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Intro

Today we will Be"H begin מסכת בבא מציעא, and learn דף ב'.

The מסכת begins with a discussion regarding the concept of

חזקה

One is the presumed owner of anything in his possession. Hence the principle of

המוציא מחבירו עליו הראיה

The burden of proof rests on the claimant. Therefore, if שנים אוחזין בטלית

If two people are holding a cloak and they both claim ownership,

אנן סהדי דמאי דתפיס האי דידיה הוא

ומאי דתפיס האי דידיה הוא

They both have a legitimate claim to the טלית, and Tosfos adds

חשיב כאילו כל אחד יש לו בה בודאי החצי

Each one is considered the owner of half the טלית.

In this case, the Mishnah rules יחלוקו בשבועה

They each swear to their claim, and they then divide it equally.



В

The Gemara contrasts this with several other cases of disputed ownership where we rule differently, including

חנוני על פנקסו

If an employer instructed his storekeeper to give his workers some food or money for their wages, and promised to pay him at a later date, and the storekeeper says he gave it to them, while the workers deny having received it, and so both are demanding payment from the בעל הבית:

2.

שור שנגח את הפרה ונמצא עוברה בצדה

An ox gored a cow, and a dead fetus was found at its side; and we don't know if the cow miscarried AFTER, and as result of, it being gored, and the ox's owner is therefore liable for the fetus; or if the cow miscarried BEFORE it was gored, and so he is not liable for the fetus?









C

Some of the other topics we will learn about today include:

### ראיה בהפקר לא קני

One must perform a קנין, a formal act of acquisition, such as הגבהה, picking it up, to acquire something that is ownerless, and cannot acquire it simply by looking at it with the intent of acquiring it.

#### ספק במקח וממכר

If someone accepted payment for an item from two people, he is believed to say which payment he accepted willingly and which one he received unwillingly only as long as the item is still in his possession.

ממון המוטל בפסק חולקין בלא שבועה

maintains that money of uncertain ownership is divided between the two parties without them swearing. This may depend whether

שמא ושמא

או ברי וברי

If their claims are possible claims or certain claims:

Or, and whether there is a דררא דממונא As Rashi explains, a loss of capital, or as Tosfos explains בלי טענותיהן יש ספק

The case is inherently unclear.





Dedicated By: \_





So let's review...

## Zugt di Mishnah

שנים אוחזין בטלית

If two people are holding on to a cloak, and

זה אומר אני מצאתיה

וזה אומר אני מצאתיה

They both claim that they found it lying ownerless; and זה אומר כולה שלי

וזה אומר כולה שלי

Each one claims that he owns the entire טלית;

And as Rashi explains,

שניהם מוחזקים בה

ואין לזה כח בה יותר מזה

Since one who is possession of an item is the presumed owner, both have an equally legitimate claim to the garment.

#### Therefore, the Mishnah rules

זה ישבע שאין לו בה פחות מחציה

וזה ישבע שאין לו בה פחות מחציה

ויחלוקו

Each one swears that he owns at least half the טלית, and they divide it equally.

## However, Rashi explains,

אילו היתה ביד אחד לבדו

הוי אידך המוציא מחבירו

ואינו נאמן ליטול בשבועה

If only one of them was holding the טלית, and the other person claimed ownership, he would not receive half the טלית by swearing. Rather he must bring witnesses to support his claim, because the burden of proof always rests with the one who seeks to extract something from another's possession.

# The Gemara questions the repetitious language in the Mishnah:

ליתני חדא

The claim of אני מצאתיה is Halachically equivalent to the claim of כולה שלי?

The Mishnah should have said

אני מצאתיה

ואנא ידענא דכולה שלי

He claimed he found it, and obviously, he is claiming that it is now his.

Or conversely,

ליתני כולה שלי

ולא בעי אני מצאתיה

Each one claims to own the טלית, and the fact that they found it is irrelevant?









Additionally, the Gemara asks והא זה וזה קתני

The Mishnah also uses the term it twice, indicating that we are discussing two distinct cases?

The Gemara therefore explains

רישא במציאה

וסיפא במקח וממכר

We are indeed referring to two separate cases:

רישא במציאה

The phrase אני מצאתיה refers to a case where both claim that they found the object; and the חכמים obligated them to swear, because

מורי ואמר

חבראי לאו מידי חסר בה

איזל אתפיס ואתפליג בהדיה

It is possible that one found it first, and the other person then seized it as well, rationalizing that the one who found it would not suffer a loss of capital.

## On the other hand,

סיפא במקח וממכר

The phrase כולה שלי refers to a case where both are claiming they bought it, and the scenario is where נקט מתרוייהו

ולא ידענא

מי הוה מדעתיה

ומי הוה בעל כורחיה

The seller accepted money from both of them, but he does not remember which payment he took willingly, and which one he took unwillingly. Therefore, the סרמים obligated them to swear because

מורי ואמר

חבראי דמי קא יהיב

ואנא דמי קא יהיבנא

The one who gave the money forcibly may have rationalized that since they both paid for the object,

השתא דצריכא לדידי

אשקליה אנא

וחבראי ליזיל לטרח ליזבן

I might as well take it, and let the other fellow take his money back and buy another item elsewhere.

