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Mishnah

If someone deposits something with his friend, and the owner did not set aside a place for the item deposited (*in the guardian's house*), and the guardian carried it and broke it, if it broke when it was in his hand, he is liable if he was carrying it for his own reasons. If he was carrying it for the good of the item when it broke, he is not liable. If it broke only after he put it down, he is not liable whether he was carrying it for its sake or for his sake. If the owner set aside a place where the object was supposed to be and the guardian carried it and broke it, whether it happened when he was holding it or after he put it down, he is liable if it was for his own purposes, but not if it was for the object's sake. (40b3)

The Gemara asks: Whose view is this?

The Gemara answers: It is Rabbi Yishmael, who ruled: The owner's knowledge is unnecessary. [The first clause states that if he moves it for his own purpose, puts it down, and then it is broken, he is not liable (to pay compensation). Now, when he moves it for his own purpose, he is regarded as having stolen it, since a custodian must not make any use of a deposit, and there is a view, expressed immediately in the Gemara, that when a person steals an object he is responsible for it until he returns it and informs its owner that he has returned it. Rabbi Yishmael holds that the owner's knowledge is unnecessary. Now, when the custodian puts the barrel down, he returns it to its owner, of course, without the owner's knowledge, and since the Mishnah rules that he is not responsible then, it must agree with Rabbi Yishmael.] For it has been taught in a Baraisa: If one steals a sheep from a flock or a coin from a purse, he must return it to the place from which he stole it; this is Rabbi Yishmael's view. Rabbi Akiva said: The owner's knowledge is required.

The Gemara asks: If (the Mishnah is following the opinion of) Rabbi Yishmael, why (does the Mishnah) specify 'if he (the owner) did not designate [a place]' – even if he did (designate a place), it is still the same (that the custodian should be exempt when he returns the barrel to its place)!?

The Gemara answers: This is a case of 'it is not necessary to state' as follows: It is not necessary to state that if he designated [a place for it, the owner's knowledge of its return is not required], since it is its place; but even if no designation was made, so that it is not its place (since it has no fixed place which can be called its own), yet the owner's knowledge is not required.

The Gemara notes: Then consider the second clause: If the owner designates a place for it, and he (the custodian) moves it and it is broken, whether in his hand or after he puts it down, - [if he moved it] for his purpose, he is liable (to pay compensation); if for its own need, he is not liable. That agrees with Rabbi Akiva, who ruled that the owner's knowledge is required.

The Gemara asks: If (the Mishnah is following the opinion of) Rabbi Akiva, why (does the Mishnah) specify 'if he (the owner) designated [a place]' – even if (did) not (designate a place), it is likewise so (that he should be liable, as he did not inform the owner of its return)!?

The Gemara answers: This is a case of 'it is not necessary to state' as follows: It is not necessary to state that if he did not

designate [a place for it, the owner's knowledge of its return is required], since it is not its place; but even if designation was made, so that it is its place, the owner's knowledge is still required.

The Gemara asks: Then the first clause agrees with Rabbi Yishmael, and the second with Rabbi Akiva!?

The Gemara answers: Yes, for Rabbi Yochanan said: He who will explain me [the Mishnah of] barrel in accordance with one Tanna, I will carry his clothing after him to the bathhouse.

