

Nine Tenths of the Law – and Counting...

Hamotzi me'chaveiro – The Power of Possession in Torah Law

1. The Source

One of the bedrock principles in Torah monetary law is that of *hamotzi me'chaveiro alav hara'aya* – one who wishes to extract money from his fellow needs to produce proof that he owes him. This can take the form either of:

- a. A specific contested item: Reuven claims that Shimon is illegally holding an item of his, e.g. he stole his watch, but cannot prove it.
- b. An unverified obligation: e.g. there exists a possibility that his Shimon's animal damaged Reuven's property, but Reuven cannot prove it.

The one currently in possession of the money is known as the *muchzak* – the holder. The Gemara in Bava Kama¹ discusses the source of this principle in the Torah. Initially it presents the verse describing the words that Moshe said to the Jewish People as he was about to ascend Mount Sinai, where he tells them that the elders are with them “whoever has a grievance let him approach [*yigash*] them”². The Gemara expounds the word ‘*yigash*’ as ‘*yagish*’ – let him present the evidence to support his claim, for without it he has no case. To this the Gemara counters and asks: “why do we need a verse? This matter can be understood based on *sevara* [logic], one who is in pain let him go to the doctor!” I.e., the claimant who has the problem obviously needs to substantiate his claim, otherwise he has no case. And thus the Gemara concludes that there is no source necessary to teach this central principle, it can be derived from *sevara* alone.

2. *Muchzak* vs. *Rov* – The Nature of the Beast

To get a sense of the strength of this principle, specifically when it is in conflict with other known halachic principles, let us consider the case of the killer ox. The Gemara³ discusses a situation where someone purchased an ox for

¹ 46b

² Shemos 24:14.

³ Bava Kama 46a

purposes of plowing, which then turned out to be violent, so that it has no real value other than to be slaughtered and eaten. The buyer returns to the seller and demands a refund, claiming that the ox is useless for plowing, which is the purpose he bought it for, and thus the sale was invalid. The buyer, for his part, claims that it is perfectly good for eating, and the sale was just fine. Are we to assume that the sale was for plowing, in which case it is invalid, or for slaughtering, in which case it is valid?

Now, for purposes of focusing on the principle at hand, the Gemara proceeds to sideline any other factor that may *provide* the answer to this question, e.g. the discrepancy in price between an ox that is sold for plowing as opposed to eating. All we have to go on is the fact that *most* people in that locale buy oxen for plowing. Is that enough to force the seller to refund the money? The Gemara records a dispute in this matter between Rav and Shmuel, with the latter stating that when it comes to money: *hamotzi me'chaveiro* – the claimant needs to furnish proof of his intentions, otherwise the sale stands. The halacha follows the opinion of Shmuel.

This above ruling is very important for us, as it demonstrates to us the power of the concept of *muchzak*, even in the face of a *rov* which states the opposite. *Rov* is followed in almost every other area of Torah, but not when it comes to a monetary claim.

Yet, having seen this, perhaps it should cause us to re-examine the assertion made in the Gemara above [sec. 1], namely, that we do not require a verse to inform us of the principle of *hamotzi me'chaveiro*, we know it from *sevara*. As reasonable as the *sevara* is, nevertheless the Torah *has* told us as a rule that in cases of doubt we follow the *rov*. Can we really say with certainty that even without a verse we would have known that *muchzak* wins over *rov*?...

3. When in Doubt – Keep the Money?

There is a fundamental question raised regarding our principle which states that if one is unsure whether he owes money, he does not have to pay. If indeed he does not owe the money, then it is his. If, on the other hand, he does owe the money, then he is a thief for withholding it, and is violating the Torah prohibition not to steal. If so, then in a case where he *may* owe the money, then he *may* be violating the prohibition against stealing. We have a rule that in a situation of doubt, if there is a Torah prohibition at stake then

we must rule stringently. If so, then how can a *muchzak* keep the money in a case of doubt? He should have to pay for fear of possibly violating the Torah prohibition against stealing!

