

Nedarim 34a

Understanding When and Why a “Returner’s Fee” Has to be Given to Hekdesh

We learned in a Mishna תנן
 in a place that they take for it מקום שנוטלין עליה
 payment (for the returning) שכר
 ‘give’ the benefit to hekdesh תפול הנאה להקדש

The Mishna said that even though it is mutur to return the lost object, if in this location it is the custom for the owner to give a ‘finder’s fee’ i.e., compensation for the income the returner lost as a result of spending the time returning the object, this ‘finder fee’ has to be given to hekdesh (i.e., even if the returner declines to take it, the owner has to give it to hekdesh, because if he doesn’t, it will come out that the owner has benefitted from the returner).

The Gemara now tries to figure out the case in which this halacha is true. The Gemara says:

It is good בשלמא
 according to the one who says למאן דאמר
 (that) even (in the case that) אפילו
 the property of בשנכסי
 the owner of the aveida is assur בעל אבידה אסורים
 on the returner על מחזיר
 it can also be returned נמי מהדר
 this is (understandable) what is taught היינו דקתני
 (that) in a location מקום
 that they take payment שנוטלין עליה שכר
 you “give” it to hekdesh תפול הנאה להקדש

The Mishna stated that one is allowed to return the lost object, and with regard to this there was a machlokes with regard to which case the Mishna is referring to. According to one opinion, the heter of the Mishna applies both in the case that the owner is assur to benefit and in the case that the returner is the one who can’t benefit. If so, we can say that the case in which the fee has to be given to hekdesh is the case in which both the owner and the returner are assur to benefit from each other. And in this case we understand very well why in both these cases the ‘returner’s fee’ has to be given to hekdesh. If the owner gives the returner the fee, the returner has benefitted. And if he does not give the fee, the owner has benefitted (as he got his object back without having to pay for it). Therefore, the only option is to give the fee to hekdesh, and by doing so, no one benefits, and we understand the Mishna very well.

The Gemara continues and asks:

But according to the one who holds אלא למאן דאמר
 that when the property of בשנכסי
 the owner of the lost object בעל אבידה
 is assur on the returner אסורים על מחזיר
 he cannot return it לא מהדר
 why אמאי
 should you ‘give’ the benefit תפול הנאה
 to hekdesh להקדש

According to the opinion that holds that if the returner is the one who is assur to benefit, the object cannot be returned, the Mishna is obviously not referring to such a case as the Mishna clearly says that the object can be returned. If so, according to this opinion, the Mishna must only be referring to a case in which the owner is the one who is assur to benefit from the returner. But if so, why does the ‘finder fee’ not be given to the returner. He is not the one who is assur to benefit, and if so, there should be nothing wrong with him taking the fee.

The Gemara answers:

On one of them it was learned אחדא קתני

The Gemara answers that this halacha that the ‘finder’s fee’ must be given to hekdesh was only said in reference to one of the two parties involved, that is, it was said with reference to the owner but not the returner. If the owner wants to give the fee to the returner, he is allowed to do so (that is the returner is allowed to benefit from this fee). However, if the returner declines to take it (and by doing so he benefits the owner), in this case the owner must give the fee to hekdesh in order to prevent himself from benefitting from the returner.

Another Version of the Machlokes R’ Ami and R’ Asi (when is one allowed to return a lost object to someone that he is assur to benefit from)?

The Gemara now brings the opposite version of the machlokes between Rav Ami and Rav Asi.

