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Mishnah

Someone exchanged a cow for a donkey and it gives birth or he sold his maidservant and she gives birth. The seller claims that the birth happened before the sale, while the buyer claims it was after the sale. They should split the offspring.

A person had two slaves or fields, one small and one big. If the buyer claims he bought the big field, while the seller says he is unsure which field he bought, the buyer receives the big field. If the seller claims he sold the small field, and the buyer says he is unsure which field he bought, the buyer only receives the small field. If the buyer claims he bought the big field and the seller claims he bought the small field, the seller should swear that he sold the small field. If they both claim that they do not know which field was involved, they should split it. (100a1)

Monetary Disputes

The *Gemara* asks: Why should they split the offspring? Let us see in whose domain the offspring was born, and the other person should have to bring proof to take it out of his domain! The principle is that the burden of proof rests on the one who is attempting to exact money from his fellow!?

Rav Chiya bar Avin answers in the name of Shmuel: The case is where it is standing in a meadow (*nobody's domain*). The case of the maidservant as well is when she was in an alley (*near the slave market that is nobody's domain*).

The *Gemara* asks: Why don't we say that the offspring should be in the possession of the original owner until the other can bring proof and take it out of his domain? [*This is what is known as a "chezkas mara kamma" - let us presume that it remains in the status of the last-known owner!?*]

The *Gemara* answers: This is the opinion of Sumchos, who holds that money that lies in doubt should be divided without anyone having to take an oath.

The *Gemara* asks: Sumchos only said this when both people are unsure about the circumstances. Did he say this when both claim to be sure?

Rabbah bar Rav Huna says: Yes, Sumchos indeed said this law even when both claim to be sure about what happened.

Rava says: Sumchos only said this when both people are unsure about the circumstances, not when both claim to be sure. The *Mishnah* should therefore read: The seller claims that the birth *might have* happened before the sale, while the buyer claims it *might have been* after the sale.

The *Gemara* asks on Rabbah bar Rav Huna: The *Mishnah* had stated: If they both claim they do not know which field was involved, they should split it. This is understandable according to Rava. Being that the first part of the *Mishnah* discussed a case when they are unsure; the second part of the *Mishnah* also discusses a case where they are unsure. However, according to Rabbah bar Rav Huna who holds Sumchos indeed said this law even when both claim to be sure about what happened, if the first part of the *Mishnah* said this is the law when they are certain, it is certainly the law when they are uncertain! [*Why is the last case of the Mishnah necessary?*]

The *Gemara* answers: This is not a question. The second part of the *Mishnah* is revealing the true explanation of the first part of the *Mishnah*. One should not have thought that the

first part of the *Mishnah* is referring only to a case where they are both uncertain; but where they are sure, this would not apply. This is why the second part of the *Mishnah* states a case where they are uncertain. Now it is clear that the first part of the *Mishnah* is discussing a case where they are both sure, and even so, the verdict is that they should split it.

The *Gemara* challenges Rabbah bar Rav Huna again: The *Mishnah* had stated: One says that he sold the big field and the other one says that he sold the small field. The seller should swear that he sold the small field. This is understandable according to Rava, who says that Sumchos only said this regarding a case where they are unsure. This is why they swear in this case (*as opposed to splitting without having to swear*). However, according to Rabbah bar Rav Huna who holds Sumchos indeed said this law even when both claim to be certain about what happened, why should the buyer swear? The *Mishnah* should say that they should just split it!?

The *Gemara* answers: Sumchos admits that when there is a Torah mandated oath, we must administer the oath, as we will be required to answer below. (100a1 – 100a3)

The *Mishnah* had stated: If he had two servants, one big and one small etc.