A classic response to this question is presented by R Yechiel Bassan⁴. With regards to other areas of Torah, there can be meaning in ruling stringently, for typically it involves only one person, e.g. if one is not sure whether a certain food item is kosher, he must be stringent and throw it out. In a monetary case, however, there are always two people in the equation, the claimant and the defendant. Now, as surely as it a Torah prohibition for the defendant to keep the money if he actually owes, it is equally a Torah prohibition for the claimant to take the money if it is not actually owed to him! To put it succinctly, when it comes to money, one man's stringency is another man's leniency. This being the case, there is no way one can act stringently in a monetary case without simultaneously acting leniently, which is antithetical to a doubt regarding a torah matter. The idea of going stringently thus becomes fundamentally unworkable in the area of money, and we rather take recourse to the principle of *hamotzi me'chaveiro*.

4. Stealing Basis: Defining Theft in Halacha

A different answer to this question is to be found in the *Kuntres Hasfeikos*⁵. It is true that there is a Torah prohibition against stealing. However, the definition of stealing is being in possession of money that you are not legally entitled to. To put that somewhat differently, the label of stealing can only be applied once the halacha has decided that you are not entitled to hold onto this money. Therefore, to raise the possibility that you may be stealing while the halacha is deciding whether you are entitled to the money is actually, by definition, meaningless. It is therefore incumbent first to determine halachically whether you can keep possession of the money; and seeing as the answer is yes – based on the principle of *hamotzi me'chaveiro* – you can keep the money with assuredness that you are not stealing.

What is highlighted by this approach of the *Kuntres Hasfeikos*, is that in halacha, monetary matters have their own apparatus and guidelines for determining the correct course of action. Indeed, this is underscored by the fact that the Gemara states in a number of places that *mamona me'isura lo*

⁴ Quoted in *Kuntres Hasfeikos*, sec. 1.

⁵ *Ibid*

gamrinan - we do not derive halachos in the realm of mitzvos generally from the realm of monetary matters, for we are unable to assume that there is an equation to be drawn regarding the various principles in these two realms.

Having gleaned some insight into what are essentially two separate halachic realms within Torah, namely, money and mitzvahs, let us see how the concept of *rov* features in each of them.

5. Rov: Most Definitely or Most Probably?

We know that throughout the Torah the rule is: in a case of doubt, we must be stringent; but if the *rov* points in the leniency – we may follow it. R' Shimon Shkop⁶ raises the question: What is the meaning of following *rov* in cases of doubt? Are we to say that:

A. We no longer consider there to be any doubt in the situation?

B. Or is it possible that although the doubt remains, nonetheless the Torah has given us license to rely on the *rov*?

It would seem that the second path is the more intuitive one, for the fact remains that while the presence of a *rov* in any situation provides us with the more likely scenario, nonetheless, every majority has a minority which reflects the possibility that in this particular instance, things did not happen the way they normally do. That having been said, the Torah nonetheless allows us to relate to the case at hand *as if* things happened in accordance with the *rov*. But this is a chiddush of the Torah, to invest what is essentially the more likely probability with the status of certainty.

All this is true when it comes to mitzvos generally. However, with regards money matters, we have already seen that they are governed by a somewhat unique set of laws. And what is the principle that embodies these laws?

Sevara!

This is what the Gemara means when it invokes *sevara* as the source for the principle of *hamotzi me'chaveiro*. Namely, given that we are dealing with

⁶ Shaarei Yosher shaar 5 sec. 15

issues of money, then the fact that *sevara* alone tells me that one cannot extract money without proof, any *pasuk* to that effect would be redundant.

And now we may return to our earlier question: Given that the halacha states that *muchzak* is stronger than *rov*, is it not possible that this is what we need the *pasuk* for? Perhaps we would not otherwise know that the principle of *rov*, which holds sway in every other area of Torah, can be trumped by *muchzak*!

The answer to this question, says R' Shimon, is – *sevara*!

Sevara demands a proof to back up a claim. *Sevara* recognizes the concept of *rov*, but accepts it exactly for what it is in *sevara* terms, namely, a statistical likelihood, but no more. It is true that throughout Torah we follow the *rov* as if it is a certainty, but that is a function of the chiddush of the torah saying ‘*acharei rabim le’hatos* – follow the majority’. That chiddush does not enter into the realms of money. And thus we understand that by invoking the concept of *sevara*, the Gemara is telling us that as surely as we know when it comes to money one needs a proof, we also know that *rov* will not constitute such a proof, and thus the proposed *pasuk* is considered redundant for this idea⁷.

6. Hamotzi Me’chaveiro – Static or Dynamic?

We have thus far established that a claimant cannot extract payment without bringing proof to verify his claim, even though the possibility exists that he is correct. The question arises: What if he grabbed the object anyway, would we take it back from him?

