

חָדָא בְּמִקּוּם תְּרִי, וְחָדָא בְּמִקּוּם תְּרִי – לֹא אִמְרִינְן. עַד שְׁלֹא תִּתְאַרְס – הָעֵמֶד הַגּוֹף עַל חֻקְתּוֹ לֹא אִיכָא לְמִימַר. מֵאִי אִיכָא – חֻקְתָּ דְאִין אָדָם שׁוֹתֵה בְּכּוּס אֲלֵא אִם כֵּן בּוֹדְקוּ, וְהֵאִי רָאָה וְנִפְיִים הוּא – אֲדַרְבֵּהּ, חֻקְתָּ אִין אָדָם מִיפְיִים בְּמוֹמִין, וְהָעֵמֶד מִמּוֹן עַל חֻקְתּוֹ.

רַב אֲשִׁי אָמַר: רִישָׁא – “מְנָה לֵאבָא בִּידְךָ,” וְסִפָּא “מְנָה לֵי בִידְךָ.”

אִיתִיבִיהּ רַב אַחָא בְּרִיהּ דְּרַב אֲוֵיָא לְרַב אֲשִׁי: מוֹדָה רַבִּי מֵאִיר בְּמוֹמִין הָרְאוּיִן לְבָא עִמָּה מִבֵּית אָבִיהּ, שְׁעַל הָאָב לְהַבִּיא רְאִיָּה. וְאִמְרֵי? “מְנָה לֵי בִידְךָ” הוּא.

הָכָא בְּמֵאִי עֲסָקִינְן – בִּיתְיֹרֶת, יִתְיֹרֶת מֵאִי רְאִיָּה מִיִּתְיֹרֶת? רְאִיָּה דְרְאָה וְנִפְיִים הוּא.

one presumption opposed by two others.^N And we do not say that one presumption is decisive when it is opposed by two. However, if the husband brings proof that that she was blemished before she was betrothed, we cannot say: Establish the state of the woman's body according to its presumptive status, since it has been established that the blemishes existed prior to the betrothal. What claim is there in the woman's favor? Only the presumption that a person does not drink from a cup unless he first examines it, and this man has undoubtedly seen her blemishes and been appeased. The Gemara responds: On the contrary, there is a presumption that a person does not become appeased with regard to blemishes, and therefore the money is established according to its presumptive status and do not obligate the husband to pay for the marriage contract.

Rav Ashi said that the contradiction between the first and last clauses of the mishna can be resolved in the following manner: The first clause is similar to a claim made by one who says: My father has one hundred dinars in your possession.^N When the blemishes were discovered he had not yet married her, and therefore the payment for the marriage contract would go to the woman's father, and not to her. And the latter clause is referring to a married woman who claims the marriage contract for herself, and it is therefore as though she says: I have one hundred dinars in your possession. The presumptive status of her body enables her to claim money only for herself, not on behalf of someone else, including her father.

Rav Aha, son of Rav Avya, raised an objection to Rav Ashi's opinion from a *baraita*: Rabbi Meir concedes with regard to blemishes that naturally come with her^H from her father's house, and which did not develop after the marriage, that the father must bring proof that she did not have them before the betrothal, even if she was already married when they were discovered. But why does Rabbi Meir agree in that case? It is similar to the case where someone says: I have one hundred dinars in your possession, along with the presumptive status of her body; therefore, the burden of proof should be upon the husband.

The Gemara answers: With what are we dealing here? With a case of a woman who has an additional toe. She was obviously born with that blemish. The Gemara is puzzled by this response: If the *baraita* is speaking about an additional toe, what proof could the father possibly bring to argue that the toe grew after the marriage? The Gemara answers: He can provide proof that the husband saw the extra toe before the betrothal and he became appeased about it.

NOTES

One presumption opposed by two others – חָדָא בְּמִקּוּם תְּרִי: Rashi asks why the issue of monetary possession is disregarded in this case, and he answers that a presumption of this kind is overruled by the presumptive status of the body. The Ritva gives an alternative response: Since the husband's claim is uncertain, while his liability to the marriage contract is certain, this is not viewed as monetary possession.

