the debtor to return to that place. However, if the debtor has the item with him, he must return it wherever the creditor demands it. Furthermore, if the debtor is a thief, but he acquired the object through a change, the obligation now has the rule of a loan, since it is purely a monetary obligation, and may be demanded anywhere. The Ramban adds that even in the case of a loan, the creditor must leave the debtor with enough money for him to support himself until he leaves the desert.

How Obligated?

When discussing the Mishna about one who is unsure of his obligation, the Gemora introduces the concept of *batzais yedei shamayim* – one who cannot be forced to pay in court, but wants to fulfill his religious obligation. Rav Shimon Shkop in *Shaarei Yosher* (5:16) discusses the

nature of this obligation. One has no obligation to fulfill his religious obligation, but if he does want to, he is opting to not invoke his power of ownership (muchzak), and then is obligated based on the standard rules of bari and shema. It is a good character trait to want to fulfill such an obligation, but we do not try to persuade him to do so. This is different than the concept of chayav b'dinei shamayim – one who is obligated at a religious level, but not in a court context. That situation is one where a clear obligation exists, but cannot be directly enforced by a court. We do, however, provide inducements to persuade him to do so.

The Need to Know

The Gemora discusses different levels of knowledge that a theft victim must have when the thief returns an item. The Rashba states that once the victim saw someone steal his item, the thief must notify the victim so that he does not consider him a thief anymore. The Rashba therefore holds that if the victim just realized that an item was stolen by noticing that one was missing, this is not considered knowledge of the theft. The Sma states that once the item is stolen, the victim despairs of having to guard it, and therefore must be aware of its return. According to the Sma, once the victim notices the item missing, this would be considered knowledge of the theft.

The Rif and Shulchan Aruch rule like Rav Chisda and Rabbi Yochanan. The Rif explains that Rava explains Rav Chisda, and agrees with him, indicating that the halachah follows his opinion. When dealing with an inanimate item, Rav Chisda would agree to Rabbi Yochanan. In any case, we would rule like Rabbi Yochanan, since he is favored over both Rav and Shmuel in general. The Baal Hamaor, however, rules like Rav. One of his reasons for this ruling is the fact that the Gemora established the opinion of Rabbi Akiva to follow Rav in the case of a coin. See Biur Hagra (HM 365:1) for a discussion of why the Rif ruled like Rabbi Yochanan against the majority of Rav and Shmuel.

See Responsa Rabbi Akiva Eiger (1:155) for a detailed discussion of the Baal Hamaor's opinion.

Guardian's Theft

The Gemora said that Rabbi Akiva and Rabbi Yishmael argue about a case of a guardian who stole the item he should be guarding. Rabbi Akiva says that the theft ended the term of the guardian, and he must now return it to the owner's possession, while Rabbi Yishmael says that the guardian's term is not ended, and he must just return it to its original place. The Rishonim explain that Rabbi Akiva holds that once the guardian stole the item, the owner would not trust the guardian anymore. The Rashba discuss why Rabbi Yishmael requires him to return it at all – if the guardian's term is not over, it is safe in his possession, and should not have to be returned. The Rashba offers three answers:

1. Rabbi Yishmael is not being precise.
2. Rabbi Yishmael is referring to a case of a coin, which must be kept in its designated place.
3. Even an animal should be in its flock, to ensure it doesn't run off.

The Rashba states that once the Gemora establishes the dispute in the case of a guardian, it does not depend on any specific opinion about the level of knowledge necessary. Rashi, however, states that even this reading of the braisa assumes that both Rabbi Akiva and Rabbi Yishmael agree with Rav Chisda's position.

What's in the Pocket?

The Gemora offers an explanation of the braisos dealing with returning stolen money at a later sale that distinguishes between putting money in an empty pocket or by putting it in a pocket that has money. Rashi explains that in an empty pocket, the owner will count the money and realize it was returned, while in a pocket with money,

he won't realize how much was added. The Rif, however, explains that in an empty pocket, he will not count the money, and not realize it was returned, while in a pocket with money, he will count it and realize the extra money. The Shulchan Aruch (H" M 365:1) states that if the pocket was empty, the thief has not fulfilled his obligation, but if the pocket had money, and the owners knew how much, the thief has fulfilled his obligation. The Gra explains that the Shulchan Aruch is ruling like the Rif, but adding in Rashi's qualification. The Rif only stated that generally one knows how much money is in their pocket, when it's not empty, since they check it periodically. Once they know how much is there, they will realize the extra, since they will again check. However, the Rif would agree with Rashi that if the owner did not know how much money was there, putting the money there is not notification.

Shepherds

The braisa stated that one may purchase wool shearings that are tfurim. Rashi explains that this means when the wool was made into clothing, in which case the shepherd acquired the wool by its change. The Raavad says it means shearings that are connected and put into large groups. The reason one may buy is that such large items are probably not stolen, because a thief would not draw attention to himself. The Rashba explains, based on the tosefta, that it means pieces of wool that are stuck on bushes. Since they are so insignificant, the flock owner does not mind if the shepherd takes them.

DAILY MASHAL

Why do snakes guard graves?

When the sages came to Rav Kahana's grave, they saw a snake entwined over the entrance of the cave containing the tomb. Mahara Galanti (cited by Chida in Pesach 'Einayim on our sugya) remarks that the Gemara mentions in several places that snakes have been

appointed to guard the sages' graves. He explains that people can use their attributes for good or bad. One's appetite, for example, can be used to honor the Sabbath with tasty food and the inclination to win an argument can be used to plunge the depths of a sugya. Tzadikim toil all their lives to control inclinations for holy aims and therefore a snake, which is compared to the yetzer hara, is the best creature to guard the grave of one who has harnessed his inclinations for the service of his Creator.