

OVERVIEW of the Daf

1) Clarifying the Mishnah (cont.)

Rava concludes his response to Abaye's challenge to his resolution of the contradictory inferences of the Mishnah.

R' Ashi offers a third resolution to the contradictory inferences of the Mishnah.

R' Acha the son of R' Avya unsuccessfully challenged this resolution from a Baraisa.

2) Exchanging a cow for a donkey

R' Yehudah in the name of Shmuel rules that when Reuvan and Shimon are exchanging animals and Reuvan takes possession of Shimon's animal and it is discovered that Reuvan's animal is dead, Reuvan must bring proof that his animal was alive at the time of the transaction for the exchange to be considered executed.

Shmuel claims that the ruling in the Mishnah related to the bride is proof to his position.

After two failed attempts to identify the relevant ruling of the Baraisa R' Nachman bar Yitzchok suggests a ruling that proves Shmuel's point.

Shmuel's ruling is challenged.

After a failed attempt to resolve the challenge Rami bar Yechezkel states that teachings his brother Yehudah cites in the name of Shmuel should be ignored and in this particular case he ruled that the one in whose possession the doubt arose has the burden of proof.

This resolution is unsuccessfully challenged. ■

REVIEW and Remember

1. How did R' Ashi resolve the contradiction in the Mishnah?

2. In the case of exchanging a cow for a donkey, when does the ownership transfer?

3. Explain קידושין לאו לטיבועין ניתנו.

4. At what point does a seller release his merchandise?

Distinctive INSIGHT

Upon whom is the burden of proof?

הכי אמר שמואל כל שנולד ספק ברשותו עליו הראיה

The case discussed in the Gemara features an exchange transaction (חליפין) between the owner of a donkey and the owner of a cow. The original owner of the donkey pulled the cow into his domain to effect the transaction. Before the owner of the cow had a chance to pull the donkey into his domain, his donkey died. Now there is a doubt whether the donkey died before the cow was pulled, which would result in the transaction being null, or if it died after the transaction, in which case the previous owner of the cow is now the owner of a donkey which died just after he acquired it. In such a case, the Gemara, in its conclusion, rules that "proof must be brought by the one in whose domain the doubt arose."

Rebbe Yehuda originally ruled that the burden of proof is upon the original owner of the donkey, the seller. This view is rejected based upon a question from a Baraisa regarding a case of an animal furnished to a butcher who paid for it, and the animal is then found to be a teraifa. Here, also, there is a doubt whether the particular defect in the animal occurred before or after the animal was transferred to the butcher. The ruling is that the butcher, the buyer in this case, must bring proof to get his money back. Yet the doubt arose while the animal was still in the possession of its original owner. According to Rebbe Yehuda, why should the butcher have to prove anything? The Gemara answers that the case is where the butcher did not yet pay, and it is the animal's original owner who has the burden of proof in order to collect his money. Still, the Gemara is not satisfied, because the butcher usually does not get the animal before paying.

The view of Rami bar Yechezkel is that the original owner of the cow has the burden of proof. Rashi and Tosafos understand that this means that since the cow was clearly taken into the possession of the donkey owner, the cow's original owner has the burden of proof that the donkey died before the transaction. Otherwise, the cow's original owner will lose the case. This is even the case if the cow is now back in his farm, for example if it was placed there, or if the original transaction was done other than by pulling.

Rif rules according to Rebbe Yehuda, and Rashba asks why this should be so, when the Gemara left Rabbi Yehuda's opinion unresolved in contrast to the ruling of the case of the butcher. Rashba explains that Rif understood that both Rebbe Yehuda and Rami bar Yechezkel agree that the burden of proof is upon the owner of the donkey. They argue concerning the circumstances and location of the dead donkey, whether it died in the possession of its owner, or even if it died in a no-man's land. ■

HALACHAH Highlight

Breaking an engagement due to a blemish

מודה ר' מאיר במומין הראויין לבא עמה מבית אביה וכו'

R' Meir agrees concerning blemishes that could have come with her from her father's home...

The discussion of the Gemara concerning the effects of discovering blemishes on a woman is a matter of significant controversy. The Gemara distinguishes between visible and hidden blemishes. The claim of the husband that he was unaware of the presence of blemishes is only acceptable for hidden blemishes since it is possible that he was unaware of their existence but concerning visible blemishes the husband cannot claim that he was unaware of the blemishes since they are visible and his claim is summarily dismissed. Some authorities maintain that this discussion is only relevant for a couple that has reached the stage of marriage – נשואין – but if the couple is merely engaged – אירוסין, it is possible that he has not yet made a thorough exam and the discovery of even a visible blemish could be grounds to nullify the kiddushin. This is the position of Rav Yosef Karo¹ who maintains that if a blemish is discovered after kiddushin a גט is still required. Tur², on the other hand, mentions these distinctions even in the context of kiddushin indicating that, in his opinion, the husband cannot

nullify the kiddushin with a claim of a blemish if that blemish is visible.

Beis Shmuel³ suggests that this dispute is related to a disagreement between Rashi and Tosafos versus Ramban and Rashba regarding the strength of the presumption that if the blemishes were found at this time (after the kiddushin while the bride is still living in her father's home) that it was in her father's house prior to the kiddushin that they originated (כאן נמצאו כאן היו). Rashi and Tosafos maintain that this presumption is strong enough to counter the father's claim of certainty that these blemishes appeared after the kiddushin and the kiddushin will be nullified under the rule that it was performed until false pretenses. In contrast, Ramban and Rashba maintain that this presumption is not strong enough to counter the certain claim of the father.

As a practical matter, Beis Shmuel⁴ rules that if a blemish was discovered after a shidduch was made, i.e. the couple is engaged, the engagement may be broken without the normal consequence of a fine. The reason is that if a blemish found after marriage exempts a husband from paying the kesubah, certainly if it was discovered after the couple was engaged there will be no financial consequence for breaking the shidduch. ■

1. בדק הבית אה"ע סי' ל"ט.
2. טור אה"ע סי' ל"ט.
3. ב"ש שם ס"יק י"א.
4. ב"ש שם. ■

STORIES Off the Daf

Checking the "Contents of the Cup"

"דאין אדם שותה בכוס אלא אם כן בודקו..."

Our daf mentions a precedent: that a person does not "drink from a cup until he checks its contents." Although in the context discussed, this maxim concerns the investigation for physical blemishes, clearly the same holds true with regards to character defects. Just as none would be so foolish as to take a deep drink of a liquid until he was assured of the contents of the cup, it is assumed that one would exercise at least as much caution when checking into the middos of the pro-

spective chassan or kallah.

Once, a young woman was dating a promising bochur but felt that he might have a problem with miserliness. She was uncertain of this, however, and decided to consult with Rav Shach, zt"l.

"Rebbi, I don't know what to do! On the one hand, I am very impressed with him. On the other hand, I would never consent to marry a miser. But how can I tell if I am just listening to my overactive imagination or if there is a real problem?"

Rav Schach responded, "Of course, you must not marry him until you are certain he is not a miser! There is a very simple way to check this, though. At your next meeting, bring up the issue of money with him. Ask him what

assets he has and what his bank situation is. If you get the impression that he is not being straight with you and is hiding things, you will know that he has a controlling and secretive attitude about money. If he is completely open with you, then he is surely not a miser. He may be someone who is careful with money, but this is in no way detrimental to your future with him."

The young woman followed the Gadol's advice and brought this issue up on their next date. The young man was completely open with her, and told her everything she asked about his finances. The young lady felt easy in her mind and the two went on to build a bayis ne'eman b'Yisrael! ■