There are those that learn איכא דמתני לה

‘this way’ בהאי לישנא

(that) they argue in this regard פליגי בה

R’ Ami and R’ Asi רבי אמי ורבי אסי

one said חד אמר

we didn’t learn (the heter of the Mishna) לא שנו

only אלא

when the property of בשנכסי

the owner of the aveida בעל אבידה

is assur to the returner **אֲסוּרִין עַל מַחְזִיר**
 (and the reason that it is mutur) is because **מִשּׁוּם**
 the 'perutah of Rav Yosef' **פְּרוּטָה דְּרַב יוֹסֵף**
 is not common **לֹא שְׂכִיחַ**
 but when the property of the returner **אֲבָל נִכְסֵי מַחְזִיר**
 is assur to the owner of the aveida **אֲסוּרִים עַל בְּעַל אֲבֵידָה**
 he cannot return it **לֹא מֵהֵדָר לִיה**
 because he is giving him benefit²⁶ **מִשּׁוּם דְּקָא מְהַנִּי לִיה**

And one says **וְחַד אָמַר**
 even **אֲפִילוּ**
 when the property of the returner **נִכְסֵי מַחְזִיר**
 is assur **אֲסוּרִים**
 to the owner of the aveida **עַל בְּעַל אֲבֵידָה**
 it (will still be) mutur **מִתָּר**
 for when he returns it **דְּכִי מֵהֵדָר לִיה**
 his own thing he is returning **מִיָּדֵי דְנִפְשֵׂיהּ קִמְהֵדָר לִיה**

To Summarize: In this version of the machlokes, everyone agrees that if the returner is assur to benefit, he can return the object. This is because even though in theory the returner benefits because of the 'Perutah D'Rav Yosef', this is not common and is therefore it is not considered a benefit (that is assur as a result of the neder).

But in the case that the owner is forbidden to get benefit, this is the machlokes. One shita holds that in this case it assur to return the object, as by returning the object the owner benefits as he gets his object back. The second shita holds that even in this case the object can be returned, and it is not considered as if the owner is benefiting as the owner is just getting his own object back.

The Gemara now asks a similar question to what it asked previously on the first version of the machlokes.

We learned in the Mishna תָּנוּ

²⁶ **Why Can the Person Pay Back the Other Person's Debt but not Return His Object?**

Although the Ran explains why paying back a debt is different than returning a lost object, it is not entirely clear as to Ran's intent. We will explain the Ran as we understand it, but the readers are urged to see the Ran inside for themselves

Seemingly the Ran is saying that the reason why you cannot return the lost object is because be doing do, you are directly benefiting the person (as the Ran writes, you are putting the object in the person's hand), as opposed to paying back the debt where you are only indirectly giving him benefit. Another way of explaining the difference is that with regard to paying back the debt you are just preventing a loss to him as opposed where you actually give him something.

The Ran then continues and according to our understanding he is just coming to answer a different question but is not explaining why the act of paying back a loan is not considered a benefit as opposed to returning the object which is considered a benefit (although there are those who learn that the Ran is giving two distinct answers to explain the difference between paying back a debt and returning a lost object).

in a place **מְקוֹם**
 that they take payment for it **שְׁנוּטְלִין עָלֶיהָ שְׂכָר**
 you should 'give' it to hekdesch **תַּפּוּל הַנָּאָה לְהַקְדִּישׁ**

The Gemara now asks:

It is good **בְּשֵׁלְמָא**
 according to the one who holds **לְמַאן דְּאָמַר**
 that even **אֲפִילוּ**
 when the property of the returner **בְּשִׁנְכֵי מַחְזִיר**
 is assur **אֲסוּרִים**
 to the owner of the aveida **עַל בְּעַל אֲבֵידָה**
 he can return it **מֵהֵדָר**
 this is how **הֵינּוּ**
 we can answer (the halacha) of 'place' **דְּמִתְרָךְ מְקוֹם**
 But according to the one who says **אֲלֵא לְמַאן דְּאָמַר**
 that when the property of the returner **בְּשִׁנְכֵי מַחְזִיר**
 is assur (to the owner) **אֲסוּרִין**
 he cannot return (the aveida) **וְלֹא מֵהֵדָר**
 how can it be answered **הֵיכִי מִתְרָךְ**
 (the halacha of) 'place' **מְקוֹם**
 (indeed) it is difficult) **קִשְׂיָא**

The Gemara asks a similar question to the one that was asked previously but in a different manner. The Mishna said that the 'returner's fee' has to be given to hekdesch. The Gemara now tries to find the case for this halacha. The Gemara starts by saying that according to the one that holds that the Mishna is discussing both a case in which the owner is assur and a case in which the returner is assur, we can understand the halacha of 'place' very well. (When the Gemara refers to the halacha of 'place' it is referring to the halacha that says that in a place that the custom is to give a 'finder's fee', this 'finder's fee must be given to hekdesch.)

