The Geller Edition

שרשרת זהב

My Mistake, Your Money?

מחילה בטעות

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שמואל יעקב בן רחל

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שרשרת זהב

These booklets are called **Sharsheres Zahav** (*Golden Chain*), based on the verse describing the golden chains of the Choshen (Shemos 28:13–14). Just as those chains connected the Choshen to its proper place, so too these works are intended to be small links in the golden chain of Torah transmission, connecting the learner to the teachings of Chazal, the Rishonim, the Acharonim, and the great Torah scholars of every generation.

In particular, these booklets seek to connect the reader to the illuminating Torah of the **Ketzos HaChoshen**, whose teachings serve as a central foundation throughout. Everything written here is based on the sacred words of our sages and was prepared through sincere effort to clarify and understand the sugyos in the light of their teachings.

May Hashem grant that these words find favor among those who study Torah, and may these works become worthy additions to the eternal chain of Torah transmission from generation to generation.

Amen.

How to Read This Sheet?

Each source appears first in the original Hebrew or Aramaic, with a plain English version directly underneath. A Sugya Note helps explain the source in everyday words.

A Term Note defines an important word or idea. A Takeaway sums up the main point in a line or two.

You do not need any background to follow along. Read each source, then the English, then the note. The sheet is built to walk you through the discussion one step at a time.

Do not worry if you do not finish the sheet in one sitting. A good Torah session is not measured only by how much you finish, but by how deeply you learn to think through the discussion.

מחילה בטעות
My Mistake, Your Money?

Opening Frame

Reuven and Shimon are neighbors who share a driveway. After years of cracked pavement and drainage trouble, Reuven finally hires a contractor to repave and reinforce the whole thing, a job that protects both properties. The bill comes to $12,000.

By any fair reckoning, Shimon owes half. There's even a local ordinance saying that when a shared improvement is structurally necessary, each owner pays his full proportional share, which here would put Shimon's part at closer to $6,000.

But Reuven has no idea the ordinance exists. He figures the fair thing is to split just the "basic" cost, the cheap surface layer, and eat the rest himself. So he texts Shimon: "Don't worry about the whole thing. Just cover the $800 for the top coat and we're square." Shimon, relieved, pays the $800.

A month later the two end up before a mediator over an unrelated dispute, and the ordinance comes up. The mediator realizes Reuven was legally entitled to far more: $6,000, not $800.

Now the mediator is stuck with a real question. Reuven gave up the extra $5,200, but only because he never knew he was owed it. He would never have let it go had he understood the law. So was that a real, binding **waiver** — a person letting go of a right he holds — or a mistake that doesn't count, meaning Shimon is quietly sitting on $5,200 that was never really his to keep?

And if it doesn't count as a real waiver, does the mediator have to speak up and tell Shimon he isn't in the clear until he pays what the law actually requires? Or does the mediator stay silent, because Reuven only claimed the $800, and no one rules beyond what was asked?

I. Three Demands and a Ruling

Where the rule comes from, and what the Rema does with it.

A man's field is surrounded by his neighbor's land. The neighbor builds a fence around it. Does the inner owner have to help pay?

Earlier in the Gemara, the Sages give different ways to measure what the enclosed property owner may owe. Rav Huna, in accordance with Rav Yosi, measures his share by the fence that was actually built. Chiya bar Rav limits the payment to the cheaper cost of a fence made from reeds. Another opinion measures the value of the protection the fence provides, and what the owner would have paid for that protection alone.

Talmud Bavli, Bava Basra 5a | (בבא בתרא, ה.)

The Mishnah is the written summary of the Oral Law. It was set down in Eretz Yisrael around the year 200. The Gemara records the discussion that grew up around it in Babylonia over the next three centuries. Together they are the Talmud. Masechta Bava Basra deals with property, and with what neighbors may demand of each other. Here the neighbors are Ravina and Runya, and the case comes before Rava.

רוניא אקפיה רבינא מד' רוחותיו, א"ל הב לי כמה דגדרי, לא יהיב ליה, הב לי לפי דמי קנים בזול, לא יהיב ליה, הב לי אגר נטירותא, לא יהיב ליה כו', אתא לקמיה דרבא, א"ל זיל פייסיה במה דאפייס, ואי לא דיננא לך דינא כרב הונא אליבא דרבי יוסי.

Ravina fenced Runya's field in on all four sides. [Ravina] said to him: Give me [money] according to how much I fenced. He did not give him. Give me [money] according to the cheap price of reeds. He did not give him. Give me the guarding fee. He did not give him...

The case came before Rava. Rava said to Runya: Go satisfy Ravina with what he was willing to accept. And if not, I will judge you according to Rav Huna following Rabbi Yosi, and require the full cost of the fence.

Term Note

אגר נטירותא | *Agar Netirusa* | **The Guarding Fee**

What the enclosure is worth to the inner owner as protection, rather than what it cost to build.

Sugya Note

Ravina moves through the different measures. He begins with the full cost of the fence, then drops to the cheaper cost of reeds, and finally asks only for the guarding fee. Runya refuses every one.

When the case reaches Rava, Rava tells Runya to satisfy the smallest amount Ravina was willing to accept. But he adds a warning: if Runya refuses, Rava will judge him according to Rav Huna following Rabbi Yosi, which would require the larger payment.

Darchei Moshe, Choshen Mishpat 17 | דרכי משה (חו"מ סי' י"ז, ס"ק ו')

Rabbi Moshe Isserles (1530 to 1572) was rav of Krakow, the leading halachic authority of Polish Jewry. His glosses on the Shulchan Aruch record Ashkenazic practice, printed right alongside Rabbi Yosef Karo's own rulings.

