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**Rented and Borrowed**

[The *Mishnah* discusses cases of a mixed custodianship, with part rental, and part lending. The custodianship is split either in time (*some time rental, some time lending*), or in items (*one item rented, one item lent*). The *Mishnah* detailed the rules when a cow of such a custodianship dies, and the owner and custodian dispute whether it fell under the rental or borrowing section.]

The *Gemara* quotes a statement of Rava to explain the *Mishnah*’s case: For Rava said: [If one person says to another,] “You owe me a maneh,” to which he replies, “I [certainly] owe you fifty [zuz], and as for the rest, I do not know,” since he cannot swear, he must pay [all]. [On these lines,] the first clause [referring to our *Mishnah*’s first two cases] is conceivable when two, and the latter (the third case), when three [cows are involved]. [Thus:] ‘The first clause, when two [are involved].’ One person said to another, “I gave you two cows, loaned for half a day and rented for half,” or, [he says: “they were] loaned for one day, and rented for another, and both died during the time they were borrowed.” To which the other replied, “One indeed did die then, but as for the other, I do not know whether it was during the time it was borrowed or the period of rental,” — since he cannot swear, he must pay.<sup>1</sup>

<sup>1</sup> Rava says that if one claims that someone owes him 100 *zuz*, and the defendant responds that he is certain that he owes 50, but doesn’t know about the other 50, he must pay the full 100. If he had denied the other 50, he would be liable to take an oath, but since he is claiming that he doesn’t know, he cannot take an oath, and therefore must pay. In Rav Nachman’s dispute, the defendant doesn’t know whether he owes any money. Since he is unsure of any obligation, he need not take an oath nor pay. However, in Rava’s case, he has admitted to some of

And the second clause, where three [cows are involved], [thus:] One person said to another, “I gave you three cows, two loaned and one rented, and the two loaned ones died.” To which the borrower replied, It is true that one borrowed animal died; but as for the other, I do not know whether the borrowed one died and the one alive is the rented one, or the rented one died and the one alive is the borrowed;” since he cannot swear, he must pay.

The cases of the *Mishnah*, according to Rav Nachman are:

Split	Cows	Died	Owner claims...	Custodian claims...
Time	2	2	During borrowing	One during borrowing, one I don’t know
Items	3 (1 rental)	2	Both borrowed	One borrowed, one I don’t know

And according to Rami bar Chama, who maintained that the four custodians must partially deny and partially admit [liability], the first clause is possible only when three, and the second when four [animals are involved]. ‘The first clause when three [are involved]’: One person said to another, “I gave you three cows, half a day on loan and half on rental,” or, [he says, “I gave you them] one day, on loan and one on

it. This admission would obligate him to take an oath, if he denied the other half. Therefore, when he doesn’t know about the other half, we consider him to be someone who would be obligated to take an oath, but unable to do so — since he doesn’t know if he owes it or not — and he therefore must pay. Our *Mishnah* is as well referring to a case where the custodian admitted part of the owner’s claim, and therefore, if he doesn’t know about another part, he must pay.

rental, and the three died, all in the period when they were borrowed.” To which the borrower replied, “As for one, the claim is entirely unfounded [I never received it]; the second did die in the period when it was borrowed; of the third, I do not know whether it died during the time it was borrowed or the period when it was rented.” Since he cannot swear, he must pay. ‘And the second clause, where four [animals are involved].’ One person said to another, “I gave you four cows, three loaned and one rented, and the three loaned ones died.” To which the borrower replied, “As for one, the claim is entirely unfounded; with respect to the second, it is true that a borrowed one died; and as to the others, I do not know whether it was the rented one that died and the one alive is the borrowed one, or whether it was the borrowed one that died and the one alive is the rented one;” and since he cannot swear he must pay.