If the Mishna is discussing a case in which the owner is forbidden to get benefit, then if the returner forgoes this fee, the owner will benefit as he got his object back without the need to

The question that the Ran is coming to answer is what do to with the reasoning of the one who allows the returning the lost object. The first shita in our sugya holds that he is allowed to return the lost object as this is not considered as a benefit to the owner as the person is just returning something that already belonged to him. If so, what does the shita that holds that it is assur to return the object do with this line of reasoning?

This is the question that the Ran is coming to answer, and he says that it is still considered a benefit because if this person had not returned , it is quite possible that it would have been lost forever. Therefore, despite the fact that the object already belongs to owner, it is considered a benefit when it is returned to him. (ע' היטב בדברי הרשב"א כאן, ויש לדון בכבונת דבריו, ואפשר שכר"ן כיון לדבריו, אבל.) (כנראה שאינו כן, ע"י שם)

pay this fee. Therefore, the Mishna tells us that in this case the owner must give the fee to hekdesch (in order that he should not benefit from the returner).

But according to the one that holds that the heter of the Mishna is only in a case in which the returner is assur to benefit but not the owner, why does the owner have to give the fee to hekdesch? Why can he not just keep it for himself? Even though

this is a benefit to the owner, this is not a problem at all as according to this shita it is the returner who is assur to benefit and not the owner.

The Gemara concludes that indeed this is a valid question on this shita.²⁷

27 Understanding why the Gemara Could Not Answer as it Did Previously that the Mishna is Referring to a Particular Case

In the first version of the machlokes there was a shita that held that the case of the Mishna is only if it is the owner who was not allowed to benefit. And on this the Gemara asked that why does the finder's fee have to go to hekdesch? If the case is one in which it is the owner who is not allowed to benefit but the returner could benefit, why would the owner not be allowed to give the finder's fee to the returner? To which the Gemara answered that the Mishna is discussing a case in which the returner is not willing to accept the fee, and this causes the owner to benefit as he now got his lost object back without having to pay the usual fee. Therefore, we understand very well why the owner has to give the fee to hekdesch. This is done in order to prevent him from benefiting from the returning.

But according to version of the machlokes that the Gemara is now discussing, there is a shita that holds that the Mishna is only discussing when it is the returner that is assur to benefit and not the owner and on this the Gemara has its 'unanswerable' question of why the finder's fee has to be given to hekdesch. The Gemara's question is based on the fact that if the owner is allowed to benefit from the returner, then there is no circumstance that would force the owner to give the finder's fee to hekdesch. That is, we understand very well why the owner cannot give the fee to the returner as the returner is not allowed to benefit from the owner. But if so, why cannot the owner just keep the fee for himself? Even though this would cause the owner to benefit from the returner, this would not be a problem as there is no issur on the owner according to this version of the machlokes. And yet the Mishna says that the fee must be given to hekdesch, and this is why the Gemara concludes that it is difficult to understand why this is true according to this version of the machlokes.

Nedarim 34b

The Halachos of Using an Object of Hefker that One Made Hekdesh

Rava said **אמר רבא**
if there was before him **היתה לפניו**
a loaf of hefker²⁸ (i.e., an ownerless loaf) **כפר של הפקר**
and he says **ואמר**
“This loaf is hekdesh” **כפר זו הקדש**
if he takes it to eat **נטלה לאוכלה**
he is ma'al according to the whole thing **מעל לפי כולה**
(but if he take it in order) to ‘give it’ as an inheritance **להוריש**
to his sons **לבניו**
he is ma'al **מעל**
according to **לפי**
the ‘benefit’ that is in it **טובת הנאה שבה**

A person finds a loaf of bread that is hefker and makes it hekdesh. If the person then goes ahead and eats the loaf, he is ma'al on the entire value of the loaf as he is taking the loaf out of the reshus (domain) of hekdesh (it is forbidden for a private person to benefit from things that belong to hekdesh (see footnote for further explanation).

