

**What is this different from - ומאי שנא מהא דתנן המחליף פרה בחמור כולי - this which we learnt; one who exchanges a cow for a donkey, etc.**

## **OVERVIEW**

The המחליף פרה challenges גמרא's ruling of (of ארבא by כדא"ג) from the משנה of פרה where the ruling is יחלוקו (and not כדא"ג).<sup>1</sup> From the fact that the גמרא challenges ר"נ from this משנה, it would indicate that the גמרא maintains that we rule סומכוס by יחלוקו. Generally the ruling of יחלוקו is ascribed to סומכוס, however the חכמים maintain the מוציא מחבירו עליו הראיה. Our תוספות rejects the notion that we can derive from the גמרא here that the גמרא assumes that we follow סומכוס and not the חכמים.

cautions: תוספות

**אין להוכיח מכאן דהלכה כסומכוס מדפריך מיניה -**

**We cannot prove from the גמרא here that the הלכה is like סומכוס, since the גמרא challenges ר"נ from this ruling -**

**דעד כאן לא פליגי עליה התם בהשואל (בבא מציעא דף ק,א) אלא משום דאזלינן בתר חזקה דממונא -**

**For the only reason the חכמים there argue on סומכוס is only because the חכמים maintain that we rule according to the 'possession of money' -**

**ומוקמינן<sup>2</sup> בחזקת מרה קמא<sup>3</sup> הא לאו הכי מודו דיחלוקו -**

**And therefore we place the calf in the presumptive status of its original owner, however where there is no קמא מרא (as in the case of ארבא) the חכמים (would seemingly) admit that the ruling is יחלוקו.<sup>4</sup>**

<sup>1</sup> The case there is where the individual owners of a donkey and a [pregnant] cow wanted to exchange their animals. It was accomplished through the חליפין קנין. The initial בעל הפרה made a משיכה in the חמור, so now the animals belong to their respective new owners. The פרה was not present when the משיכה was made, and when its new owner came to retrieve it, the פרה had already given birth to a calf. However we do not know if the calf was born before the קנין was made, whereby it belongs to the initial בעל הפרה (for the exchange was only for the [entire] פרה but not for the calf), or if it was born after the קנין whereby it belongs to the new בעל הפרה (the initial החמור). The משנה rules יחלוקו; the value of the calf is divided between the two. The גמרא there concludes that the משנה follows the ruling of סומכוס, who maintains that בספק חולקין.

<sup>2</sup> The ומוקמינן<sup>2</sup> לה בחזקת, amends this to read, הגהות הב"ה.

<sup>3</sup> The גמרא there (seemingly) rules that if the calf is found in the property of either owner, that owner is the מוחזק and acquires the calf (even according to סומכוס [see תוס' there]). The מחלוקת between סומכוס and the חכמים is where the calf is found באגם (in no-man's land), where סומכוס maintains יחלוקו and the חכמים rule that since the initial בעל הפרה is the מרא קמא of this calf (when it was a fetus) therefore המע"ה and it is awarded to the initial בעל הפרה.

<sup>4</sup> תוספות is saying that in the הו"א (before we differentiated between ארבא and פרה בחמור), there is no reason for the חכמים to argue with סומכוס in the case of ארבא; for since by ארבא there is (no מוחזק and) no קמא, the חכמים would seemingly agree to סומכוס that יחלוקו. In any event there is no proof that the הלכה is like סומכוס where there is

anticipates a difficulty with his assumption that the הלכה is not like סומכוס:

ובהמוכר את הבית (לקמן דף סג,א ושם) גבי האומר תנו חלק לפלוני מנכסי וכולי דמייתי מסומכוס –  
And in the case of one who said, ‘give a portion [חלק] of my  
assets to him’, etc.<sup>5</sup> where the גמרא cites a ruling from סומכוס<sup>6</sup> –

ופירש הקונטרס<sup>7</sup> דטעמא משום דחלק מספקא ליה אי הוי משהו או פלגא<sup>8</sup> –  
And the רשב"ם there explains that the reason we give him a fourth is because  
there is a doubt as to the meaning of חלק; is it a minuscule share, or is it half –

וממון המוטל בספק חולקין<sup>9</sup> אם כן משמע דהלכה כסומכוס<sup>10</sup> –  
Therefore, we divide the money which is in doubt; it therefore seems that the  
הלכה is like סומכוס (not like תוספות presumes) –

replies:

ויש לדחות דטעמא לאו משום ספיקא כדפירש הקונטרס אלא משום דחלק הוי רביע<sup>11</sup> –  
And this proof can be rejected, for the reason he receives a fourth is not because  
we are in doubt as to the meaning of חלק as the רשב"ם explained, but rather  
because the word חלק (usually) is accepted to mean a fourth. Therefore there is no  
proof at all from that גמרא that we rule like יחלוקו.

until now rejected two possible proofs that the הלכה is like סומכוס. Now תוספות will rule  
definitely that the הלכה is not like סומכוס regarding חולקין בספק המוטל.

ונראה דאין הלכה כסומכוס אף על גב דבכמה מקומות<sup>12</sup> סתם לן תנא כוותיה<sup>13</sup> –  
And it is the view of תוספות that the הלכה is not like סומכוס, even though that in  
many places the תנא (of the משנה) states the ruling anonymously like סומכוס –  
דהא סבר שמואל כרבנן<sup>14</sup> כדאמרינן בריש הפרה<sup>15</sup> (בבא קמא דף מו,א ושם) –

[and סומכוס [both] ארבה גמרא]. [The גמרא concludes that by ארבה [both] סומכוס and סומכוס (either a מוחזק or) מרא קמא, for then the הלכה would be דמע"ה.] [כדא"ג we rule [חכמים] agree that]

<sup>5</sup> The man who bequeathed this amount died, and the heirs want to minimize the amount to be given to this person.