My father has one hundred dinars in your possession, etc. – מְנָה לֵאבָא בִּידְךָ וכו' – Rashi asks: Since there is a presumptive status of the body, why is it ignored in the first case of the mishna? He answers that a presumption of this type is relevant only if the woman herself makes this claim, in which case it stands in opposition to the monetary possession of husband. But if she is a betrothed woman, then the claim is on behalf of her father, and the presumptive status of the daughter's body does not help the father. Ultimately, *Tosafot*, the *Rid*, and the *Meiri* also accept this opinion.

Other early authorities, however, raise many difficulties with Rashi's reasoning, as it is not at all clear why the presumptive status of the daughter's body should not be of value to the father, whose claim is dependent upon it. Consequently, they explain that the claim of the father is an uncertain one, as he does not always know when his daughter developed a blemish on a hidden part of her body. In that case, Rabban Gamliel rules that the presumptive status of her body is not relevant (*Rosh*; *Rashba*; *Rabbi Aharon HaLevi*).

HALAKHA

הָיָה בָּהּ – מוֹמִין הָרְאוּיִן לְבָא עִמָּה: If a wife was discovered to have blemishes that must have been present before her betrothal, such as an additional toe, the father must bring proof that the husband knew about them and married her regardless. If the husband

had relations with her, the presumption is that he was aware of and accepted the blemish. If the father fails to bring proofs to this effect, all agree that she may be divorced without payment of any part of her marriage contract (*Rambam Sefer Nashim, Hilkhot Ishut* 25:4; *Shulhan Arukh, Even HaEzer* 117:7).

אָמַר רַב יְהוּדָה אָמַר שְׁמוּאֵל: הַמְחַלֵּיף פָּרָה בְּחֵמֹר, וּמִשְׁךְ בַּעַל הַחֵמֹר אֶת הַפָּרָה, וְלֹא הִסְפִּיק בַּעַל הַפָּרָה לְמִשּׁוֹךְ אֶת הַחֵמֹר עַד שְׁמַת הַחֵמֹר – עַל בַּעַל הַחֵמֹר לְהַבִּיא רְאִיָּה שֶׁהָיָה חֵמֹר קַיִם בְּשַׁעַת מְשִׁיבַת פָּרָה.

§ Rav Yehuda said that Shmuel said: With regard to one who exchanges a cow for a donkey,^{NH} where the two animals involved in this transaction are not in the same location, one of the parties acquires one of the animals by means of pulling it, which transfers the other animal to the other party through acquisition by means of the exchange. And in this case the owner of the donkey pulled the cow, but before the owner of the cow could pull the donkey in turn, the donkey died. The owner of the cow claimed that the donkey died before the other one pulled the cow, which means the exchange transaction never took effect. In that case, the owner of the donkey must bring proof that his donkey was alive at the time when the cow was pulled. If he is unable to bring proof to this effect, the owner of the cow retains his animal.

וְתַנָּא תוֹנָא בְלָהּ. הִי בְלָהּ? אֵילִימָא

Rav Yehuda adds: And the *tanna* of the mishna also taught along similar lines with regard to a bride. Shmuel learned this *halakha* concerning an acquisition by means of barter from the case of a bride. The Gemara inquires: Which *halakha* involving a bride serves as the basis for the *halakha* that Shmuel taught? If we say

NOTES

הַמְחַלֵּיף פָּרָה בְּחֵמֹר – One who exchanges a cow for a donkey – All the commentaries struggle to explain this passage and the opinion of Shmuel, with regard to both his reasoning and the proof he cites in support of his opinion. *Tosafot* discuss the basic issues, proposing two interpretations. One approach, accepted by some early authorities, is that the case is decided based on the presumptive status of the prior owner: Since the cow initially belonged to him, the burden of proof rests upon the claimant even if the claimant is currently in possession of the cow. Another suggestion is that the *halakha* follows the current state of affairs, similar to the *halakha* that all impurities follow the moment of their discovery. Because the donkey was dead when the case came before the court, its owner must prove that it was alive at the time of the acquisition.

Conversely, in his *Sefer HaYashar*, Rabbeinu Tam explains that according to the statement of Rav Yehuda, citing Shmuel, that the burden of proof rests upon the party in whose possession the uncertainty arose, Shmuel's ruling applies only if the donkey died in its owner's domain. But if it died in a location that did not belong to its owner, the burden of proof is upon the owner of the cow.