However, if he takes it, not to be koneh for himself but rather just to eventually give it over to his sons as an inheritance, in this case he will only be ma'al according to the value of the benefit that he gets with this that his children appreciate what he did (this type of benefit is referred to as טובת הנאה – that is, benefit from this that others have feelings of gratitude towards you).

He is not ma'al according to the actual value of the loaf as he did not have in mind to be koneh the loaf, and as such, he did not remove it from the reshus of hekdesh. But he is ma'al according to the value of the טובת הנאה that he received from this that he promised his sons this loaf (i.e., he is ma'al according to the value of the benefit that he got from the bread which is the value of the טובת הנאה).

²⁸ Why Does the Gemara Specifically Choose a Case of Hefker?

The Ran explains that the Gemara specifically chose a case in which the loaf was hefker and not that the loaf belonged to him. The Ran explains that if the loaf originally belonged to him and afterward, he ate it, the person would not be ma'al. The reason for this is that even though he ate what belonged to hekdesh, the loaf did not change from being in one reshus (domain) to being in another reshus. That is, before he made the loaf hekdesh, the loaf was in this person's reshus and even after he made it hekdesh it is still in hekdesh's reshus. This is because even after the person made the loaf hekdesh, he becomes like the gizbar (i.e., the one in charge of hekdesh) on the loaf. And the rule is that the only way a person can be ma'al is if he takes it from one reshus to a different reshus, but in this case since the object did not change reshus with his eating he will not be ma'al.

Although this previous halacha seems unrelated to our Gemara, the Ran explains that the reason that the Gemara brings this halacha is because it is similar to the Gemara's next question.

If a Person Forbids an Object from His Friend, Can He then Give it to His Friend as a Gift?

He asked from him **בעא מיניה**
Rav Chiya bar Avin from Rava **רב חייא בר אבין מרבא**
(if a person says) “My loaf **כפרי**
should be (assur) to you” **עליך**
and he then gave it to him **ונתנה לו**
as a present **במתנה**
what is the halacha **מהו**

The Gemara now explains its sofek.

“My loaf” he said to him **כפרי אמר לו**
(and therefore he means to say that) when **כי**
it is in his reshus **איתיה בך שותיה**
that is when it is assur **הוא דאסור**

or maybe **או דלמא**

“On you” he said to him **עליך אמר ליה**
(and therefore we say that) he meant to make **עילויה שותיה הקדש**
it hekdesh on him

This person said, “my bread should be onto you”, and on this the Gemara has its sofek of which part of this statement is the main part. That is, when he said the word “my loaf” do we say that his intention was to limit the neder to only that time that the loaf is actually his, and if so, if he would then give the loaf to this person, it will no longer be his and therefore it would then be mutur.

Or do we say that since this person said the words “on you” his intent is to say that this loaf should be onto you like a korban, and if so, just like a korban is assur forever, so too this loaf should be assur forever as well.

The Gemara answers:

He said to them **אמר ליה**

However, in the Gemara's case the person is ma'al when he eats it. The Ran explains as follows. When the person said that the object of hefker should become hekdesh, it becomes hekdesh as a person has the ability to be koneh (acquire) things that are in his daled amos. Therefore, since this loaf was in his daled amos, he has the ability to make it hekdesh, and it comes out that this person was never koneh the loaf. And therefore, when he ends up eating it, he is now ma'al as his eating takes it out of the reshus of hekdesh.