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As part of this discussion, the **G**emara teaches that בראיה בעלמא לא בראיה בראיה בראיה בעלמא לא פו

One cannot acquire an ownerless object by merely looking at it with the intent to acquire it. He must make a valid קנין, a formal act of acquisition, such as הגבהה, picking it up.

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The Gemara now contrasts our Mishnah with several similar cases where we do NOT rule יחלוקו:

1.

אמר בעל הבית לחנוני

תן לפועלים בסלע מעות שאני חייב בשכרם

ועלי ליתן סלע

If an employer instructed a storekeeper to give his workers some food or money for their wages, and promised to pay him at a later date; and

הוא אומר נתתי

והוא אומר לא נטלתי

ושניהם תובעין את בעל הבית

The storekeeper says he gave it to them, while the workers deny having received it, and so both are demanding payment from the בעל הבית:

שניהם נשבעין ונוטלין מבעל הבית

The אמא says they are both entitled to payment IF they swear to their claims.

However, בן ננס counters

כיצד אלו ואלו

באין לידי שבועת שוא

How can the חכמים allow them both to swear, knowing that one of them will certainly swear falsely? Therefore, שניהן נוטלין בלא שבועה

They both receive payment WITHOUT swearing.

Now, the **G**emara assumes לימא מתניתין דלא כבן ננס

Our Mishnah does not agree with בן ננס, because we DO obligate both parties to swear?

However, the Gemara differentiates:

התם ודאי איכא שבועת שוא

In that case, בן ננס does not allow them to swear because it will certainly result in one of them swearing falsely.

הכא איכא למימר דליכא שבועת שוא

אימור דתרוייהו בהדי הדדי אגבהוה

In our case, it is possible that both are swearing truthfully, because they might have picked it up simultaneously, and each one THINKS he picked it up first, and so they ARE both entitled to half. Therefore, he agrees that we require them both to swear.









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שור שנגח את הפרה ונמצא עוברה בצדה

If an ox gored a cow, and a dead fetus was found at its side; and we don't know if the cow miscarried AFTER, and as result of, it being gored, and the ox's owner is therefore liable for the fetus; or if the cow miscarried BEFORE it was gored, and so he is not liable for the fetus? The רבנו rule

המוציא מחבירו עליו הראיה

The burden of proof rests on the claimant, the בעל הפרה and so the בעל השור is not liable, while סומכוס maintains ממון המוטל בספק

חולקין בלא שבועה

When in doubt, we divide the disputed sum between the claimant and the defendant, and we do NOT require them to swear.

Now, the Gemara explains that our Mishnah may agree with the רבנון, because

התם דלא תפסי תרוייהו

אמרו רבנן המוציא מחבירו עליו הראיה

The דבון rule in favor of the defendant, because they were not both in possession of the disputed money at the time the dispute arose, rather the בעל השור has sole possession of the money. Therefore, the בעל הפרה must bring proof to extract payment. However,

הכא דתרוייהו תפסי פלגי לה בשבועה

In our case, both are holding onto the טלית, and so both are in possession of the טלית. Therefore, neither one can take a portion without swearing.

However, it seems that מתניתין דלא כסומכוס סת מתניתין דלא כסומכוס Our Mishnah does not agree with סומכוס, because מה התם דלא תפסי תרוייהו חולקין בלא שבועה הכא דתרוייהו תפסי לה לא כ"ש

If in that case, where the claimant is not in possession, he receives half the disputed sum without swearing; certainly, in our case, where they are each in possession, they should divide it without swearing?





Dedicated By: \_\_\_





6 The Gemara offers two answers:

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כי אמר סומכוס שמא ושמא

אבל ברי וברי לא אמר

סומכוס only says to divide the item without a שבועה where their claims are only possible claims, because neither party knows what really happened. However, where their claims are certain claims, סומכוס agrees with the תנא קמא in that case, where only one is מוחזק, that

המוציא מחבירו עליו הראיה

And with our Mishnah, in our case, where both are מוחזק

יחלוקו בשבועה



2.
And according to the opinion that
אמר סומכוס אפילו ברי וברי
אמר סומכוס אפילו ברי וברי
המר סומכוס אפילו ברי וברי in all cases;
The Gemara answers that indeed, מעיקר הדין according to טלית according to טלית מיקר איז מיקר מיקר איז מיקר איז מיקר איז מיקר איז מיקר איז פאר איז מיקר חכמים היא בין באר איז איז בין איז איז אר מיקר אחד ואחד הולך ותוקף בטליתו של חבירו
של איז בא כל אחד ואחד הולך ותוקף בטליתו של חבירו של הבירו של הפאר אומר שלי הוא מרי בא should not simply seize another person's object and

One should not simply seize another person's object and claim ownership, and thereby receive half of it. Therefore, the חמכים instituted this oath as a deterrent.

And according to the opinion that
אמר סומכוס אפילו ברי וברי:

ב

אמר סומכוס אפילו ברי וברי:

ב

אואס סומכוס אפילו ברי וברי:

אואס סומכוס אפילו ברי וברי:

אואס סומכוס אפילו ברי וברי:

אואס סומכוס אפילו בי אחד ואחד

ואומר שלי הוא
ואומר שלי הוא

As part of this discussion the **G**emara discusses דררא דממונא Rashi explains it to mean, חסרון ממון A loss of capital; Tosfos explains it to mean בלי טענותיהן יש ספק The case is inherently unclear.