Rabbeinu Tam further states that according to Rami bar

Yehezkel below (76b), the burden of proof is not determined by the place where the uncertainty was discovered, but by the party who had legal possession of the item in question, in this case, the donkey, at the time the uncertainty arose. Consequently, since the act of exchange had already been performed, it is assumed that the animals were acquired, and the owner of the cow must bring proof that the donkey had been dead at the time of the exchange, as the donkey is now legally considered in his domain. However, this opinion is challenged by a number of authorities, including the Ramban.

A different explanation is provided by Rabbeinu Zerahya HaLevi and the Ra'avad. They contend that since the acquisition itself was uncertain, as it cannot be clearly established that the donkey was alive when the exchange was performed, the party in possession of the animal is the one that definitely owned it. Consequently, the prior owner of the donkey is the claimant. Rabbi Aharon HaLevi and his students favor this interpretation, as does the Meiri. The Ritva, cited in *Shita Mekubbetzet*, states that it is hard to infer the principle upon which Shmuel bases his ruling from his own words, and that Shmuel's reasoning can be understood only in light of the proofs cited below with regard to a bride.

HALAKHA

הַמְחַלֵּיף פָּרָה – One who exchanges a cow for a donkey, etc. – **בְּחֵמֹר וְכוּ:** If the owners of a cow and a donkey wanted to exchange their animals, and the owner of the donkey pulled the cow as an acquisition by means of exchange, but before the owner of the cow could do the same with the donkey it died, the prior owner of the donkey must bring proof that his animal was alive when the cow was sold. The same reasoning applies to any case where an uncertainty arose with regard to an item in the possession of a particular party, as stated

by Shmuel. The Rema cites the *Tur*, who cites the Rosh as saying that in this case the burden of proof rests upon the owner of the cow, for as soon as the cow is pulled the donkey belongs to the owner of the cow, no matter where the donkey is located. This means the uncertainty arose when the donkey was already in the domain of the prior owner of the cow, in accordance with the opinion of Rami bar Yehezkel (Rambam *Sefer Kinyan, Hilkhot Mekhira* 20:14; *Shulhan Arukh, Hoshen Mishpat* 224:1).

כלה בבית אביה. מי דמי? התם –
מיייתי אב ראיה ומפיק, הכא –
מיייתי בעל החמור ראיה ומוקים!

אמר רבי אבא: פלה בבית חמיה.
ואכתי לא דמי: התם – בעל מיייתי
ראיה ומרע ליה לחזקיה דאב,
הכא – בעל החמור מיייתי ראיה
ומוקים חזקיה בידיה!

אמר רב נחמן בר יצחק: פלה בבית
אביה, ולקידושין.

ולא תימא אליבא דמאן דאמר:
קדושין לאו לטיבועין ניתנו,
אלא אפילו למאן דאמר: קדושין
לטיבועין ניתנו – הני מילי קידושין
ודאי אבל קידושין טעות, אי מיייתי
ראיה – אין, אי לא – לא.

מיתבי: מחט שנמצאת בעובי בית
הבוסות; מצד אחד – בשורה, משני
צדדין – טריפה. נמצא עליה קורט
דם – בידוע שהוא לפני שחיטה.
לא נמצא עליה קורט דם – בידוע
שהוא לאחר שחיטה.

הוגלד פי המכה – בידוע ששולשה
ימים קודם שחיטה. לא הוגלד פי
המכה – המוציא מחבירו עליו
הראיה. ואי יהיב טבת דמי – בעי
לאיתויי ראיה ומפיק,

that his proof is from the *halakha* with regard to a bride who is still in her father's house, when the burden of proof is upon the father, is it comparable? There, the father brings proof and takes money away from the husband, whereas here, the owner of the donkey brings proof and maintains possession of the cow. Consequently, perhaps this case is different, and he should not be obliged to provide proof.

Rabbi Abba said: The proof is from the case of a bride in her father-in-law's house, that is, one who has entered her husband's domain. The Gemara raises a difficulty: And yet the cases are still not comparable: There, the husband brings proof and undermines the presumption that was in favor of the father, i.e., the presumptive status of the daughter's body, whereas here, the owner of the donkey brings proof and thereby maintains the presumptive status of the donkey's body and consequently maintains the cow in his possession. Perhaps, therefore, he should not have to bring proof.