גרסי' פ"ק דב"ב (ה' ע"א) רוניא אקפיה רבינא מד' רוחותיו, א"ל הב לי כמה דגדרי, לא יהיב ליה, הב לי לפי דמי קנים בזול, לא יהיב ליה, הב לי אגר נטירותא, לא יהיב ליה כו', אתא לקמיה דרבא, א"ל זיל פייסיה במה דאפייס, ואי לא דיננא לך דינא כרב הונא אליבא דרבי יוסי. נראה ללמוד מזה דאם בעל דין תבע חבירו בדבר מועט וראה

[The Darchei Moshe quotes the Gemara above in full, and then rules:]

It appears that one may learn from this that if a litigant claims a small amount from his fellow, and the judge sees that by law he is entitled to more, the judge should rule only what he claimed. If the judge awards him more than he

claimed, that is an error in law, and the ruling is reversed. The Rivash writes the same in his Written Rulings, siman 227.

הדיין שחייב לו יותר ע"פ הדין שאין צריך לפסוק לו רק מה שתבעו, ואם פסק לו יותר ממה שתבעו הוה טעות בדין והדין חוזר, כ"כ ריב"ש בתשו' סי' רכ"ז.

רמ"א (חו"מ סי' י"ז:י"ב) | Rema, Shulchan Aruch CM 17:12

The Rema's gloss on the Shulchan Aruch: the codified form of the ruling he worked out in the Darchei Moshe.

A litigant sued his fellow for a small matter. The judge sees that by law he is owed more than he claimed. Even so, the judge is not to rule him more than he claimed. If he does, it is an error in law, and the ruling is reversed.

בעל דין שתבע חבירו בעד דבר מועט והדיין רואה שיתחייב לו על פי הדין יותר ממה שתבע, אין לו לדיין לפסוק יותר ממה שתבע, ואם פסק לו יותר הוי טעות בדין וחוזר (דעת עצמו מפ"ק דב"ב רוניא אקפיה רבינא וכו' וכ"כ הריב"ש בסי' רכ"ז).

Term Note

טעות בדין | *Ta'us B'din* | **An Error in Law**

A ruling given on a mistaken view of the law, which is not final and is reversed.

Sugya Note

Even where the law gives the claimant more, the court judges only by what the claimant asked for. A judge who awards more than the claim has made an error in law, and the ruling is reversed.

The Gemara is the Rema's own source for this rule. In the fence case, Ravina could have demanded the full amount under the highest measure of liability. Instead he started with a lesser demand, and only worked his way up once it was refused. Rava's threat shows that the larger liability existed as a matter of law all along — but it still had to be claimed before a judge would act on it.

From here comes the Rema's principle: a court decides whether the plaintiff is entitled to what he demanded. It does not build him a bigger claim than the one he brought. Even where the judge can see that the defendant owes more by law, the plaintiff himself only asked for the smaller amount — so an award beyond that amount goes beyond what was actually before the court. According to the Rema, that is a legal error, and the ruling is reversed.

In short: the law is one thing, the claim is another. A court may recognize that a larger right exists, but it cannot award what was never claimed.

מבואר מדברי הרמ"א דאין לדיין לפסוק לבעל דין יותר ממה שתבע, ואף אם מצד עיקר הדין היה זכאי לסכום גדול יותר, מ"מ כיון שלא תבעו אין בית דין דנין לו אלא כפי תביעתו. ואם פסק לו יותר ממה שתבע, הוי טעות בדין והדין חוזר. וביאר הדרכי משה דמקור דין זה הוא מהא דבבא בתרא, דרבא לא חייב את הנתבע אלא במה שהתובע דרש באותה שעה, ומזה למד הריב"ש דגבולות פסק הדין נקבעים על פי מסגרת התביעה, ואין לדיין להוסיף מדעתו זכויות שלא נתבעו. נמצא, דעצם התביעה מגדירה את היקף דינו של בית דין, ואין בית דין רשאים לפסוק מעבר למה שהעמיד התובע בתביעתו.

Takeaway

What fixes a judge's award is the size of the claim, not the size of the debt. A litigant can be owed more by strict law and still walk away with only what he asked for.

II. Which Was It?

The proof looks solid, until you take the case apart.

But does the story it comes from actually prove that?

Sugya Note

The later authorities challenge that proof. Either way you read the case, there is a problem.

Say Ravina told Rava the whole story: that he first demanded everything owed him on Rav Huna's measure, and only then settled for less. Then there is no proof. Rava ruled the smaller sum because Ravina had waived the rest.

Say Ravina told Rava only the small claim. Then how could Rava threaten to apply the law according to Rav Huna? On the Rivash's and the Rema's own position, a court may not rule beyond the claim.

Either way, the Gemara does not seem to prove the Rema's rule. The matter still requires explanation.

אמנם הקשו האחרונים על ראיית הדר"מ מסוגיית בבא בתרא, דלכאור' ממ"נ, אם רבינא טען לפני רבא את כל השתלשלות הדברים, דמעיקרא תבע את כל המגיע לו כשיטת רב הונא, ורק לאחר מכן נתרצה להתפשר בפחות, א"כ אין מכאן ראיה כלל, שהרי מה שפסק לו רבא רק כפי שנתפייס הוא משום שמחל על יתר תביעתו. ואם לא טען לפניו אלא את התביעה המועטת בלבד, א"כ כיצד אמר לו רבא "ואי לא דיינינא לך כרב הונא", והרי לשיטת הריב"ש והרמ"א אין בית דין רשאים לפסוק יותר ממה שתבע בעל הדין. ונמצא שאין הסוגיא מוכחת כלל ליסוד זה, וצ"ע

Term Note

אחרונים | *Acharonim* | **The Later Authorities**

Rabbinic authorities from roughly the sixteenth century onward, as distinct from the earlier Rishonim.

