

## OVERVIEW of the Daf

### 1) Let the stronger one prevail (cont.)

The Gemara explains why in one case Beis Din withdraws and allows the stronger one to prevail and in other cases will divide the property or leave it to the discretion of the Beis Din.

Another unsuccessful challenge to the ruling "Let the stronger one prevail" is presented.

Nehardai asserts that in a case where Beis Din withdraws, if a third party were to come and seize the object it could not be taken away from him.

Support for this assertion is presented.

### 2) Establishing a chazakah

R' Abba asserts that if it is established that the challenger helped the occupant use the field the occupant has an immediate chazakah.

R' Zevid maintains that the challenger can explain his behavior so that the occupant should not have a chazakah.

R' Ashi asks how someone could protect himself from a sharecropper claiming that the land is his.

R' Kahana offers some advice and cites support for his suggestion.

### 3) Acquiring property from an idolater

R' Yehudah in the name of Rav rules that a Jew who purchases a field from an idolater must produce a deed to establish a chazakah. ■

## REVIEW and Remember

1. Explain שוּדָא דְדִינִי.
2. When is שוּדָא דְדִינִי utilized by Beis Din?
3. Why is a thief from the public not considered a thief?
4. Why is a gentile unable to make a chazakah after occupying land for three years?

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## Distinctive INSIGHT

When do we say יחלוקו—to divide the disputed item?

המחליף פרה בחמור וילדה וכן המוכר שפחתו וילדה זה אומר עד שלא מכרתי ילדה וזה אומר משלקחתי ילדה - יחלוקו

Two people dispute the ownership of a piece of land, with both claiming that it belonged to their families for generations. Where the degree of proof that each produces is inconclusive, Rav Nachman ruled **כל דאליים גבר**—the court does not make an active ruling, but rather allows the litigants to continue to demonstrate the validity of each of their claims. Whoever prevails, whether in terms of bringing more proof or by demonstrating his determination, will be the eventual winner. Our Gemara contrasts this approach of Rav Nachman with the Mishnah (Bava Metzia 100a) which deals with a pregnant cow which is exchanged for a donkey (חליפין) and there is uncertainty regarding whether the cow's offspring was born before or after the transaction occurred. In this case, when faced with a doubt regarding ownership of the offspring, the Mishnah rules יחלוקו, that the money is divided. The Gemara there identifies Sumchos as the author of the opinion that says to divide the money, but the Sages disagree and say **המוציא מחבירו עליו הראיה**—the money will stay in the possession of whoever has the newborn calf, and if it is not in the possession of either one of the litigants, it will go to the seller, who was the most recent known owner. Either way, we do not say **כל דאליים גבר** as we say in our case, and the question in our Gemara is what is the difference between these cases which accounts for the change in the halacha?

Tosafos points out that our Gemara only cites the opinion of Sumchos, and asks that our case of disputing ownership of land should be יחלוקו as we find by the dispute regarding the newborn calf. The reason only Sumchos is mentioned is that the Sages would agree that the item being disputed would be divided (יחלוקו) if the item was not in either person's possession and there was no known previous owner (מרי קמא), which is the situation here where the two people dispute ownership of the land. No one has clear control of the land, and we have no record of who the previous owner was.

Tosafos in Bava Metzia (2a, ד"ה ויחלוקו) explains that Sumchos holds that even where neither one is holding on to the item, and even where dividing it cannot represent a truthful judgment (אינה יכולה להיות אמת), if the doubt is

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# HALACHAH Highlight

## Judicial discretion

ושמואל אמר שודא דדייני

And Shmuel ruled that it is up to the judge's discretion

The Gemara presents a case of two people who have contracts that state that they purchased the same property from the seller on the same day. Rav rules that the two parties should split the field whereas Shmuel is of the opinion that it is left up to the judge's discretion. Rashbam<sup>1</sup> explains that Shmuel's ruling that the decision is left up to the judge's discretion means that the judges must examine all the relevant facts to determine which of the two litigants the giver would want to have the land. Rabbeinu Tam<sup>2</sup> disagrees and asserts that a decision to leave the case to the judge's discretion means that the judges have the right to randomly decide who will be granted the property without any attempt to try and determine who the intended recipient was. Shulchan Aruch<sup>3</sup> rules in accordance with the explanation of Rashbam.

There was once a woman who died and left a will that stated that all her movable property and jewelry should be given to her daughter's daughter, named Traineleh. A granddaughter, married to a Torah scholar, stepped forward and identified herself as the granddaughter of the deceased who is named Traineleh. It turned out, however, that the deceased woman had a second granddaughter who was also

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clearly present even without their claims, which is the case regarding the newborn calf, Sumchos still rules that the item is divided. Rabbi Akiva Eiger notes according to our Tosafos, it is not only Sumchos who would say יחלוקו under such conditions, but the Sages would also agree that the halacha would be יחלוקו. ■

named Traineleh and a dispute ensued about which granddaughter would be the recipient of her grandmother's generosity. Noda B'yehudah<sup>4</sup> cited the ruling in Shulchan Aruch concerning a person who gave his property to Tuviah and it turns out that there are two people named Tuviah. Shulchan Aruch rules that if only one of the people named Tuviah is a Torah scholar it could be assumed that he was<sup>5</sup> the designated recipient since it is a great merit for the deceased to give money to Torah scholars. Accordingly, if the property in question was the type of property that a husband would benefit from it can be assumed that the grandmother intended to give it to the granddaughter who is married to the Torah scholar. In this case, where the property under dispute was not the type of property from which the husband would benefit, Noda B'yehudah advocated that the two parties reach some sort of compromise and share the property. ■

1. רשב"ם ד"ה שודא דדייני.
2. עי' תוס' ד"ה שודא דדייני.
3. שו"ע חו"מ סי' ר"מ סעי' ג'.
4. שו"ת נודע ביהודה מהדו"ת חו"מ סי' מ"ח.
5. שו"ת חו"מ סי' רנ"ג סעי' כ"ט. ■

# STORIES Off the Daf

## Acquiring ownership

"אי דלי ליה איהו גופיה צנא דפרי לאלתר  
הוי חזקה..."

Rav Nochum Aharon Rokeach, zt"l, was once visiting the home of one of his chassidim when he was served a big tray of fruit. Although it was his custom to distribute "shirayim," they were usually given to the most prominent chassidim first. It seemed extremely strange, then, when Rav Nochum called the baal habayis over from the other room and gave him his portion ahead of many others who were on a much higher level

and would ordinarily have received theirs before the baal habayis.

When Rav Nochum saw that some of the chassidim seemed to feel slighted by this, he wished to mollify them. He explained what he had done in a manner so that even those who failed to grasp that a guest should really give the owner of the house first would also understand.

He said, "You must know that all the chassidim who are here were not really invited by the baal habayis, so it is surely questionable whether I can give out his fruit to them, as we find in the Magen Avrohom.<sup>1</sup> How can we be certain that the baal habayis, who was not even in the room at the time, gave

his permission to give out the fruit?

"But there is a halachic way to acquire the fruit and then hand it out to whomever one wishes. Rabbeinu Chananel explains in Bava Basra 35 that even if one doesn't have a chazakah for three years, if he gives the fruit to the fruit salesman this proves that they were truly purchased, since the seller would have protested that they cannot be a gift since the fruit was never sold in the first place.

"Similarly, it is only after I gave the baal habayis and he said nothing that it is clear that I have permission to give the fruit to whomever I wish!"<sup>2</sup> ■

1. מגן אברהם, סי' קס"ט, ס"ק ד'
2. רבן של ישראל, עי' 22 ■