The *Gemara* asks: Why should he swear? What he claims, the other did not admit to, and what the other admitted to he did not claim!? [*The Torah obligates a plaintiff to take an oath when he is a "modeh b'miktzas" - when he makes a partial admission to the claim. Here, he is not admitting at all!?*] Additionally, this is a case of *heilech* (*where the person doesn't just admit to owing something, but rather says "take this that I owe you" which makes his exempt from swearing*)! Additionally, one does not swear regarding claims about slaves (*as they are like land, and there are no oaths mandated for claims regarding land*)!?

Rav answers: The case is where the claim is made in monetary value. One claims the monetary value of a large

slave or field, and the other claims the monetary value of a small slave or field.

Shmuel answers: The case is where he claims the clothing of a large slave versus the clothing of a small slave, and the stalks of a big field versus the stalks of a small field.

The *Gemara* asks on Shmuel: The type of clothing that he is claiming, the other did not admit to, and what the other admitted to, he did not claim!?

The *Gemara* answers: This is as Rav Pappa says below: The case is where there were pieces of cloth sewn together to form one garment. Here too, the *Mishnah* is referring to a case where there were pieces of cloth sewn together to form one garment. [*They are arguing about the amount of pieces sewn together in a garment. They both agree, however, regarding the garment's size. This is why it is considered a partial admission.*]

Rabbi Hoshaya has difficulty with this. Does it say clothes in the *Mishnah*? It says a slave (*was sold, not his clothes*)!?

Rather, Rabbi Hoshaya says: The claim is regarding a slave with clothing and a field with its stalks (*being that everyone agrees about the clothing and stalks, the oath must be taken on the slave and field as well*).

The *Gemara* asks: Even so, the type of clothing that he is claiming, the other did not admit to, and what the other admitted to, he did not claim!?

Rav Pappa answers: The case is where there were pieces of cloth sewn together to form one garment.

Rav Sheishes has difficulty with Rav Hoshaya's explanation. Is the *Mishnah* trying to tell us that other items can cause one take an oath regarding land as well? We already learned this lesson in Kiddushin (26a)!? [*Movable property can cause one to take an oath regarding real property. Generally, one is only obligated to take an oath regarding movable*

property. However, if one was obligated to take an oath regarding movable property, he can be required to swear regarding the real property as well. This is known as a *gilgul shevuah*.]

Rather, Rav Sheishes says: Our *Mishnah* is according to Rabbi Meir, who says that a slave is like a movable object (and one would swear regarding it as well, unlike land).

The *Gemara* asks: Even so, the type of clothing that he is claiming, the other did not admit to, and what the other admitted to, he did not claim!? The *Gemara* answers: He must hold like Rabban Gamliel. This as the *Mishnah* states: If someone claims wheat and the other person admits owing barley, he is exempt. Rabban Gamliel says he is obligated (to swear).

The *Gemara* asks: Why isn't he exempt (even according to Rabban Gamliel) due to the rule of *heilech* (explained above)? Rava answers: The case must be where he cut off the hand of the small slave (that he admitted owing) and dug out different types of pits and wells to gather water in the field. [*Heilech* can only be said when he is returning what he says he owes intact.]

The *Gemara* asks: Doesn't Rabbi Meir hold the opposite (that a slave is like land)? The *Mishnah* says: If someone stole an animal or slave and they aged (and lost value), he must pay the owner their value at the time of the theft. Rabbi Meir says: He can give him back the slave and say, "Here is what is yours before you" (just as one could do with land, as we hold that land cannot halachically be stolen; it always remains in the owner's legal possession).

The *Gemara* answers: This is not really difficult, as Rabbah bar Avuha switched around this *Mishnah* and taught it as follows: Rabbi Meir says that one must pay according to their value at the time of the theft. The *Chachamim* say: Regarding a slave, one can indeed say, "Here is what is yours before you."

The *Gemara* asks: How do we know that Rabbi Meir indeed holds that we compare land to a slave and say that just as a person swears regarding a slave, he also swears regarding land? Perhaps he holds that one swears regarding slaves, but not on land? [This would go against our *Mishnah*, which clearly says he swears on land as well.]