Term Note

מחילה | *Mechilah* | **Waiver**

The holder of a right gives it up, so that the other side keeps what he holds.

Everything here comes down to one fact: what did Ravina actually tell Rava? The Gemara never says.

Takeaway

The Acharonim's challenge turns on one fact the Gemara never gives: what exactly Ravina told Rava. Without it, the story cannot prove the Rema's rule either way.

מאירת עינים (שם, ס"ק כ"ו) | Sma, CM 17:26

Rabbi Yehoshua Falk (about 1555 to 1614) headed the yeshivah of Lemberg in Poland. He was a relative and a student of the Rema. His Sefer Meiras Einayim is printed right below the Rema's own words on the page.

When Ravina and Runya came to court, there was something Ravina never mentioned. Privately, he actually knew the law entitled him to the bigger amount — but he had already decided to ask for only the guarding fee and let the rest go. He told Rava none of this. So Rava had no idea Ravina was giving up part of what he deserved. Rava simply figured Ravina himself wasn't sure of the law, and maybe thought it followed Chiya bar Rav's view, where even a token sum [a zuz or two] counts as a guarding fee.

Either way, Rava followed the basic rule: a judge doesn't award more than what was actually claimed. So he ruled only on the guarding fee, since that was all Ravina asked for. This is where the Rema's rule comes from.

But then what was Rava's threat about — "and if not, I will apply to you the law according to Rav Huna"? That wasn't a ruling. It was a penalty: this is how I deal with a bully like you, who won't cooperate and appease the claimant with at least what he asked for.

Two ways to understand that penalty. First: a judge may, and perhaps must, warn a stubborn defendant that if he won't pay what was claimed, he will be held to the strict law and made to pay everything. Tosafos makes the same point about this very passage — Rava wasn't just trying to scare Runya, he meant it as a real legal penalty.

Second: as a matter of strict law itself. Once the defendant refuses even the smaller sum, it is as if the claimant never claimed the smaller sum at all. The case starts over, and the judges simply rule him what the law actually gives him.

שכשבאו לפני רבא לא גילה הדברים שהיו ביניהן בתחלה אלא תבעו בדמי נטירה לחוד, ולא עלה דעת רבא שרבינא יודע שבדין חייב לו יותר אלא שרצה לוותר, אלא סבר שרבינא סבר דלמא הלכ' כחייא בר רב ואליבא דת"ק דס"ל בדמי נטירא בר זוזי סגי, ואפ"ה לא פסק יותר ממה שתבעו כו', וצ"ל שמור"ם ס"ל דעובדא דרבינא ורוניא הוה, שכשבאו לפני רבא לא גילה רבינא שידע הדין ושרצה לוותר עמו, שהרי לא הזכירו שם לפניו, א"כ שפיר נלמד משם דהדיין לא יפסוק יותר מהתביעה, דהא א"ל רבא זיל פייסיה במאי דאיפייס, ר"ל במאי דתבוע אותך דמי נטירא, ולא רצה לפסוק לו יותר, והא דא"ל ואי לא דיינינא לך כרב הונא כו', בתורת קנס א"ל, ור"ל דהכי דיינינא לכל אלם דכוותך דאינו רוצה לציית לדיין לפייס לפחות במאי דתבעו להעמידו על קו הדין. ולפמ"ש יש ללמוד מכאן גם לדעת מור"ם דמותר או חיוב לדיין לומר כן להנתבע, זיל תן לו במה שתבעו לך ואי לא מנדינא לך עד שתתן לו כל מה שאתה מחוייב ליתן לו מן מדין, וכן יעשה הדיין שיקנסו אם לא ישמע, וכמ"ש התוס' הנ"ל דלא להפחידו אמר כן אלא לדינא ומשום קנס. א"נ גם מצד הדין, דכיון דאינו רוצה ליתן הפחות, הוה ליה כאלו לא תבעו בפחות אלא באו לפני הדיינים ופוסקים לו כדיניה ודו"ק עכ"ל.

Term Note

קנס | *Kenas* | **A Penalty**

A sanction placed on a litigant who will not obey the court, as distinct from a ruling on the claim.

Sugya Note

The Sma answers the later authorities this way. Ravina never told the court about his earlier private conversation with Runya — he only asked for the guarding fee. Rava didn't realize Ravina actually knew the law and was choosing to give up the bigger amount; he figured Ravina simply wasn't sure what the law was. Even so, Rava ruled only on what was claimed. So this case really does prove the point: a judge cannot rule beyond the claim.

So what was Rava's threat about? Not a ruling — a penalty on a defendant who won't obey the court. And from this the Sma draws something more: a judge is allowed, perhaps even required, to warn a defendant that if he won't pay what was claimed, he will be held to the strict law and made to pay everything he owes.

A second answer. Once the defendant refuses even the smaller sum, the original claim no longer counts. At that point the court may simply judge him by the strict, full law.

But one problem remains. Even where the claimant is mistaken in the law, or simply doesn't know it well, why should the judge still be forbidden from awarding him more than he asked for?

