How and Why does a Shevua Impact Payment? כָּל הַמְחוּיָב שְׁבוּעָה שֶׁאֵינוֹ יָכוֹל לִישָּׁבַע – מְשַׁלֵּם-Bava Batra 33b-34a

On Bava Batra 34a, a principle is introduced in the name of Rabbi Abba, that in a case of monetary dispute, anyone who is obligated to take an oath but cannot do so must pay the other litigant. How should we understand this position?How does it square with similar situations, such as where a defendant would like to take an oath, but is not believed in court because of prior misdeeds? What does all this teach us about the role of oaths in general in monetary disputes?

Questions? Comments? Email dinanddaf@hadran.org.il

1. בבא בתרא לג:-לד.

דְּהָהוּא גַּבְרָא דַּחֲטַף נָסְכָא מֵחַבְרֵיהּ. אֲתָא לְקַמֵּיהּ דְּרַבִּי אַמֵּי, הֲוָה יָתֵיב רַבִּי אַבָּא קַמֵּיהּ. אַיְיתִי חַד סָהֲדָא דְּמִיחְטָף חֲטַפָא מִינֵּיהּ. אֲמַר לֵיהּ: אִין, חֲטַפִי – וְדִידִי חֲטַפִי. אָמַר רַבִּי אַמֵּי:

The Gemara now presents that case: As there was a certain man who snatched a piece of cast metal from another. The one from whom it was taken came before Rabbi Ami while Rabbi Abba was sitting before him, and he brought one witness who testified that it was, in fact, snatched from him. The one who snatched it said to him: Yes, it is true that I snatched it, but I merely snatched that which was mine. Rabbi Ami said:

הֵיכִי נִידַּיְינוּהּ דַּיָּינֵי לְהַאי דִּינָא? לִישַׁלֵּם? לֵיכָּא תְּרֵי סָהֲדֵי! לִיפְטְרֵיהּ? אִיכָּא חַד סָהֲדָא! לִישְׁתְּבַע, הָא אָמַר מִיחְטָף חַטָּפָה, וְכֵיוָן דְּאָמַר דְּחַטָּפָה – הָוֵה לֵיהּ כְּגַזְלָן!

How should judges judge for this judgment? There are reasons not to implement all potential rulings. If they were to order the one who snatched the metal to pay for it, that would not be the correct ruling, because there are not two witnesses who saw him snatch it, and the court does not force payment based on the testimony of one witness. If they were to accept his claim and exempt him entirely, that would not be the correct ruling, because there is one witness who testified against him. If they were to order him to take an oath, which is the usual response to counter the testimony of one witness, didn't he say that he did in fact snatch it, and since he said that he snatched it and there is no proof that it is his, he is like a robber, and the court does not allow a robber to take an oath.

אֲמַר לְהוּ רַבִּי אַבָּא: הָוֵי מְחוּיָב שְׁבוּעָה שֶׁאֵינוֹ יָכוֹל לִישָּׁבַע, **וְכָל הַמְחוּיָב שְׁבוּעָה שֶׁאֵינוֹ יָכוֹל לִישָּׁבַע – מְשַׁלֵּם.**

Rabbi Abba said to them: He is one who is liable to take an oath who is unable to take an oath, and anyone who is liable to take an oath who is unable to take an oath is liable to pay.

2. שבועות מז.-:

אמר רבא כוותיה דרבי אבא מסתברא דתני רבי אמי (שמות כב, י) שבועת ה' תהיה בין שניהם ולא בין היורשין היכי דמי

Rava said: It stands to reason that the *halakha* is in accordance with the opinion of Rabbi Abba; as Rabbi Ami teaches this *baraita*: The verse states that "the oath of the Lord shall be between

them both” (Exodus 22:10), but not between their heirs. What are the circumstances in which one would be liable to take an oath, but his heirs would be exempt?

אילימא דאמר ליה מנה לאבא ביד אביך ואמר ליה חמשין אית ליה וחמשין לית ליה מה לי הוא ומה לי אבוהא
If we say that it is where the lender’s son said to the borrower’s son: One hundred dinars that belonged to my father were in the possession of your father, as a loan, and you must repay me, and the borrower’s son said to him: He had a debt of fifty, and the other fifty he did not have to pay him, i.e., he did not owe it, that is difficult. Under these circumstances, what does it matter to me if it is he, the borrower’s heir, or his father, the original borrower? Since the son is admitting that he owes part of the money and denying the rest with certainty, he is liable to take an oath, just like his father would have been.