The *Gemara* answers: You should not think this, as the *Baraisa* states: Someone exchanged a cow for a donkey and it gives birth, or he sold his maidservant and she gives birth. One claims that the birth happened in his domain, while the other is quiet. The one who is certain is entitled to the offspring. If each says that they do not know when it happened, they split the offspring. If each claims that the birth took place when it was in their possession, the seller should swear that it happened in his possession (and he wins), as all of those who are obligated to swear according to the Torah must swear, and do not have to pay. These are the words of Rabbi Meir. The *Chachamim* say: One does not swear regarding slaves or land. This implies that Rabbi Meir holds one does swear on slaves or land!

The *Gemara* asks: How do we know this is correct? Perhaps the *Chachamim* told him "just like etc." Just like you admit that one does not swear regarding land, admit to us also that one does not swear regarding slaves.

The *Gemara* proves this: Know that this is indeed Rabbi Meir's position, as the *Mishnah* states: If someone says that he gave his friend ten loaded grapevines to watch, and the other claims he only received five, Rabbi Meir says that he must take an oath. [This is known as "*modeh b'miktzas*," meaning that one, who partially admits must swear on the remaining portion.] The *Chachamim* say: Anything that is attached to the ground is like land. [He therefore does not swear, as there is a law that one does not take such an oath regarding land.] Rabbi Yosi the son of Rabbi Chanina explained that the argument above is in a case where the grapes are ready to be harvested. Rabbi Meir holds they are considered as if they are already harvested (and are therefore like movable objects, which require an oath of

modeh b'miktzas in this case). The *Chachamim* maintain that they are regarded as land (and therefore an oath does not apply). [However, everyone agrees that if they are attached to the ground and not about to be harvested, one does not swear!]

Rather, the *Gemara* answers: The explanation of the *Mishnah* is like that of Rabbi Hoshaya. Although we asked a question earlier that we already learned from *Kiddushin* (26a) that one takes an oath on land and slaves if he has to take an oath on other objects for which one normally has to take an oath, this *Mishnah* is still necessary. One might think that the clothing of a slave is like the slave himself, and the stalks of a field are like the field itself (and they do not cause one to take an oath). Our *Mishnah* teaches us that this is incorrect. (100a3 – 100b4)

The *Baraisa* had stated: If they both claim that they do not know when the birth happened, they should split it.

The *Gemara* asks: Who is the author of this statement? The *Gemara* answers: It is *Sumchos*, who says that when there is a doubt regarding money, it should be divided.

The *Gemara* asks: The second part of the *Baraisa* says that if the seller claims that the birth happened in his domain, and the buyer claims it was in his domain, the seller should swear that it gave birth in his domain. According to *Rabbah bar Rav Huna* who holds that *Sumchos* indeed said this law even when both claim to be certain about what happened, why should the buyer swear? The *Mishnah* should say that they should just split it!?

The *Gemara* answers: *Sumchos* agrees that an oath must be taken when there is a Torah oath. The case here is where he cut off the hand of the slave, as stated by *Rava* (earlier in explanation as to why there is no claim of *heilech*). (100b4)

Mishnah

If someone sold his olive trees for firewood, and before they were chopped off, they produced less than a *revi'is* (a

quarter-log of olive oil) per *se'ah* (of olives; meaning they were not very good olives), the olives belong to the new owner of the olive trees. If they produced more than this amount, and the buyer says, "My olive tree grew this," while the owner says, "My land grew this," they should split the olives.

A river swept away a person's olive trees and deposited them (together with their roots) in someone else's field. The owner of the trees says, "My olive tree grew this," while the owner of the land says, "My land grew this." They should split the olives. (100b4 – 100b5)

Explaining the Mishnah

The *Gemara* asks: What is the case? If the seller said to the buyer of the olive trees, "Cut them down right away," even less than a *revi'is* per *se'ah* should go to the owner of the land!? If he said, "Cut it down whenever you want," even a *revi'is* per *se'ah* should belong to the owner of the olives!?