דהיינו הסמ"ע מיישב קושיית האחרונים, דלעולם כשבאו לפני רבא לא הזכיר רבינא את כל השתלשלות הדברים, אלא תבע רק דמי נטירה. אלא שרבא לא ידע שרבינא מודע לכך שמעיקר הדין מגיע לו יותר ובחר למחול, אלא סבר שרבינא עצמו מסופק בהלכה וסובר דשמא אין מגיע לו אלא דמי נטירה. ומשום הכי לא פסק לו אלא כפי תביעתו, ומכאן אכן מוכח שאין לדיין לפסוק יותר ממה שתבע בעל הדין. ומה שאמר רבא "ואי לא דיינינא לך כרב הונא", ביאר הסמ"ע שאין זה פסק דין על עיקר התביעה, אלא קנס שהטיל על הנתבע על שאינו מציית לבית דין ואינו מוכן לשלם אף את המועט שנתבע. ומכאן למד, דמותר, ואפשר אף מצוה, לדיין להתרות בנתבע שאם לא ישלם את הסכום הנתבע, יעמידנו על עיקר הדין ויחייבנו בכל המגיע ממנו. ועוד כתב ליישב, דכיון שהנתבע מסרב לשלם אף את המועט, הרי זה כאילו בטלה התביעה המצומצמת, ושוב רשאי בית דין לדונו על פי עיקר הדין ולחייבו בכל חיובו.

III. By What Right Does He Keep It?

The Sma has saved the Rema's proof. But his answer creates a much harder problem. The Shach asks a more basic question.

שפתי כהן (שם, ס"ק ט"ו) | Shach, CM 17:15

Rabbi Shabsai HaKohen (1621 to 1662) sat on the rabbinic court in Vilna. He fled the city in 1655 ahead of invading armies, and died as rav of Holleschau at forty-one. His Sifsei Kohen is printed alongside the Sma, and the two dispute constantly.

אם הדיין רואה שמגיע לו תובע ע"פ הדין יותר ממה שתובע, והתובע טועה בדין או אינו בקי, למה לא יפסוק לו לשלם לו כל מה שמגיע לו ע"פ הדין, דאטו משום שהתובע א"י ששלו הוא אצל חבירו לא יפסוק הדיין להחזיר לו, ובאיזה צד יזכה הנתבע במה שבידו משל חבירו, דאי משום מחילה ליכא דהא לא ידע דמחל ע"ש.

If the judge sees that the claimant is owed more by law than he is claiming, and the claimant is mistaken in the law or simply does not know it, why should the judge not rule that the defendant pay him everything the law gives him? Would you say that because the claimant does not know his own money is sitting in his fellow's hands, the judge should not order it returned?

What makes the rest of the money his? If it is because of a waiver, there is no waiver here. The claimant did not know, so he could not have waived it.

אורים ותומים (שם, ס"ק ח') | Urim V'Tumim, CM 17

Rabbi Yonasan Eybeschutz (1690 to 1764) was a child prodigy. He headed the yeshivah of Prague at just twenty-one. He was deeply learned in Kabbalah, and later won a rare license to print an edition of the Talmud. He went on to serve as rav of Metz, and then of the joined communities of Altona, Hamburg, and Wandsbek.

משום דלא הוה מחילה, דהוא מחילה בטעות, דלא ידע הדין ואלו ידע הדין לא הוה מחיל, א"כ אף דרבינא היה תובע רק דמי נטירא, הוי גזל ביד רוניא אם לא ישלם לו המותר כפי שורת הדין כל דמי מחיצה כרב הונא, ומה בכך דרבינא אינו תובע יותר הוא מחמת חסרון ידיעה ובין כך אין כאן מחילה, א"כ איך אמר רבא לרוניא לשלם רק דמי נטירא בתביעת רבינא ולא הצילו לרוניא מגזל לומר אינך יוצא ידי גזל עד שתשלם לו הכל, ומה בכך שנתפייס בפחות הא הוא מפאת חסרון ידיעה ע"ש.

Because it is no waiver. It is a mistaken waiver. He did not know the law, and had he known it, he would not have waived. So even though Ravina was only claiming the guarding fee, Runya is still holding stolen money if he does not pay the rest, the full fence money, by Rav Huna's measure. What does it matter that Ravina is not claiming more, when that is only because he does not know? Either way there is no waiver here.

If so, how could Rava tell Runya to pay only the guarding fee? Why did he not save Runya from robbery, and tell him: you are not clear of robbery until you pay him everything? What does it matter that Ravina was appeased with less, when that is only because he does not know?

Term Note

קנס | *Kenas* | **A Penalty**

A sanction placed on a litigant who will not obey the court, as distinct from a ruling on the claim.

Term Note

מחילה בטעות | *Mechilah B'ta'us* | **A Mistaken Waiver**

A right given up by someone who did not know what he was holding

Term Note

גזל | *Gezel* | **Robbery**

Holding what belongs to another, whether or not it was taken by force.

Sugya Note

The Shach and the Urim V'Tumim keep pressing one point: there is no real waiver here. The claimant doesn't even know that more money is owed to him, so his "giving up" is a mistake, not a real choice. So what gives the defendant the right to keep the rest? The judge should have held him to the full law, so his fellow's money wouldn't stay in his hands like stolen property.

דהש"ך והאו"ת הקשו, דכיון שאין כאן מחילה כלל, שהרי אינו יודע שמגיע לו יותר, הויא מחילה בטעות, ומהיכי תיתי שיזכה הנתבע בממון שאינו שלו. אדרבה, היה לו לדיין להעמידו על הדין ולחייב את הנתבע בכל המגיע ממנו, כדי שלא יהא ממון חבירו נגזל בידו וצ"ע.