Rami bar Chama requires a custodian to take an oath only if he has totally denied part of the claim. Taking into account this requirement leads to the following cases:

Split	Cows	Died	Owner claims...	Custodian claims...
Time	3	3	During borrowing	One never took, one during borrowing, one I don't know
Items	4 (1 rental)	3	Both borrowed	One never took, one borrowed, one I don't know

(97b2 – 98b1)

In the third case, the *Mishnah* stated that if the owner claimed the borrowed cow died, and the guardian claimed it was the rented cow, the guardian must take an oath.

The *Gemara* questions why this is considered a bona fide admission and denial. In this case, the guardian is totally denying the claim of the owner, but admitting something else instead. [This would be similar to one who claims that a debtor owes him wheat, with the debtor admitting only to

owing barley, in which case the debtor would not be liable to take an oath.]

Ulla says that the oath referenced in the *Mishnah* is by *gilgul* – attaching an oath to an existing one. The owner can demand the guardian take an oath that the cow – which he claims was rented – died naturally, and not through negligence. Once the guardian is taking that oath, the owner can demand he take an oath that the cow that died was the rented one, through *gilgul* to the first oath. (98b1)

In the last case, the *Mishnah* said that if both parties were unsure which cow died, they split the value of the cow. The *Gemara* explains that this follows the opinion of Sumchus, who says that when there is an irresolvable doubt in money between two parties, they split it. (98b1)

### **Transitioned Custodianship**

[If one guards an item while the owner is working for him, he is not liable for the item's loss. The owner must be working for him at the onset of guardianship, even if not at the time of the loss.]

Rabbi Abba bar Mamal asked a number of questions about the application of this rule to guardianships that transition over time.

What [is the ruling] if the borrowing was made together with the owner's [service], but subsequently it [the object] was rented without the owner? Do we say, the borrowing stands alone, and the renting stands alone? Or perhaps the renting is a continuation of the loan, since he is responsible for theft and loss? And should you rule that renting is a continuation of the loan, what if he rented it together with the owner's [service], and then borrowed it without the owner? Shall we say that borrowing is certainly not included in renting? Or perhaps, being partly related to it, it is wholly related to it. And should you rule that we do maintain that partial relationship is regarded as complete relationship, what if one borrowed it with the owners [service], rented it without the owner's, and borrowed it again [without the owner]?

Does the borrowing revert to its former status? Or perhaps, the renting breaks the connection? [Likewise,] if it was rented with the owner's [service], then borrowed, and then rented again [the last two without] — do we say that the renting reverts to its former status? Or perhaps, the intermediate borrowing breaks the connection? These problems remain unsolved.<sup>2</sup> (98b1 – 98b2)

### Point of Transfer

The *Mishnah* discusses at what point the obligation of a borrowing begins and ends. If the owner sent a cow to the borrower via his son or the borrower's son, slave, or agent, and it died on the way, the borrower is not liable, since his obligation begins only once he's received the cow. If the borrower told the owner to send the cow via these people, or if the owner notified the borrower that he was sending it via these people, and the borrower agreed, the borrower has agreed to be responsible once they've received it, and he is liable once it's been handed to them. The same principle applies at the time the cow is returned. Thus, if the borrower returned the item via his or the owner's son, slave, or agent, and it died before reaching the owner, the borrower is liable. If the owner told him to send it via these people, or if the borrower notified the owner that he was sending it via them, and the owner agreed, the borrower is not liable once he hands it to them. (98b3)

1. Borrowing to rental – limiting liability
  1. Borrowed while the owner was working for him
  2. Transferred the borrowing to renting, after the owner stopped working for him

The second stage may be a new transaction, since it is a new set of liability. However, since the liability inherent in the second stage (*for loss or theft*) is a subset of the original liability (*all but loss from normal use*), we may consider the second stage to be an extension of the first.

2. Rental to borrowing – extending liability
  1. Rented while the owner was working for him
  2. Transferred the rental to borrowing, after owner stopped working for him

If the first case is considered one transaction, what would be the ruling in this case? Borrowing is not a limit in liability of rental, but it is an extension of liability, so it is more likely to be considered as a new guardianship.

3. Borrowing to rental to borrowing – reverting or extending?

### INSIGHTS TO THE DAF

#### Related or Unrelated Claims

The *Gemara* questions why the guardian must take an oath if he and the owner dispute which cow died, since he did not admit any part of what the owner claimed.