The *Gemara* answers: This *Mishnah* is needed in a case where nothing was specified. When it is less than a *revi'is* per *se'ah*, people do not care (the seller does not care that the buyer is benefiting from his land). People normally do care when it is more than a *revi'is* per *se'ah*. *Rabbi Shimon ben Pazi* said: When the *Mishnah* mentioned a *revi'is*, it is exclusive of the expense (of the picking and pressing of the olives). (100b5 - 101a1)

INSIGHTS TO THE DAF

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WHEN A CLAIM OF "BARI" OVERRIDES A CLAIM OF "SHEMA"

QUESTION: The *Mishnah* discusses various cases in which a dispute arises between a buyer and a seller concerning the object that was purchased. The *Mishnah* says that in a case in which the buyer claims that he bought the larger object (such as the larger field), and the seller does not know which

one he sold to the buyer, the buyer is entitled to take the larger field.

Why is the buyer entitled to take the larger field? Presumably, the *Mishnah* entitles the buyer to take it because his claim is a claim of certainty ("Bari"), while the seller has only a claim of doubt ("Shema"). The Halachah in such a case, however, is "Bari v'Shema Lav Bari Adif" -- when one person has a claim of certainty and the other has a doubtful claim, the claim of certainty does *not* prevail to take money or objects from the possession of the other. Why, in the case of the *Mishnah* here, does the buyer's claim prevail?

ANSWERS:

(a) In his first answer, the **RA'AVAD** explains that the rule of "Bari v'Shema Lav Bari Adif" applies only when the one with the claim of "Shema" is actually in possession of the object in doubt and thus has a "Chezkas Mamon" that counters the other person's claim of "Bari." If, however, the one with the claim of "Shema" is not in possession of the object (and he has only a "Chezkas Mara Kama" -- a Chazakah that, before this moment, he was known to be the owner -- to support his claim of ownership), the other person's claim of "Bari" overrides his claim of "Shema."

The *Mishnah* presumably discusses a case in which the seller is not in physical possession of the object. The previous case in the *Mishnah*, according to the *Gemara*, certainly refers to a case in which the cow is not in the physical possession of either the buyer or seller, but rather is in the marsh. It is reasonable to assume that the second case of the *Mishnah* also discusses such a situation. Since there is no proper "Muchzak," but only a Chazakah of "Mara Kama," the buyer's claim of "Bari" overrides the seller's claim of "Shema."

The **RAMBAN** (Bava Basra 34b), however, argues with the Ra'avad's assertion and maintains that even when the original owner is not in physical possession of the object and has only a Chazakah of "Mara Kama," the other person's claim of "Bari" does not prevail.

(b) The Ra'avad offers a second answer with which the Ramban agrees. He explains that the *Mishnah* refers to a case in which the seller was obligated to make a Shevu'ah of "Modeh b'Miktzas" to the buyer due to an additional element involved in the dispute that arose between them. Since the seller admits that he owes part of the buyer's claim, and -- with regard to the buyer's claim that he bought the larger field -- the seller responds that he does not know, the Halachah follows the standard rule that a person who is obligated to swear but cannot swear must pay. (This is similar to the case in the *Gemara* on 97b.) (Y. Marcus)

Heilech

QUESTION: The *Mishnah* (100a) discusses various cases in which a dispute arises between a buyer and a seller concerning the object that was purchased. The *Mishnah* says that in a case in which the buyer claims with certainty that he bought the larger slave (or larger field), and the seller claims with certainty that he sold the smaller slave (or smaller field), the seller must swear that he sold the smaller slave (and then the buyer receives only the smaller slave). This Shevu'ah is a "Shevu'as Modeh b'Miktzas," since the seller admits that he did sell something.