Takeaway

If the claimant never knew the law entitled him to more, he never really gave it up. So what makes the rest of the money the defendant's to keep?

IV. The Ketzos Pushes Back

Does it matter when the mistake happened, and what kind it was?

קצות החושן (שם, ס"ק ג') | Ketzos HaChoshen, CM 17:3

Rabbi Aryeh Leib Heller (1745 to 1812) was rav of Rozdol, and later of Stryi in Galicia. He lived and wrote in great poverty. The Ketzos HaChoshen is one of the sharpest analytical works on Choshen Mishpat.

אבל לענ"ד נראה דהריב"ש לשיטתו שכתב בסעי' של"ה ז"ל דמחילה בטעות הוי מחילה וכו', והיינו משום דאע"ג דטעא בדין מ"מ מחילה בטעות הוי מחילה כיון דהוא מוחל מדעתו, וכן עובדא דרבינא כיון שבשעה שעשה הגדר על מקום שניהם הרי היה בדעתו לזכות מקום החצר את הגדר כו', וא"כ כיון דרבינא רצה אגר נטירא א"כ כבר מחל לו את שלו ובשעה שבנה רצה לזכות לו בדמי אגר נטירא א"כ מחילה בטעות הוי מחילה.

In my humble opinion, the Rivash is simply being consistent with a position he already took elsewhere. In siman 335 he wrote that a mistaken waiver still counts as a waiver — even if you gave something up because you were wrong about the law, it still counts, because you gave it up of your own free will.

The same idea applies to Ravina's case. When he built the fence on land that belonged to both him and Runya, his intention was that their shared courtyard ground would acquire the fence. And because Ravina only wanted the guarding fee, he had already let go of the rest of what was his. So even though he was mistaken, his waiver still holds — a mistaken waiver is a waiver.

Term Note

מדעתו | *Mida'ato* | **Intentionally / Of His Own Will**

He deliberately chose to give up the right, even though his decision rested on a mistaken understanding of the law.

הקצות החושן (סי' ע"ה ס"ק ד') | Ketzos HaChoshen, CM 75:4

The same author, stating the position again in a different siman.

ועוד לפי מש"כ הריב"ש סי' של"ה התם זביני דבכל ענין הוי מחילה בטעות מחילה, כל שאין הטעות במחילת הממון אלא הטעות בדין כל כי האי הוי מחילה ע"ש.

The Rivash makes a related point in siman 335, commenting on the Gemara's phrase "there it is a sale": a mistaken waiver still counts as a waiver, so long as the mistake wasn't about giving up the money itself, but only about the law. If you meant to give up the money and were just wrong about what the law required, the waiver holds.

Sugya Note

The Ketzos explains that the Rivash is just being consistent with his own view. The rule: when a person chose to give something up on his own, and his only mistake was about the rules — not about the giving-up itself — the waiver still works. So in Ravina's case: by agreeing to take just the guarding fee, he gave up the rest. That he was mistaken about the law doesn't cancel it. As we just saw, the Ketzos repeats this same test in siman 75: so long as the mistake isn't in the act of giving up, but only in what the law says, it counts as a waiver.

But one question still remains. The waiver was still made by mistake. So what does it really add that the man made it of his own free will? The whole mistake is that had he known the law, he would not have given anything up in the first place. In what way is this waiver any better than any other mistaken waiver — the kind that normally does not count? The matter still needs more explanation.

דהקצות יישב דהריב"ש אזיל לשיטתו דמחילה בטעות בדין הויא מחילה. דכל היכא שהמחילה נעשית מדעת, אלא שטעה בגדרי הדין וסבר שאינו זכאי ליותר, אין זה פוגם בעצם חלות המחילה. ולפ"ז אף בעובדא דרבינא, כיון שנתרצה ליטול אגר נטירא בלבד, הרי מחל על יתרת זכותו, ואף אם טעותו הייתה בדין, מ"מ מחילה זו חלה. ויסוד זה חזר הקצות וביארו גם לקמן (סי' ע"ה), דכל שטעותו אינה בעצם מעשה המחילה אלא בידיעת הדין בלבד, מחילה בטעות כהאי גוונא הויא מחילה.

Takeaway

A waiver survives a mistake about the law, so long as the person knowingly chose to let go of what he held. Why that should be enough is still an open question.

V. A Mistaken Waiver

Rav Nachman's two rulings seem to pull in opposite directions.

The term "mistaken waiver" comes from a passage in Bava Metzia. A borrower pledges his field as security for a loan and allows the lender to eat its produce while the loan remains unpaid. The Gemara will compare that case with a very different transaction: a sale of fruit that does not yet exist.

Term Note

אסמכתא | *Mida'ato* | **Heat-of-the-Moment Promise**

A promise made in the heat of the moment that the person never really meant to keep.

Rav Nachman gives rulings in both cases. The Gemara now asks whether those two rulings can fit together.

(בבא מציעא, ס"ו:) | Talmud Bavli, Bava Metzia 66b

Masechta Bava Metzia deals with property disputes, hired labor, lost objects, and the laws of interest. This passage comes from the chapter on interest. Rav Nachman was a leading Babylonian Amora and a judge in Nehardea.

אמר רב נחמן השתא דאמור רבנן אסמכתא לא קניא הדר ארעה והדרי פירי, למימרא דסבר רב נחמן מחילה בטעות לא הויא מחילה, והאיתמר המוכר פירות דקל לחבירו, אמר רב הונא עד שלא באו לעולם יכול לחזור בו, משבאו לעולם אין יכול לחזור בו, ורב נחמן אמר אף משבאו לעולם יכול לחזור בו, ואמר רב נחמן מודינא דאי שמיט ואכיל לא מפקינן מיניה, התם זביני הכא הלואה .

