

INSIGHTS FROM OUR CHABUROS

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.

STORIES OF 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 prospective 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!

PARSHA CONNECTION

In this week's daf the Gemara discusses a כלה that has מומין. Although sometimes we live with imperfections, when it comes to the מושכן everything had to be perfect. This is highlighted in the beginning of פרשת תצוה. The Parsha states: ואתה תצוהו: את-בני ישראל ויקחו אליך שמן זית זך כתית למאור להעלות נר תמיד. The oil used for the מנורה had to be extra pure, and even oil that would be good for מנחות was פסול for the מנורה. Why was it so important that only the purest first drop of oil was to be used? To understand this better, we need to analyze the reason for lighting the מנורה in the first place. הקב"ה who provides light for the whole world, clearly doesn't need "our" light. The מפרשים point out two obvious questions in the above mentioned פסוק, it says נר which means one, but there were actually seven candles. Second, it says להעלות which means to elevate instead of להדליק which means to light? The הקדוש offers the following insight: The נר here is a reference to our collective נשמה which we know from the possuk in כ is called a fire: נר ה' נשמת אדם חפש כל-חדרי-בטן. Lighting the מנורה elevated our collective נשמה. This is why it says נר in the singular, because it is not referring to the physical lights, but rather our spiritual נשמה which is essentially one (כאיש אחד בלב אחד). This is also why it says "להעלות" which means to elevate, because it refers to our נשמה rather than the candles. Perhaps we can now understand why it must be very pure oil, since spiritual beings must be 100% pure. The תורה is also compared to light, and when it comes to learning we must always ensure that our learning is "pure", meaning לשמנה!

HALACHA HIGHLIGHT

Breaking an engagement due to a blemish

מחלה ר' מאיר במומין הראויין לבה 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 only קידושין has occurred, 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 not 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. Since the halacha states that if a blemish is found after marriage the husband may divorce his wife without 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"ק י"א.
4. ב"ש שם.

MUSSAR FROM THE DAF

Selfless Giving

ולא תימא אליבא דמאן דאמר קדושין לאו לטיבועין ניתנו. אלא אפילו למאן דאמר קדושין לטיבועין ניתנו

The Gemara brings a machlokos Amorim if we say קדושין לטיבועין (whether kiddushin money is given with an understanding that it is to be lost). One can understand the סברא of קדושין לאו לטיבועין ניתנו, since when a man gives a woman money for kiddushin he gives it with the understanding that he will eventually marry her. Therefore, if for some reason he never actually married her, then one can understand that the wife should return the money. However, according to the סברא of קדושין לטיבועין ניתנו, why should the woman keep the money if the two didn't actually get married. Wasn't the money given with the daas that he would marry her?

Perhaps one can explain this savara of קדושין לטיבועין ניתנו that the money given for kiddushin is not like other transactions. There is a relationship between the couple based on Ahava. And therefore the Ahava elevates the money from being purely transactional, to a מתנה as well. And therefore the husband wants her to have the money as a מתנה even if for some reason he cannot complete the marriage. (See Aruch Hashulchan, Even Haezer Siman 50)

There is a great lesson here for marriage. The Baalei Mussar teach that the beginning sets the tone in every facet of the world. Therefore the beginning of a marriage is highly significant. The first item a husband gives his wife sets the tone for the relationship. The one who holds קדושין לטיבועין ניתנו, understands that the man can't simply be relating to his wife simply as a business deal. There must be an aspect of the כסף that is altruistic. This type of giving, simply because you care about the other and want them to be happy is the foundation of what will make a successful marriage.

POINT TO PONDER

רש"י ד"ה רב אשי אמר writes that a daughter claims the kesuba for her father, meaning that she is saying, you owe my father the כתובה. In the משנה Rashi writes that the father is demanding the כתובה and not the daughter. Why did Rashi change to now say that she is claiming for her father?

Response to last week's Point to Ponder:

The Mishna says that if a lady has מומין and she is still in her father's house, the father must prove that the מומין developed after she got engaged. However if she is already in the husband's house, then the husband has to prove that she had them, before they got engaged. On this second scenario עדים writes רש"י ד"ה הבעל צריך להביא. Why didn't רש"י write the same on the first case where the father is the one bringing proof.

In the רישא where the father is claiming that he knows that his daughter didn't have these מומין earlier, he may be able to bring other proofs without having עדים because he is claiming ברי. However in the second case, the husband needs עדים because he obviously can't claim with certainty that she had these earlier, because if he does that means that he knew about them and he was מוחל. (See מהר"ם שו"ת)

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