Rabbi Yaakov bar Abba interpreted it (the Mishnah) before Rav as meaning that he took it with the intention of stealing it; Rabbi Nassan bar Abba interpreted it before Rav as meaning that he took it with the intention of using it. [These two Amoraim explain the Mishnah so that the entire Mishnah agrees with one Tanna. Rabbi Yaakov bar Abba maintains that the first clause means that he returned it to its place, since no particular place was assigned to it, wherever he puts it is its place. Therefore, if it is broken, he is exempt from liability. This is following Rabbi Yishmael's opinion, who maintains that when returning the object, it is unnecessary to have the owner's knowledge. But in the second clause the meaning is that it is not returned to its place; therefore, he is liable. For although Rabbi Yishmael holds that the owner's knowledge is unnecessary, yet it must be put back into its place before he is freed of his responsibility. This, however, holds good only if he takes the barrel in the first place intending to steal it; if he merely desires to borrow it, we are not so strict, and wherever he put it back, even not in the place assigned to it, suffices to free him. Rabbi Nassan bar Abba explains it likewise, but holds that even if the depositary takes it with the mere intention of using some of its contents, he immediately becomes responsible (though he does not carry out his intention) for the entire object, and remains so until he returns it to its own place. The assumption that the second clause means that he does not return it to its own place is implicit on both explanations, but these are interrupted while certain objections are raised.]

The Gemara asks: Regarding what do they (Rabbi Yaakov bar Abba and Rabbi Nassan bar Abba) differ?

The Gemara answers: In whether [unlawful] use must be accompanied by a loss. [The Torah teaches us that if the custodian misappropriates the deposit to his own use, he is responsible for subsequent accidents. These two Amoraim differ as to whether that holds good always, or only if his using it resulted in a loss.] He who says that he must have taken it in order to steal it, holds that [unlawful] use must result in a loss (but otherwise, the custodian will not be liable; therefore, if he takes it merely to use it and did not use it, he is not liable, seeing that no loss occurred); while he who maintains that it was in order to use it, is of the opinion that [unlawful] use need not result in a loss (therefore, the mere taking to use it is sufficient).

Rav Sheishes raised an objection: Does he [the Tanna] state 'he took it'; he actually says: he moves it!?

Rather, said Rav Sheishes, this refers to one who took it in order to fetch some birds [while standing] upon it, and he [the Tanna of the Mishnah] holds that a borrower without permission is regarded as a robber. Thus the entire Mishnah agrees with Rabbi Yishmael, as the second clause means that he did not return it to its place.

The Gemara asks: And Rabbi Yochanan (why didn't he learn like this)?

The Gemara answers: 'He puts it down' implies in its own place. (40b4 – 41a3)

It has been stated: Rav and Levi: One maintained, [Unlawful] use [by the custodian] must involve a loss; and the other maintained that it is not necessary.

The Gemara notes: It may be determined that it was Rav who ruled that [unlawful] use need not involve a loss, for it has been taught in a Baraisa: If a shepherd who was guarding his flock left it and entered the town; then a wolf came and tore a sheep, or a lion came and devoured it, he is free from liability. If he put his staff or wallet upon it, he is liable. Now, we had asked: because he put his staff or wallet upon it, he is liable!? But he removed them!? And Rav Nachman answered in the name of Rabbah bar Avuha in the name of Rav: It means that it was still upon it. But they asked: Yet even if it was still upon it, what of that!? But he had not taken drawn it to him (thus, he never took possession of it)! And Rav Shmuel son of Rav Yitzchak answered in the name of Rav: It means that he hit it with his staff and it ran before him.

The Gemara concludes its proof: But he did not cause it any loss! This surely proves that he [Rav] holds that [unlawful] use need not involve a loss!

The Gemara rejects the proof: Say as follows: He had weakened it with his staff. This follows too from the fact that he states: he hit it with his staff. This indeed proves it.

The Gemara notes: Now, since Rav holds that [unlawful] use must involve a loss, it follows that Levi maintains that it does not; what is Levi's reason?

What is Levi's reasoning? - Rabbi Yochanan said in the name of Rabbi Yosi ben Nehorai: [Unlawful] use stated in connection with a paid custodian differs from that stated in connection with an unpaid custodian; but I say: It is not different. Why is it different? For [unlawful] use should not have been stated in connection with a paid custodian, and it would have been (logically) inferred from an unpaid custodian: if an unpaid custodian, who is not responsible for theft or loss, is nevertheless liable if he puts it [the deposit] to use; then a paid custodian, who is responsible for theft or loss, is surely [liable if he puts it to use]. Why then did the Torah state them [both]? To teach you that unlawful] use need not involve a loss.