Background

The Gemara is weighing two of Rav Nachman's own rulings against each other, to see whether he contradicts himself.

Rav Nachman ruled that once the Rabbis said an asmachta does not transfer ownership, the field returns to its original owner, and so does the produce that grew on it in the meantime. The man who ate that produce did so thinking the deal was valid. In a sense, the owner "let it go" without objecting, but only because he mistakenly believed the deal held. Since Rav Nachman sends the produce back too, it looks like he holds that a mistaken waiver does not count. If it did count, the produce would have stayed where it was.

But Rav Nachman said the opposite elsewhere. A man sells the future fruit of his date palm, before the fruit exists. Rav Nachman holds that sale is shaky. The seller can back out even after the fruit grows, since he cannot really sell what did not yet exist. But Rav Nachman adds: if the buyer already grabbed the fruit and ate it, we do not make him give it back.

Why does the buyer keep it? Because the seller, thinking the sale was valid, let him take the fruit. That is a waiver too, and a mistaken one, since the seller did not realize he could still have backed out. Yet Rav Nachman lets the buyer keep it. Here it looks like a mistaken waiver does count.

So which is it? The Gemara answers: "There it is a sale; here it is a loan." The date-palm case is a sale. The buyer took possession of goods under a real transaction, and once he has eaten the fruit, the letting-go sticks. The asmachta case is, underneath, a loan: one person owed money and put up his field as security. A debt does not disappear because the creditor mistakenly took some produce. The debt and the property still belong where the law says they belong, so it all reverts.

Now the passage itself:

Rav Nachman said: Now that the Rabbis have ruled that a commitment not fully meant [an asmachta] does not transfer ownership, the field returns, and the produce returns.

[The Gemara asks:] Does this mean Rav Nachman holds that a mistaken waiver is not a waiver? But it was taught: one who sells the future fruit of a date palm to his fellow. Rav Huna said he can

retract before the fruit exists, but not after. Rav Nachman said he can retract even after. And Rav Nachman conceded: if the buyer already seized and ate it, we do not take it from his hand.

[The Gemara answers:] There it is a sale; here it is a loan.

רש"י (שם, ד"ה הכא הלואה היא) | Rashi, Bava Metzia 66b

Rabbi Shlomo Yitzchaki (1040 to 1105) of Troyes in northern France made his living from his vineyards. He wrote the commentary that has accompanied the Talmud on the page ever since.

ומיחזי כרבית, שמתחילה בהלואה בא לו עכ"ל.

And it looks like interest, since from the outset it came to him by way of the loan.

Term Note

רבית | *Ribbis* | **Interest**

Anything the lender takes from the borrower on account of the loan.

Sugya Note

דמדברי הגמ' מבואר לכאורה, דלמסקנת הסוגיא אף רב נחמן מודה דמחילה בטעות הויא מחילה. דהגמרא פריך, דמחד גיסא ס"ל לרב נחמן דאסמכתא לא קניא והדרי פירי, ומשמע דמחילה בטעות לא הויא מחילה, ומאידך גיסא אמר גבי המוכר פירות דקל, דאם שמיט ואכיל לא מפקינן מיניה, אף דלכאורה אינו אלא משום מחילה בטעות. ותירצה הגמרא דשאני התם דזביני, משא"כ הכא דהלואה היא. ופירש רש"י דטעמא דהלואה משום דמיחזי כרבית, שהרי כל עיקר הנתינה באה מכח ההלואה. ולפי זה נמצא, דהחילוק אינו בגדר מחילה בטעות, אלא בדין מיוחד בהלואה משום חשש ריבית, וממילא מבואר דמעיקר הדין ס"ל לרב נחמן דמחילה בטעות הויא מחילה.

The Gemara concludes that even Rav Nachman agrees a mistaken waiver is a waiver. His two statements seemed to pull in opposite directions, and the Gemara reconciled them by distinguishing a sale from a loan. Rashi explains what the loan has to do with it: since the entire transfer came about by force of the loan, letting the lender keep the produce would look like interest.

So the distinction has nothing to do with what a mistaken waiver is. It is a rule specific to loans, arising solely from the concern about interest.

Takeaway

The Gemara's own conclusion is that even Rav Nachman treats a mistaken waiver as a real waiver. The loan-versus-sale split is about interest, not about what makes a waiver work.

VI. Why Should a Waiver Be Different?

Mistakes undo other legal acts.
The question is whether a waiver works the same way.

תוספות (שם, ד"ה התם) | Tosafos, Bava Metzia 66b

Tosafos is not one author. It is a school: the Baalei HaTosafos, Franco-German scholars of the twelfth and thirteenth centuries, many of them Rashi's students and descendants. Their glosses are printed opposite Rashi on the page of the Talmud.

דהרי קי"ל קנין בטעות חוזר והקדש טעות אינו הקדש ע"ש.

For we hold that an act of acquisition made in error is retracted. And a consecration made in error is not a consecration.

Term Note

קנין | *Kinyan* | **Act of Acquisition**

The act by which ownership passes from one owner to another.

Term Note

הקדש | *Hekdesh* | **Consecration**

Property made over to the Temple treasury, which may then not be put to ordinary use.