Rashi learns that the *Gemara* is stating that the custodian has not admitted any part of what the creditor claimed, and he need not take an oath. The owner is claiming that a borrowed cow died. The guardian totally denies this claim. Instead, he admits to something the owner never discussed – that the rented cow died. Therefore, the *Gemara* is questioning why the guardian must take an oath.

The Raavad says that the *Gemara's* question was due to the fact that the two transactions – rental and borrowing – are unrelated. Therefore, the fact that the guardian admitted to something about the rental has no bearing on his denial of the borrowing claim.

The Raavad further extends this to a case of one who claims that he lent 100 *zuz* to a debtor, and also deposited 100 *zuz* for him to guard, while the guardian admits the 100 *zuz* of deposit, but denies the 100 *zuz* of a loan. The Raavad says

1. Borrowed while the owner was working for him
2. Transferred to rental after the owner stopped working for him
3. Transferred to borrowing

If the second case is considered two transactions, what would be the ruling in this case? Although the second borrowing is not an extension of the preceding rental, is it an extension of the original borrowing?

4. Rental to borrowing to rental – reverting or limiting?
  1. Rented while the owner was working for him
  2. Transferred to borrowing after the owner stopped working for him
  3. Transferred to rental

Is the second rental simply a limit of liability of the borrowing in the interim, or is it attached to the original rental?

(See *Tosfos 98b Hachi Garis* for an alternate reading of the last two cases.)

that in this case as well, the two claims are unrelated transactions. While a claim of both wheat and barley are two types of merchandise, the transaction is the same in both – a loan. Here, the transactions are distinct, and therefore the claims are not treated as related.

The Ramban says that when one claims both a loan and deposit, and the debtor agrees to only one, the debtor must take an oath, since although the transactions are different, this is similar to a claim of both wheat and barley, with an admission of barley. Similarly, in the case of borrowing and rental, since both are guardianships, they are considered one transaction, and the custodian must take an oath.

The Rosh explains that according to this reading, the *Gemara's* question was simply that regarding the cow claimed, the guardian has denied the claim, while the other cow he is presenting immediately, removing that portion of the claim. This is therefore a case of *heilach* – *here it is*, where we remove the portion paid, and consider whether he is in partial admission of the remainder. In this case, he is denying the remainder, and need not take an oath.

However, the Ramban says that if one claimed a loan from a debtor, and the debtor admitted part of the amount, but claimed it was a deposit, he is considered in total denial.

The Rambam (To'ain v'nitan 3:14) says that this too is a partial admission, and obligates the debtor to take an oath.

The Gr"a (98b note 1) says that the different readings of the *Gemara's* question determine the exact text of the question. The *Gemara* starts by stating that what the owner claimed the guardian did not agree to – this is true according to all the Rishonim. However, some texts (*ours included*) continue to further state that what the guardian *did* admit was not what the owner claimed. The Gr"a explains that the Raavad who considers the rental and borrowing claims to be unrelated have the text of both parts of the question, since the question is stating that this is a case of claiming wheat and admitting barley. However, according to the Rishonim

who say that the two claims are related, the only reason that we disregard the guardian's admission is because it is *heilach*, not because what he admitted is not what the owner claimed. They therefore will omit this second part of the question. See also Gr"a on Shulchan Aruch HM 88:39,40.

## DAILY MASHAL

### In Hashem's House

Our Mishnah explains that a borrower must compensate his lender for any oness to a borrowed item unless "its owner is with it". According to this halachah, the Rebbe of Pshischa zt"l interpreted David's statement: "One thing have I asked of Hashem, that I have sought: to sit in His house all the days of my life" (Tehillim 27:4). A person's soul, said the Rebbe, is a deposit given him by Hashem and if we damage its sanctity, we must compensate Him in full. "One thing have I asked", in the sense of "borrowed" – the soul – and I hope to merit to sit in His house where I shall be exempt from damages as "its owner is with it".