Rav Nahman bar Yitzhak said: Shmuel's proof is from the *halakha* of a bride in her father's house, but with regard to the money used for betrothal, not for the marriage contract. The father must bring proof in order to retain the betrothal money.

Rav Nahman bar Yitzhak explains: And do not say that this is only according to the one who says in general that betrothal money was not given with the understanding that it is to be lost,^{HL} that is, the money was handed over only for the purpose of betrothal and it must be returned if the betrothal is canceled. Rather, say that this is even according to the one who says that in the case of betrothal money that was given to be lost, this applies only to a betrothal whose status is certain. According to this opinion, if a husband later divorces his wife or dies she does not have to restore the betrothal money. But with regard to a mistaken betrothal, if the father brings proof then yes, he may keep the money; if he does not bring proof he may not retain ownership of the betrothal money. This supports Shmuel's opinion that in an uncertain case the one in possession of the money must bring proof in order to retain his ownership.

The Gemara raises an objection to Shmuel's opinion with regard to presumptions from a *baraita* about a different issue: In a case of a needle that is found in the thick wall of a slaughtered animal's second stomach,^{HB} if it has pierced the stomach from only one side, the animal is kosher. If the stomach is pierced from both sides, meaning that the needle pierced a hole completely through the wall of the stomach, it has the status of an animal with a condition that will cause it to die within twelve months [*tereifa*], and one is consequently prohibited to eat from it. Furthermore, if a drop of congealed blood is found on top of the needle, it is certain that the perforation was created before the slaughtering of the animal, and it is therefore a *tereifa*. If no drop of blood is found on it, it is certain that it occurred after the slaughtering, which means the animal is kosher.

If a scab appeared over the wound on that spot, it is certain that the incident happened three days before the slaughtering. The significance of this fact is that if the animal was sold to a butcher after this point in time, the butcher can claim that the transaction was performed in error, as he did not intend to purchase a *tereifa* animal. If a scab did not appear over the wound, and the seller claims that the animal was injured while in the possession of the butcher who purchased the animal, while the butcher claims that it was wounded when he bought it, the burden of proof rests upon the claimant. And therefore, if the butcher had already given the money, he needs to bring proof and then he can take his money back from the seller.

HALAKHA

בetrothal money was not given to be lost – לְטִיבוּעִין נִתְּנָוּ: With regard to one who betroths a woman, if he subsequently retracts the betrothal, or she changes her mind, or one of them dies, or he divorces her, the betrothal money need not be returned. Even if he betroths her with a thousand dinars, this money is considered a gift. However, this applies only to a betrothal whose status is certain. If the betrothal was performed in error the man is entitled to demand the return of his money (Rambam *Sefer Kinyan, Hilkhot Zekhiya UMattana* 6:18–19; *Shulhan Arukh, Even HaEzer* 50:1).

A needle that is found in the thick wall of an animal's second stomach – מַחַט שֶׁנִּמְצְאָת בְּעוֹבֵי בֵּית הַבּוֹסוֹת: If a needle was found in the thick wall of a slaughtered animal's second stomach, and the perforation did not go completely through the wall of the stomach, the animal is kosher. If a drop of blood is found on the perforation, the animal is a *tereifa*, as the organ was undoubtedly pierced before the animal was slaughtered. If there is no blood on the perforation it is permitted, as the perforation certainly came after the slaughter. If a scab formed over the wound, one can be certain that the animal was a *tereifa* three days prior to its slaughter. If no scab was formed the matter is uncertain, and therefore the butcher who bought the animal must bring proof that it was a *tereifa* before he purchased it. If he fails to do so he must pay the seller (Rambam *Sefer Kinyan, Hilkhot Mekhira* 20:15; *Sefer Kedusha, Hilkhot Shehita* 6:12; *Shulhan Arukh, Yoreh De'a* 48:8; *Hoshen Mishpat* 224:2).

LANGUAGE

To be lost [*letibu'in*] – לְטִיבוּעִין: Although there are several different theories as to the meaning of this word, its primary meaning comes from the same root as the word for drowning, as the money is lost and will not come back even if the betrothal is reversed.