Sugya Note

דהיינו דאי נימא דמחילה בטעות הויא מחילה, תקשי מהא דקי"ל דקנין בטעות חוזר והקדש בטעות אינו הקדש, הרי דכל חלות הנעשית על יסוד טעות בטלה מעיקרה. ואם כן, אמאי תהא מחילה עדיפא משאר חלויות, דנימא בה דחיילא אף במקום טעות.

If a mistaken waiver truly counts as a waiver, a difficulty arises. An act of acquisition made by mistake is undone, and a consecration made by mistake is no consecration at all. Anything that takes legal effect on the basis of a mistake is void from the start. Why, then, should a waiver be any different from every other legal act — holding firm even when it was made by mistake?

שער המשפט (סי' כ) | Shaar HaMishpat, siman 20

Rabbi Yisrael Isser was rav of Vinnitsa from about 1770 until his death in 1829. He was praised by early Chassidic leaders, including the Chozeh of Lublin. His Shaar HaMishpat on Choshen Mishpat, printed in 1810, was a central work on Jewish monetary law until the Ketzos HaChoshen appeared. Here he quotes the Hagahos Asheri, glosses on the Rosh's rulings by Rabbi Yisrael of Krems that preserved material from works otherwise never printed.

לכך נראה לי דודאי גם ר"נ סבר דמחילה

So here is what I think is really going on. Rav Nachman

בטעות הוי אע"ג דקנין טעות חוזר, בדין שיכול לחזור בו כיון שהממון עדיין בידו הוא יש כח בידו לחזור כיון דבטעות הקנהו, והקדש נמי לא חייל בטעות כיון דבעינן שיגמר בלבו ואין זה גמר כיון שטעה כו', אבל אדם שיש לו ממון ומוכר אותו לחבירו ומוחל לו אע"פ שהוא בטעות זכה חבירו, מידי דהוי אהפקירא בעלמא דחשיב הפקר, א"כ שכנגדו קנה ביאוש בעלים כו', והכא הכי פירושו, הכא הלואה ואיכא איסור רבית הילכך מחילה דידיה לא הויא מחילה דפשיטא הוא דאילו הוה ידע דאית ביה שום נדנוד עבירה לא היה מוחל כלל כו', התם זביני וליכא שום איסור הילכך הוי מחילה עכ"ל.

does hold that a mistaken waiver is a waiver, even though a mistaken act of acquisition can be retracted. Why the difference?

In the acquisition case, the item legally still belongs to the original owner. "The money is still in his hand" doesn't mean he's physically holding it — it means he still has legal control over it. He handed it over by mistake, so in the eyes of the law the deal never fully locked in, and he can take it back. The same logic applies to a mistaken consecration: it doesn't take effect either, because consecration requires a full, settled resolve, and there is none here, since the person was mistaken.

But a waiver works completely differently. Picture a man who has money, "sells" it to his friend, and lets it go to him. Even by mistake, his friend has already acquired it. Why? Because a waiver isn't a sealed deal that has to lock in — it works just like throwing something away, ordinary abandonment. No formal handoff is needed; the moment the owner releases his claim, the other side can take it, and there is no legal control left in his hands to pull it back.

And this explains the split between the loan and the sale. In the loan case there's a concern for interest, so the waiver does not hold — obviously, had the man known there was any hint of a prohibition in it, he would not have waived at all. In the sale case there is no such prohibition, so there the waiver does hold.

Term Note

הפקר | *Hefker* | **Abandonment**

The owner ends his own ownership, without handing anything to anyone. Whoever takes the property afterward acquires it.

Term Note

גמירות דעת | *Gemiras Da'as* | **Full Resolve**

The settled decision of the heart that some legal acts require before they can take effect.

Sugya Note

ומבואר בשער שהביא את דברי הגהת אשר"י, שכתב לחדש דמחילה בטעות אינה דומה לקנין בטעות ולהקדש

The Hagahos Asheri teaches that a mistaken waiver is unlike an acquisition or a consecration made by mistake. An acquisition can be undone because the money is still

with the man handing it over, and he handed it over by mistake. A consecration needs a full resolve, which a mistake prevents.

A waiver works differently. The person is not transferring the right to someone else. He is simply giving up his own claim to it. So it is like abandonment, and it takes effect despite the mistake just as abandonment does, and the other man acquires what was waived to him.

So the Gemara's split between a loan and a sale is not about what a mistaken waiver is. In a loan there is a concern for the prohibition of interest, and we can be sure that had the man known of any hint of a prohibition he would not have waived at all. So there is no waiver. In a sale there is no prohibition, and a mistaken waiver is a waiver.

בטעות. דבקנין, כיון שהממון עדיין ברשות המקנה, יש בידו לחזור בו מחמת שההקנאה נעשתה בטעות. וכן בהקדש, כיון דבעינן גמירות דעת גמורה, טעות מפקיעה את עצם ההקדש. משא"כ במחילה, כיון שעיקר עניינה הוא סילוק זכותו של המוחל ולא מעשה הקנאה, הרי היא דומה להפקר, וכשם שהפקר חל אף בלא הקנאה, כך גם מחילה בטעות חלה, והלה זוכה במה שנמחל לו. ומוסיף לבאר, דהא דאמרה הגמ' לחלק בין הלואה לזביני, אין הכוונה לחלק בגדר מחילה בטעות, אלא דבהלואה, כיון שיש חשש איסור ריבית, אומדנא דמוכח היא שאילו היה המוחל יודע שיש בדבר נדנוד איסור, לא היה מוחל כלל, ומשום כך לא הויא מחילה. משא"כ בזביני, דליכא צד איסור, שפיר אמרינן דמחילה בטעות הויא מחילה.