'But I say: It is not different,' in accordance with Rabbi Elazar, who maintained: One has the same purpose as the other. What did he mean that one has the same purpose as the other? Because one can refute [that argument]. As for an unpaid custodian, [he may be liable if he used it] because he must repay double on a [false] plea of theft. [In this respect his responsibility exceeds that of a paid custodian; therefore, it might also have been regarded as greater in respect of misappropriation. Consequently, it must be mentioned in connection with a paid custodian too, for its own purpose, and not for mere definition; therefore, it must involve damage.]

And he who does not refute it is of the opinion that [liability to] the principal without [the option of] an oath is a greater responsibility than [having to pay] double after a [false] oath. (41a3 – 41b1)

Rava said: [Unlawful] use need not have been mentioned in connection with either an unpaid or a paid custodian, and it could have been inferred (logically) from a borrower. If a borrower, who in using it acts with its owner's permission, is [nevertheless] responsible [for unpreventable accidents]; surely the same applies to unpaid and paid custodians! Then why is it stated [in connection with these two]? Once, to teach you that [unlawful] use need not involve a loss. And the other: that you should not say as follows: It is sufficient that that which is deduced through a kal vachomer shall be as that from which it is deduced: Just as a borrower is exempt if the owner [is in his service], so also are unpaid and paid custodians exempt, if the owner [is in their service]. [The Torah writes concerning a borrower: And if a man borrows something from his fellow, and it gets hurt or dies, the owner - being not with it, he shall surely make it good. But if the owner is with it, he shall not make it good. The Rabbis interpret this as meaning that if the owner is in the borrower's service when the article is borrowed, he is not liable.]

The Gemara asks: Now, on the view that [unlawful] use must involve a loss, what is the purpose of these two [verses] on [unlawful] use?

The Gemara answers: One, that you should not say as follows: It is sufficient that that which is deduced through a kal vachomer shall be as that from which it is deduced. And the other, for that which was taught in a Baraisa: [If a man shall deliver to his fellow money or stuff to keep, and it was stolen . . . If the thief was not found,] then the householder (the unpaid custodian) shall be brought before the judges – [this means] for (the purpose of taking) an oath. You say, 'for an oath'; but perhaps it is not so, the meaning being for judgment? [Unlawful] use is stated below (regarding a paid custodian) and [unlawful] use is stated above (in our passage, regarding an unpaid custodian): Just as there, [the reference is] to an oath, so here too, for an oath [is meant]. (41b1 – 41b2)

DAILY MASHAL

Why the Ship Sank

Rabbi Yochanan pledged that if someone solved a certain difficult question, he would carry his clothes for him to the bathhouse. Apropos of his statement, we offer a story told by an elder Boyaner *chasid*:

Rabbi Heshel of Krakow zt"l, teacher of the *Shach*, *Nachalas Shiv'ah* and many leading *poskim*, was a great figure of his generation and famous for his wisdom and astuteness. Very few of his commentaries, though, have been published and even then, only after his demise, as recorded in the commemorative volume *Chanukas HaTorah* (*Kuntres Acharon*, p. 102). His son-in-law was sailing in a boat when a fearsome wave capsized the vessel, sinking all his possessions and Rabbi Heshel's writings but leaving him alive. The story goes that once, as Rabbi Heshel was giving a lesson on Rabbi Yochanan's question in our *sugya*, he ingeniously devised a solution. At the end of the lesson he humorously concluded, "We have done ours. Now Rabbi Yochanan should do his." That night Rabbi Yochanan came to him in a dream and thanked him for his marvelous solution but added that as he should not have spoken so boldly, he must choose an atonement. Rabbi Heshel chose that his *chiddushim* should never be published and the loss is entirely ours!

L'zecher Nishmas HaRav Raphael Dov ben HaRav Yosef Yechezkel Marcus O"H