BACKGROUND

A needle that is found in the thick wall of a slaughtered animal's second stomach – מַחַט שֶׁנִּמְצְאָת בְּעוֹבֵי בֵּית הַבּוֹסוֹת: The second of the four stomach chambers of ruminant animals, called the reticulum, is known as the *beit hakosot* in Hebrew. The Hebrew term literally translates as house of cups, since it is shaped like a series of cups placed one inside the other. Here, food is mixed with saliva and separates into layers of solid and liquid material, with solids clumping together to form the cud. The most likely way that a needle can find its way into the wall of the reticulum is from the food that is ingested by the animal, which swallows everything indiscriminately. It is also possible, however, for a needle that made its way from one of the other digestive organs to become imbedded in the reticulum from the outside.

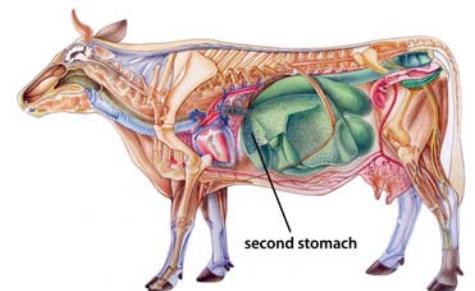


Diagram showing a cow's organs, including the second stomach, or reticulum

PERSONALITIES

Rami bar Yehezkel – רמי בר יחזקאל: Rami is a shortened form of Rav Ami. Rav Ami bar Yehezkel was the younger brother of Rav Yehuda.

Although in his youth he studied Torah under Rav and Shmuel in Babylonia, Rav Ami bar Yehezkel ascended to Eretz Yisrael, where he received many ancient traditions, among them unknown baraitot. In the Jerusalem Talmud he appears under the name Rav Ami bar Yehezkel. It may be assumed that at some point he returned to Babylonia, as the expression: When Rami bar Yehezkel came, refers to his coming from Eretz Yisrael to Babylonia, where he related the Torah of Eretz Yisrael. His teachings are considered important and authoritative to the extent that they were enough to refute his older brother's words.

HALAKHA

In whosoever's domain the uncertainty came into being – כָּל שְׁנוּלָד סֶפֶק בְּרִשּׁוֹתוֹ: The burden of proof rests upon the party in whose domain the uncertainty arose (Rambam Sefer Kinyan, Hilkhot Mekhira 20:14; Shulhan Arukh, Hoshen Mishpat 224:1).

ואמאי? בעל בהמה ליימי ראיה ונוקים!

The Gemara returns to Shmuel's opinion: **But why** should this be the halakha? **Let the owner of the animal**, i.e., the seller, **bring proof and establish** the validity of the sale, just as the owner of the donkey must provide proof in order to maintain possession of the cow. Why is the burden of proof upon the butcher?

בדלא יהיב טבחא דמי. מאי פסקא?

The Gemara answers: This baraita is referring to a case **when where the butcher had not yet given the money**, but was going to pay at a later time. Therefore, the seller is the one claiming money from the butcher, and he must offer proof in order for the transaction to be upheld. The Gemara poses a question: **Why** was it stated **without qualification**? The wording of the baraita implies that either side must bring proof. This baraita appears to refute the opinion of Shmuel.

אלא. כי אתא רמי בר יחזקאל, אמר: לא תציייתנהו להני כללי דכניל יהודה אחי משמיה דשמואל. הכי אמר שמואל: כל שנולד ספק ברשותו – עליו הראיה. ותנא תונא בלה.

Rather, when Rami bar Yehezkel^p came, he said: **Pay no attention to those rules formulated by my brother Yehuda in the name of Shmuel. In actuality, this is what Shmuel said: In whosoever's domain the uncertainty came into being,^{HN} the burden of proof rests upon him.** In the case of the exchange of the cow for the donkey, it is the owner of the cow who must provide proof. **And the tanna** of the mishna also **taught** along similar lines with regard to a **bride.**^N If the bride was in her father's domain he must provide proof; if she was living with her husband the burden of proof is upon him.

מיתיבי: מחט שנמצאת בעובי בית הכוסות כו', ואי דלא יהיב טבח דמי – בעל בהמה בעי לאיתויי ראיה, ומפיק. ואמאי? ספיקא ברשות טבח איתיליד!