- Consider the above question. What are the possible ways to respond to it?

⁷ Cf Pnei Yehoshua Bava Kama 46b. Based on this explanation, we will appreciate that there are certain instances where we will be guided by *rov* even in matters relating to money, namely, when there is no *muchzak*. An example of this is to be found in the Rema (Choshen Mishpat 292:10) where two people gave a joint deposit to a guardian to look after for them, with one contributing more items to the deposit than the other. In the event that one of the items goes missing – under circumstances which are not considered negligence on the part of the custodian – one of the partners will need to absorb the loss. But how will we determine whose object went missing? In this instance there is no *muchzak*, since the custodian holding all the items does not claim that any of them are his. Having removed *muchzak* from the equation, we no longer require proof as to whose object fell, and we will accept that probability based on *rov* that the lost item belonged to the one who deposited more of them. See also Rashi Bava Metzia 22b s.v. *be’aga* and Tosafos Bava Basra 23b s.v. *chutz*. Cf Rashi Bava Metzia 24b s.v. *mi*.

One the hand we could maintain that he should have to return it, after all, he was not entitled to take it without proof, in which he took it illegally, and as such should have to give it back.

On the other hand, we could argue that it was always a real possibility that the item or money belongs to him, except that barring evidence to that effect he could not force the *muchzak* to give it up. That said, once he has nonetheless gone ahead and taken, *he* is now the *muchzak*! The very reason which prevented him being able to take should bar the original *muchzak* from forcing him to give it back without proof that it was really his.

Or, to phrase the question this way: is the principle of *hamotzi me'chaveiro* static, i.e. once a certain individual has been defined as the *muchzak* in the initial stage, he becomes established as the owner, and should the claimant subsequently seize it from him he will be a thief. Or is the principle dynamic, i.e. there is an ongoing uncertainty as to whom the object belongs to, and this uncertainty will be as present post the seizure as it was prior to it, only this time it is the original *muchzak* who now needs to furnish proof that it was is to begin with.

Interestingly, this very question is discussed in the Gemara, in the famous Case of The Questionable Firstborn...

7. The Case of the Questionable Firstborn

The Torah stipulates that the *bechor* [firstborn] of every Jewish-owned animal belongs to the Kohen. Now, it is possible that we are unsure whether a certain animal is a firstborn or not, e.g. the mother was previously owned buy someone else, and we do not now whether it gave birth to other animals during that time.

- Based on what we have seen so far, would this questionable firstborn need to be give to kohen?

Since there is no proof that this animal is a firstborn, the farmer does not have to give it to the kohen, for he may say *hamotzi me'chaveiro* – prove to me that it is a firstborn.

But what if the kohen went ahead and took it anyway? This question is referred to as *takfo kohen* [the kohen grabbed]. The Gemara⁸ records a dispute as to whether we would take it back from the kohen or not. The Gemara then proceeds to resolve this matter by citing a Mishnah regarding the halachos of *maaser beheima* – animal tithes...

Every tenth animal is consecrated as an offering. However, only animals that definitely belong to the owner can be part of the count. In the Mishnah,⁹ we are told that even doubtful animals – such as our doubtful firstborn – can be part of the count. The Gemara concludes from here that if the kohen were to grab the doubtful firstborn, we would force him to give it back, and this is the halacha as formulated by almost all authorities¹⁰.

- What is the proof of the Gemara from the case of tithes? How do we understand the Gemara's connection between the doubtful, firstborn's participation in the *maaser* count and whether or not we extract it from the kohen?

It is clear from this comparison in the Gemara, that the question of whether we would force the claimant to return it is ultimately connected to the question of whether it is really 'his' at all. That is to say, if we say that *hamotzi me'chaveiro* results in awarding it to him with certainty, then at that point he becomes the definite owner. This will result in two things:

- a. It can part of his *maaser* count
- b. If the claimant takes it from him, we will force him to give it back.

However, if we look at *hamotzi me'chaveiro* purely as an expression of the inability of the claimant to extract it from him, which leaves him de facto with the ability to hold on to it, without ever concluding that it is his, then all he has is the holding power; the essential ownership of the item, however, remains non established, therefore:

- a. It cannot be part of his *maaser* count

⁸ Bava metzia 6b

⁹ Bechoros 9a.