The *Gemara* (100a) asks several questions on the *Mishnah's* ruling. The *Gemara* asks that this is not a case of "Modeh b'Miktzas" because the seller does not admit to any part of the buyer's claim. The buyer claims that he bought one slave (or one field), and the seller claims that he sold a completely different slave (or field). The case of "Modeh b'Miktzas" is a case in which the defendant admits to part of what the claimant actually claims is his. In the case of the *Mishnah*, the seller's admission relates to an entirely different item.

The *Gemara* then asks that this case should be considered a case of "Heilach," because when the seller denies that he sold a large slave, he hands over the small slave that he admits having sold. One opinion cited earlier (4a) maintains that one does not make a Shevu'ah of "Modeh b'Miktzas" in a case of "Heilach."

Finally, the *Gemara* asks that there is a rule that one does not swear about Avadim (or Karka'os, land). Why, then, does the seller have to swear?

Shmuel answers that in the *Mishnah's* case, the dispute is not over the slave himself, but over the *clothes* of an slave (or, in the case of the field, the sheaves of grain on the field). The buyer claims that he bought the clothing of a large slave, while the seller claims that he sold the clothing of a small slave. The subject of the dispute, therefore, is mobile property (Metaltelin) about which a Shevu'ah may be made (in contrast to Avadim and Karka'os). This answers the third question. It also answers the first question, as the *Gemara* itself explains, because the dispute involves one large piece of fabric from which the clothing is made. Thus, the seller indeed admits to part of the buyer's claim; the buyer claims that he is entitled to a large piece of fabric, while the seller maintains that only a portion of that fabric was sold.

How, though, does Shmuel's explanation answer the second question? The case still should be considered a case of "Heilach," because the seller readily gives to the buyer the part of the claim to which he admits (i.e. part of the clothing), and no Shevu'ah should be made. (RAN)

ANSWER: The RAN answers that the case is not a case of "Heilach" because the clothing in dispute is attached to one large piece of fabric, as the *Gemara* explains. Accordingly, the buyer does not claim a specific article of clothing, but rather he claims an *amount* (such as a length) of any part of the roll of fabric. Hence, when the seller agrees that he sold a smaller amount, there is no specific, identifiable object that the seller hands over as part of his admission. Rather, the seller now must choose which part of the fabric he will give to the buyer. Therefore, the seller's admission does not involve "Heilach." (Similarly, with regard to the sheaves in the field, the buyer claims a *number* of sheaves, but not any particular sheaves.)

DAILY MASHAL

Rav Pappa explained: The case is where there were pieces of cloth sewn together to form one garment.

Rabbi Moshe Weinberger (Congregation Aish Kodesh of Woodmere) related a moving story that he heard from an old Lithuanian Jew. This Jew survived the holocaust, Siberia and a myriad of painful experiences all with his faith intact. As a teenager, he was sent by his parents to learn at the Yeshiva in Grodno, Poland which was headed by the illustrious Torah sage Rabbi Shimon Shkopf. The Yeshiva was known to accept only the brightest, and this student, average at best, was worried that he would be summarily rejected. After three days of travel by train, carriage and foot he finally entered the portals of the Yeshiva. Rabbi Shkopf greeted the young man and invited him to his home. He could not help but notice how haggard he looked. He asked him from which city he came and surmised how difficult the journey must have been.

Reb Shimon turned to the young man and began the entrance examination. "I would like to ask you two questions," he said. In utter fear, the boy nodded his head in feigned approval. Rabbi Shkopf's face broke out with a warm smile. "When was the last time you had a hot meal, and when was the last time you slept in a warm bed?" Reb Shimon then had a piping hot meal prepared for the neophyte and a comfortable bed waiting for the new student to rest his weary bones.

"The Holocaust, made me forget the Gemara's questions," the old man told Rabbi Weinberger. "Siberia wiped out all memories of the commentaries' questions. But never, will I forget the two questions that Reb Shimon asked as long as I am alive."