The Ran points out that even though normally we say that a person is koneh objects that are within his daled amos, this case is different as since he said that he wants the loaf to be hekdesh, he is also saying that he does not want to be koneh it (as he wants it to be hekdesh). Therefore, since it was never his, he cannot be considered as a gizbar and that is why he is ma'al on the entire loaf when he eats it.

it is obviously פְּשִׁיטָא
 that even though דָּאף עַל גַּב
 he gave him a present דִּי הִבֵּה לֵיהּ בְּמַתְנָה
 it is (still) assur אֲסוּר
 rather (if you don't say that it is assur) אֶלָּא
 (this that he said) "my loaf on you" כְּכָרִי עָלֶיךָ
 what is it coming to exclude לְאַפּוֹקֵי מֵאֵי
 is it not (impossible to say that that it is coming) לֹא
 to exclude לְאַפּוֹקֵי
 that if he steals it is (considered) stealing דָּאֵי גִנְבָה מִיְיָהּ מִיְגָב

The Ran explains that the Gemara is asking a rhetorical question. That the Gemara is saying that it cannot be that the person made this neder in order to prevent the other person from stealing the bread because this is not a plausible possibility, as will be explained.

This person made a neder to assur the bread from his friend. But why did he do so? If the neder will only be in effect as long as this person owns the bread, then the neder will be unnecessary. Even without the neder the bread belongs to this person, and as such, the other person will not be allowed to eat it as a person is not allowed to take something that does not belong to him. This being the case, there would be no reason that this person would have to make a neder in order to stop the other person from eating the bread. The Ran continues and says that it cannot be that the person made the neder in order to prevent the person from stealing it as people do not normally think in these terms. That is, one could have thought to say that even though the bread belongs to this person, he still made a neder in order to add to the severity of the avayra of stealing from him. And to this the Gemara says that this is not a plausible possibility as people don't normally think that people will steal from them.

If so, that the neder is not coming to forbid the bread to the other person while it belongs to him (as the bread is already forbidden to the other person as the result of the bread not belonging to him) and it was not to prevent the other person from stealing it (as people don't typically think that people will steal from them), why did the person make the neder? The only conclusion that Rava says is plausible is that the person made the neder to forbid the bread for the time that he will no longer own it, that is, he made the neder to be in effect for even after he gives it away to the other person.

The Ran explains that this person is concerned that the other person will pressure him into giving his bread as a gift to him, and therefore to prevent this from happening, this person makes a neder to forbid the bread forever, that is, to forbid the bread for even after the time that he gives it to the other person as a gift.

But now that this person made the neder, the other person will not pressure him to give him the bread, because even if this person would cave into the other person's pressure, it will not make a difference as the object will be assur even after he gives it to the other person.

The Gemara answer that this point is not necessarily true.

He said to him אָמַר לֵיהּ
 no (it is not as you said) לֹא
 (it could be that it is) to exclude לְאַפּוֹקֵי
 if he invites him דָּאֵי אֲזַמְנִיָּה עֲלֵהּ

Rava had said that it must be that the one making the neder meant to forbid the other person even after the object was given to him, because if he meant to assur the bread for the time before the object was given as a gift, the object would anyway be assur as one is not allowed to steal.

To which the Gemara now answers that this is not necessarily true. It could be that the point of the neder is to forbid the other person from going to this person's home as a guest. That is, when a person invites someone to come and eat in his home and gives his guest food, when the guest eats the food, the food still belongs to the host, not the guest. If so, it could be that the reason that this person made this neder was to forbid the possibility of the other person from eating in his home. That is, typically when a person invites his friend to eat to his home, this invitation includes the right to eat. Therefore, in order to prevent this from happening, the person makes a neder that the other person will not be allowed to eat his bread, even if he is invited to his home. (That is, although normally a neder is not needed to prevent another person from using someone else's object, in this case a neder was necessary as the invitation implied permission to eat.)

And if this is true, it could very well be that the person making the neder never had intent to assur the object for the time period after he gives away the object to the other person as a gift.

(Although we have explained the Gemara according to the shita of the Ran, there are other pshatim in the Rishonim, ע"י שם.)