Takeaway

A waiver isn't a transfer of ownership, and it isn't a consecration — it works like abandonment. That is why a mistake that would undo either of those can still leave a waiver standing.

VII. Giving Up on What You Cannot Find

What a mistaken waiver is being compared to, and what that makes of the Ketzos's requirement.

Why should giving something up survive a mistake, when acquiring it does not?

קצות החושן (סי' קמ"ב ס"ק א') | Ketzos HaChoshen, CM 142:1

The same Ketzos HaChoshen, on a different siman.

Think about how giving up hope [yeush] works with a lost object. When you lose something and give up hope of ever finding it, that giving-up is itself based on a kind of mistake — if you actually knew where the lost object was, you never would have given up on it. Yet the law says giving up hope still works, even though it's rooted in that mistaken assumption.

That's exactly why, according to Rav Nachman, a mistaken waiver still counts. A waiver works the same way as giving up hope over a lost object: just as giving up hope is effective even though it rests on an error, so too a waiver is effective even when it's made by mistake.

וביאור דברים משום דיאוש אפי' בטעות מהני דיאוש דאבידה נמי בטעות הוא, דאלו הוי ידע היכן האבידה לא היה מייאש, וכיון דטעמא דמחילת בטעות לרב נחמן מהני היינו משום יאוש בעלים ע"ש.

Term Note

יאוש | *Yeush* | **Giving Up Hope**

The owner of a lost object gives up hope of recovering it. Under the right conditions, this may let another person acquire it.

Sugya Note

The question is now sharper. Why should a mistaken waiver ever count?

Normally, mistakes undo legal acts. A deal made by mistake can be reversed. Something consecrated by mistake never becomes holy. So if a person gave up his money only because he misunderstood the law, and would never have given it up had he known better, why should the waiver remain?

The Ketzos points to giving up hope over a lost object. That giving-up also rests on a kind of mistake. If the owner knew where his lost object was, he would never give up hope of finding it. Yet once he knowingly gives up hope, that decision can still have legal effect.

A mistaken waiver may work the same way. The person deliberately chose to let go. His reason for doing so was mistaken, but there was still a real decision by the owner to release his right.

That may explain why the Ketzos stresses that the waiver was made of the person's own will. The mistake does not erase the fact that he knowingly chose to let go.

But there may be a limit. A person can know what he has and choose to release it while being mistaken about the law. That is still a real decision to let go. But if he does not even know the facts that give him the right in the first place, he never chose to release that right at all. A person cannot give up something he does not know he has.

The dividing line may be this: did the person make a real decision to let go, even though his decision rested on a mistake? Or did he never make that decision at all, because he did not know the right existed? The first can count. The second does not.

דהיינו דהא דמחילה בטעות מהניא לשיטת רב נחמן, היינו משום דדמיא ליאוש בעלים. דכשם דיאוש מהני אף שנעשה מתוך טעות, שהרי אילו היה הבעלים יודע היכן אבידתו לא היה מתייאש, ואעפ"כ חשיב יאוש, ה"ה במחילה בטעות, כיון שוויתר על ממונו מדעתו, חשיב סילוק בעלים גמור. ולפ"ז יש לומר, דזהו גופא ביאור דברי הקצות דבעינן שתהא המחילה מדעתו. דאף שהדעת מיוסדת על טעות, מ"מ סוף סוף יש כאן דעת ורצון להסתלק מן הממון, ומשום כך חשיב כיאוש מדעת, דמהני אף במקום טעות. משא"כ במקום שאין דעת כלל למחול על ממון זה, אלא כל המחילה נובעת מחסרון ידיעה בעיקר המציאות, אין כאן אלא כעין יאוש שלא מדעת, דלא חשיב יאוש, וה"ה דלא חשיב מחילה.

Term Note

יאוש שלא מדעת | *Yeush Shelo Mida'as* | **Giving Up Before Knowing**

The owner does not yet know the object is lost. He would probably give up hope once he found out. The Gemara asks whether that future giving-up could count before he actually knows.

Takeaway

A mistake about the law can still leave a real decision to let go standing. Not knowing the facts that create the right in the first place may mean no decision was ever made at all.

Conclusion

We began with Reuven and Shimon. Reuven spent $12,000 repairing their shared driveway, but asked Shimon for only $800 because he did not know the law entitled him to much more. The question was whether that smaller demand counted as a real waiver, or whether Shimon was still holding money that belonged to Reuven.

The Rema begins with the court itself. A judge rules only on the claim brought before him, even when the law would give the claimant more. The Sma explains the case of Ravina and Runya in a way that preserves that rule. But the Shach and the Urim V'Tumim expose the deeper problem. If the claimant asked for less only because he did not know the law, what gives the defendant the right to keep the rest? If there was no real waiver, the money still belongs to the claimant.

The Ketzos answers that a mistake about the law does not destroy a waiver when the person still knowingly chose to forgive what the other person owed him. A person can know exactly what he is giving up, choose to forgive that debt, and still be mistaken about what the law would have given him. The later sources explain why. A waiver is not another form of transferring ownership. It works by releasing one's own claim against the other person. The comparison to giving up hope over a lost object shows that a real decision to let go can still count even when that decision rests on a mistake.

That brings us back to Reuven. He knew what he had spent, and he knowingly told Shimon that $800 would settle the matter. In doing so, he was forgiving the rest of what Shimon owed him. His mistake was about the law. He did not realize he was entitled to more. But he still made a real decision to forgive the remaining debt. According to the Ketzos, that forgiveness stands despite the mistake. Reuven forgave the extra $5,200, and Shimon no longer owes it.