The Gemara raises an objection: **A needle that is found in the thick wall of an animal's second stomach ... the burden of proof rests upon the claimant. And if the butcher had not already given the money, the owner of the animal needs to bring proof, and only then can he take his money.** The Gemara asks: **But why? The uncertainty was formed in the butcher's possession.** According to Rami Bar Yehezkel's opinion, it should be the butcher's responsibility to provide proof.

דיהיב טבח דמי. ומאי פסקא? סתמא דמילתא. במה דלא יהיב איניש זוזי – לא יהיב איניש חיותא.

The Gemara answers: This baraita is referring to a case **where the butcher had already given the money.** Since the butcher is the one demanding money from the seller, he must provide proof. The Gemara poses a question: **But why** was it stated **without qualification**? How is it known that the tanna was referring to this particular case? The Gemara answers: **The ordinary situation** is that **as long as a person has not given money, the other person will not give him the animal.** It can therefore be assumed that the butcher paid for the animal before he was allowed to slaughter it, which means it is he who is claiming the return of the money.

”וחכמים אומרים: במה דברים אמורים במומין שבסתר”. אמר רב נחמן:

§ The mishna teaches: **And the Rabbis say: In what case is this statement said? With regard to hidden blemishes.** But he cannot claim to have been unaware of visible blemishes. **Rav Nahman said:**

NOTES

In whosoever's domain the uncertainty came into being – כָּל שְׁנוּלָד סֶפֶק בְּרִשּׁוֹתוֹ: Rabbeinu Tam, Tosafot, and the Rosh explain that according to Rami bar Yehezkel, Shmuel does not understand domain to be referring to the physical location, meaning the property of one of the parties, as his brother Rabbi Yehuda had previously thought. Rather, he claims Shmuel means domain in the sense of ownership, meaning that the one who was owner of the animal when the uncertainty arose must bring proof. According to this opinion, in Rav Yehuda's particular case of an exchange of a cow for a donkey, the burden of proof is upon the original owner of the cow since as soon as the cow is pulled by the other party, the one who owned the cow is considered the owner of the donkey, and therefore the uncertainty occurred in his domain. The Rosh rules in accordance with this opinion.

is an uncertainty is the one who must provide proof, whereas Rami bar Yehezkel maintains that it all depends on the location where the uncertainty arose. If so, despite the differences in reasoning between Rav Yehuda and Rami bar Yehezkel, the halakha with regard to the exchange of a cow for a donkey remains the same. The Rashba, Rabbeinu Zerahya HaLevi, and Rabbi Aharon HaLevi note that this explanation fits in with the formulation of the Rif, who cites the first version of Shmuel's statement as the halakha. Even according to this opinion there are certain differences between the two opinions, e.g., if the donkey was situated in an ownerless marsh rather than in the owner's domain.

in her father-in-law's house. Tosafot and Rabbi Shimshon of Saens claim that the proof is only from a bride in her father-in-law's house. According to Rabbeinu Shimshon, at this stage the Gemara is of the opinion that the husband's obligation to bring proof is not due to the aforementioned reason that there are two presumptions against one, as at this stage the Gemara maintains that the rule: They were discovered here so they were created here, opposes the other presumptions. Rather, the burden of proof rests upon the husband because the uncertainty arose in his home.

The Ra'avad and Rabbeinu Zerahya HaLevi explain the passage in the opposite manner. They contend that Rav Yehuda's understanding of Shmuel's statement is based on the assumption that that the owner of the item with regard to which there

And the tanna of the mishna also taught along similar lines with regard to a bride – ותנא תונא בלה – There are differences of opinion with regard to this proof that follow the fundamental disagreement with regard to the interpretation of this entire passage. Rashi maintains that the proof is required with regard to both a bride living in her father's house and a bride living

Conversely, the Rashba argues that the Gemara is referring to a bride in her father's house, in accordance with the explanation of the Ra'avad and Rabbeinu Zerahya HaLevi. The reasoning is that since she is still in her father's domain for some purposes, such as with regard to vows and work, it is his responsibility to provide proof. Rabbi Aharon HaLevi also gives a similar explanation, although he maintains that the proof is with regard to the betrothal money in the case of a bride in her father's house.