¹⁰ See Rosh Bava Metzia chap. 1 sec. 11.

- b. If the claimant takes it from him, *he* now has the holding power. We will not force him to return it to the original owner, seeing as we never identified him as the actual owner.

8. Psak vs. Non-Psak

R' Elchonon Wasserman¹¹ explains that this discussion regarding *hamotzi me'chaveiro* can take place on a more fundamental level. Instead of asking what the nature of this ruling is, we may be more advised to ask whether it is a ruling at all!

Let us elaborate.

It is possible to describe *hamotzi me'chaveiro* as one of a the many types of rulings a beis din can issue, i.e. if the claimant produces evidence then the beis din rules that the object belongs to him, and if he cannot then based on *hamotzi me'chaveiro* they rule that it belongs to the defendant.

But it is also possible to explain that this principle does not yield a ruling at all. On the contrary, *hamotzi me'chaveiro* states that in the absence of evidence one way or the other the beis din *cannot* rule, rather, the case is dismissed pending the claimant being able to prove his claim. It is, in essence, a *non-psak*.

- How will this affect the procedure in a case where the claimant seizes the object?

If we understand that *hamotzi me'chaveiro* generates a ruling, then once the beis din have ruled that it belongs to they defendant, it will considered stealing for the claimant to take it from him, and if he does so he will need to return it.

If, however, we do not consider any ruling to have been issued, rather the case was dismissed due to us being unable to determine the object's ownership, then should the claimant subsequently seize the object, we will have as much to say about the subject as we did initially, namely: nothing!

¹¹ Kovetz he'aros sec. 71

It is most interesting to consider in this light the words of Rabbeinu Yehonasan of Lunil¹² in explanation of the saying which the Gemara uses to illustrate the *sevara*, “One who is sick let him go to the doctor”:

“It is clear that the procedure in judgment is no less than in the case when one goes to a doctor; the doctor cannot diagnose the patient based on thoughts alone without the patient telling him ‘my head hurts me in such and such a place... similarly, the claimant needs to furnish evidence that his claim is strong, i.e. through witnesses.’”

What is noteworthy about the explanation of Rabbeinu Yehonasan is the parallel that he draws between the *beis din* and a doctor. When the doctor does not have enough evidence, he cannot diagnose the patient as sick, but thus doesn’t mean that he thereby diagnoses him as being healthy! He simply doesn’t know. By the same token, in the absence of evidence to support the claim of either party, the *beis din* cannot ‘diagnose’ to whom it belongs, they simply have nothing to say.

9. Rambam

We mentioned above that almost all Rishonim rule, based on the conclusion of the Gemara in Bava Metzia, that if the claimant seized the object we would take it back from him. A notable exception is the Rambam¹³, who rules that if the kohen were to seize the doubtful firstborn, we would *not* take it back from him. All the commentators are most curious to know how the Rambam can rule this way, in direct contradiction to the Gemara’s conclusion?

R’ Wasserman explains: although the Gemara in Bava Metzia clearly holds that we would take the animal back from the kohen, the Rambam found another place in the Gemara which seems to indicate that the kohen could in fact keep it.

Where is this Gemara? It is ‘our’ Gemara, Bava Kama 46b.

¹² Quoted in Shitah Mekubetzes Bava Kama 46b

¹³ Hil. Bechoros 5:3.

The Gemara in Bava Kama states that to have a pasuk to teach us the principle of *hamotzi me'chaveiro* would be redundant. This indicates that according to the Gemara, there is nothing that the pasuk could teach me regarding this principle that I wouldn't be able to work out myself using *sevara*. Now, we have seen that there are those who understand that the *sevara* is describing a 'non-psak'. That being the case, the item is not *awarded* to the defendant by the beis din, he simply keeps it because we have nothing to say. But by this definition of the nature of the principle, if the claimant were to seize the object – he could keep it! And that is the sum-total of *muchzak* according to the Gemara in Bava Kama. The Rambam thus perceives a dispute between these two sugyas regarding the fundamental nature of *hamotzi me'chaveiro*, and rules in accordance with Bava Kama, seeing as it is devoted specifically to discussing the issue of *muchzak*, it is taken as the more authoritative of the two sugyas¹⁴.

¹⁴ See also responsa of the Nesivos Hamishpat, printed in Responsa Chemdas Shlomo sec. 2.