אלא לאו דאמר ליה מנה לאבא ביד אביך אמר ליה חמשין ידענא וחמשין לא ידענא
Rather, is it not that the lender’s son said to the borrower’s son: One hundred dinars that were my father’s were left in the possession of your father, and you must repay me, and the borrower’s son said to him: Concerning fifty dinars, I know that my father owed them, but I do not know anything about the other fifty dinars.

אי אמרת בשלמא אביו כי האי גוונא מיחייב איצטריך קרא למיפטר גבי יורשין אלא אי אמרת אביו כי האי גוונא נמי פטור קרא גבי יורשין למה לי
Rabba continues: Granted, if you say that his father, in a case like this, would be liable to take an oath, due to his partial admission, then the verse was necessary to exempt the heirs from taking the oath. But if you say that in a case like this, his father is also exempt from taking an oath, why do I need a verse about exempting the heirs? Evidently, an oath reverts to one who is liable to take it, and when he cannot take that oath he must pay the claim against him.

3. תוספות ב"ק מו. ד"ה דאפילו

…ועוד אומר ר"י…אלא היינו טעמא דבאב חייב לא ידענא דהיה לו לידע אם חייב לו מנה אם לאו אבל יורשיו לא היה להם לידע במילי דאבוהון…

Rabbeinu Yitzchak says that the reason why the father (i.e., the original borrower) is obligated to pay if he claims that he owes 50 zuz but doesn’t know about the other 50 is because he should have know whether he owes the lender 100 or not. But the heirs, on the other hand, are not expected to know about their father’s affairs…

4. בבא קמא מו.

אָמַר רַב יְהוּדָה אָמַר שְׁמוּאֵל: זוֹ דִּבְרֵי סוּמְכוֹס – דְּאָמַר: מָמוֹן הַמּוּטָּל בְּסָפֵק – חוֹלְקִין. אֲבָל חֲכָמִים אוֹמְרִים: זֶה נִפְטָר גָּדוֹל בַּדִּין, הַמּוֹצִיא מֵחֲבֵירוֹ – עָלָיו הָרְאָיָה.
GEMARA: Rav Yehuda says that Shmuel says: This ruling in the mishna is the statement of Sumakhos, who says: Property of uncertain ownership is divided by the two parties. But the Rabbis say that this is the significant principle of monetary law: The burden of proof rests upon the claimant, and the disputed sum is not divided. According to the Rabbis, in the cases of uncertainty in the mishna, no payment is made for the fetus or from the offspring, respectively.

לְמָה לִי לְמֵימַר ״זֶה כְּלָל גָּדוֹל בַּדִּין״? אִצְטְרִיךְ, דַּאֲפִילּוּ נִיזָּק אוֹמֵר בָּרֵי, וּמַזִּיק אוֹמֵר שָׁמָּא – הַמּוֹצִיא מֵחֲבֵירוֹ עָלָיו הָרְאָיָה.

The Gemara asks: Why do I need for the Rabbis to say the words: This is the significant principle of monetary law? Why not just state the principle? The Gemara answers: It was necessary to say them because even in a case where the injured party states: I am certain that such and such occurred, and the one liable for the damage says: Perhaps it was otherwise, without definitively refuting the claim against him, the burden of proof rests upon the claimant. Although the injured party claims with certainty that he is correct and the defendant's claim is only speculative, the definite claim still does not render the defendant liable to pay, absent proof.

5. משנה שבועות ז:א

כָּל הַנִּשְׁבָּעִין שֶׁבַּתּוֹרָה, נִשְׁבָּעִין וְלֹא מְשַׁלְּמִין. וְאֵלּוּ נִשְׁבָּעִין וְנוֹטְלִין, הַשָּׂכִיר, וְהַנִּגְזָל, וְהַנֶּחְבָּל, וְשֶׁכְּנֶגְדּוֹ חָשׁוּד עַל הַשְּׁבוּעָה, וְהַחֲנָוָנִי עַל פִּנְקָסוֹ. הַשָּׂכִיר כֵּיצַד, אָמַר לוֹ תֵּן לִי שְׂכָרִי שֶׁיֵּשׁ לִי בְיָדֶךָ, הוּא אוֹמֵר נָתַתִּי, וְהַלָּה אוֹמֵר לֹא נָטַלְתִּי, הוּא נִשְׁבָּע וְנוֹטֵל. רַבִּי יְהוּדָה אוֹמֵר, עַד שֶׁתְּהֵא שָׁם מִקְצָת הוֹדָאָה. כֵּיצַד, אָמַר לוֹ תֵּן לִי שְׂכָרִי חֲמִשִּׁים דִּינָר שֶׁיֵּשׁ לִי בְיָדֶךָ, וְהוּא אוֹמֵר הִתְקַבַּלְתָּ דִּינַר זָהָב:

All those who take an oath that is legislated by the Torah take an oath and do not pay. By Torah law, one takes an oath only in order to exempt himself from a monetary claim. And these litigants take a rabbinically instituted oath and receive possession of the disputed funds or property, i.e., their claim is upheld by means of the oath, even though they are not in possession of the property in question: A hired worker who claims that he has not received his wages; and one who was robbed and sues the person who robbed him; and one who was injured, who claims compensation from the person who injured him; and one whose opposing litigant is suspect with regard to the taking of an oath. When a person suspected of taking false oaths is liable to take an oath in order to exempt himself, the claimant takes an oath instead and receives payment. And a storekeeper relying on his ledger also takes an oath and is paid. How does this *halakha* apply to the hired worker? The case is where one says to his employer: Give me my wages that are still in your possession. The employer says: I already gave them to you. And that worker says: I have not received them. In such a case, the worker takes an oath that he has not received his wages, and he receives payment from his employer. Rabbi Yehuda says: This oath cannot be administered unless there is partial admission on the part of the employer. How so? The case is where the worker said to him: Give me my wages, fifty silver dinars, which are still in your possession. And the employer says: You have already received one golden dinar, which is worth twenty-five silver dinars. Since the employer has admitted that he owes part of the sum, the worker takes an oath and is paid the whole sum.

6. תוספות בבא מציעא ה. ד"ה שכנגדו קאמינא

וא"ת מאי שנא דבחשוד על השבועה שכנגדו נשבע ונוטל אמאי לא אמרינן מתוך שא"י לישבע משלם כדאמר גבי חמשין ידענא וחמשין לא ידענא (לקמן בבא מציעא דף צח.) ובנסכא דר' אבא (שבועות דף.) וי"ל הכא אי אמרי' משלם לא שבקת ליה חיי דכל העולם יביאוהו לידי שבועה ויטלו כל אשר לו ועוד דהתם אמר ליה שבועה דאורייתא אית לי עליך או תשבע או תשלם אבל הכא הוא ברצון ישבע אם נניחנו ולכך לא ישלם:

And if you ask: what is the difference between the person who is not trusted to take an oath, where the opposing litigant then has to take an oath before getting the payment - why not say,

because the defendant cannot take the oath (because of untrustworthiness), the defendant should simply pay (without the other litigant having to take an oath), as is the case regarding “I know about 50 zuz but not about the other 50 zuz” and the “ingot of R. Abba” case. One might say that in this case of (R. Abba’s principle), the plaintiff can say: “I have a Biblical oath that you need to take - either take it or pay.” But in the case of the untrustworthy defendant, that person would be willing to take an oath if only we would allow him to do so. Therefore, he does not pay (without the plaintiff taking the oath instead).

7. רמב"ם משנה תורה הלכות טוען ונטען ד:ז-ח

מָנֶה לִי בְּיָדְךָ וְהַלָּה אוֹמֵר חֲמִשִּׁים וַדַּאי יֵשׁ לְךָ בְּיָדִי אֲבָל הַחֲמִשִּׁים אֵינִי יוֹדֵעַ אִם אֲנִי חַיָּב בָּהֶן אוֹ לָאו הֲרֵי זֶה מְחֻיָּב שְׁבוּעָה מִפְּנֵי שֶׁהוֹדָה בְּמִקְצָת וְאֵינוֹ יָכוֹל לְהִשָּׁבַע בַּמִּקְצָת שֶׁכָּפַר בּוֹ שֶׁהֲרֵי אֵינוֹ יוֹדֵעַ לְפִיכָךְ מְשַׁלֵּם הַמָּנֶה בְּלֹא שְׁבוּעָה. וְכֵן כָּל כַּיּוֹצֵא בָּזֶה. **וְיֵשׁ לוֹ לְהַחֲרִים עַל מִי שֶׁטּוֹעֵן עָלַי דָּבָר שֶׁאֵינוֹ יוֹדֵעַ בְּוַדַּאי שֶׁאֲנִי חַיָּב בּוֹ:**

The following ruling applies when a plaintiff claims: "You owe me a *maneh"* and the defendant responds: "I know that I owe you 50 *dinarim,* but I am unsure of whether or not I owe you the other 50." The defendant is obligated to take a Scriptural oath, because he acknowledged a portion of a claim. He cannot take an oath regarding the portion he denied owing, because he does not know whether he is liable or not. Therefore, he must pay the entire *maneh;* the lender is not required to take an oath. Similar laws apply in all analogous situations.

The defendant may have a conditional ban of ostracism issued against anyone who lodges a claim against him when the plaintiff is not certain that the defendant is obligated.