<sup>6</sup> סומכוס there rules that if one said give a חלק of my wine (that is in my pit) to him, we award him a fourth of the entire wine in the pit. תנו חלק לפלוני מנכסי בר קיסי said that the same ruling applies when one says

<sup>7</sup> See ד"ה סומכוס there רשב"ם.

<sup>8</sup> The word חלק is similar to the word יחלוקו which means to divide (in two); half for each.

<sup>9</sup> We are in doubt whether to give him a משהו or half, we therefore split it and give him a fourth (and a משהו?!).

<sup>10</sup> According to the חכמים, the heirs who are the מוחזקים can claim that he deserves only a משהו, and דמע"ה.

<sup>11</sup> The גמרא cites the ruling of סומכוס by the wine to prove that חלק means a fourth, but not that he receives a fourth because we are unsure what חלק means.

<sup>12</sup> See the aforementioned משנה in השואל and the משנה in הפרה את שנגח את הפרה, see immediately following.

<sup>13</sup> When a ruling is stated anonymously (סתם) we usually follow that ruling (especially in a משנה); the fact that it is stated סתם indicates that this is the accepted ruling and not merely an individual opinion.

<sup>14</sup> There is an accepted principle that the הלכה is according to שמואל in monetary issues ([even] when he argues with רב).

<sup>15</sup> The משנה there states that if (we know that) an ox gored a pregnant cow, and a dead fetus was found beside the dead cow; however we are not sure whether the fetus was aborted spontaneously (so the owner of the ox is not

פרק For שמואל maintains like the חכמים, as the גמרא states in the beginning of the הפרה, that -

אמר שמואל זו דברי סומכוס אבל חכמים אומרים זה כלל גדול בדין כולי –  
However the חכמים maintain, (יחלוקו) that סומכוס said this is the ruling of שמואל, <sup>16</sup> 'this is the great principle in ruling, etc.', that המוציא מחבירו עליו הראיה.  
משמע זו<sup>17</sup> ולא סבירא ליה –

It appears from the wording of שמואל when he said זו דברי סומכוס, meaning, this is the ruling of סומכוס, but שמואל does not agree with it.

anticipates a possible difficulty with his interpretation of 'זו':

אף על גב דמוכח בפרק בית כור (לקמן דף קה, א ושם) דאיכא זו דסבירא ליה<sup>18</sup> –  
Even though it is evident in פרק בית כור that the word זו is used (even) when the user agrees with the ruling, so perhaps here too when שמואל said זו דברי סומכוס, it means that שמואל agrees with סומכות; תוספות rejects this for -

מיהו סתם זו לא סבירא ליה<sup>19</sup> –  
Nevertheless generally זו indicates that the user does not agree with the זו statement.

offers an additional proof that שמואל maintains המע"ה like the חכמים:

ועוד דקאמרינן התם (בבא קמא דף מו, א) אי נמי זה כלל גדול בדין הוא לכי הא<sup>20</sup> –  
And in addition, the גמרא states there, we can also say that the phrase זה כלל גדול בדין, is teaching us in this case -  
דהמוכר שור לחבירו ונמצא נגחן כולי<sup>21</sup> –

---

liable) or did the goring of the ox cause it to abort (in which case the owner of the ox is liable); the ruling is יחלוקו; the owner of the ox pays half (a quarter) of the damages (by a שור תם) to the הפרה בעל.

<sup>16</sup> According to the חכמים the בעל השור is completely פטור, unless the בעל הפרה can prove that his ox caused the fetus to abort.

<sup>17</sup> The word 'זו' ('this') lends itself to be interpreted in a limiting fashion, allowing us to infer that only סומכוס maintains המע"ה, however שמואל agrees to the חכמים that המע"ה is יחלוקו.

<sup>18</sup> The גמרא there cited a statement of ר' ננס בן ננס and asked can we say זו דברי סומכוס, but we know that he does agree. The גמרא concluded (that in this case) it is זו דברי סומכוס.

<sup>19</sup> This is evident from the fact that the גמרא there initially assumed there that זו דברי סומכוס (see previous footnote # 18); it was only because there was a contradiction that we are forced to say there זו דברי סומכוס, however elsewhere we assume זו דברי סומכוס.

<sup>20</sup> When שמואל stated that the חכמים argue with סומכוס and maintain המע"ה, he prefaced it by saying that the חכמים say (that המע"ה) is a כלל גדול בדין; the גמרא gives two explanations why it was necessary for שמואל to make this preface (one explanation is that המע"ה is effective even in a case of שמואל). תוספות is discussing the second explanation.

<sup>21</sup> The case is where the buyer claims that he bought the ox for plowing, and since it is a goring ox, it useless for him and he wants to return the ox and receive his money back, while the seller argues that he assumed the customer wanted the ox for slaughtering, for which it is perfectly suitable. There is a dispute between רב and שמואל in a situation where a majority of people buy oxen for plowing and only a minority buys oxen for slaughter. רב rules we follow the majority and the sale is void. שמואל rules that we do not follow the majority when it comes to monetary

**Where one sells an ox to his friend and it turned out to be a goring ox, etc.**

**משמע זה כלל גדול אפילו במוכר שור לחבירו אמרין דהמוציא מחבירו עליו הראיה –**

**It seems that the case of even in the case of מוכר שור לחבירו, where there is a רוב which contradicts the המע"ה, so therefore -**

**כל שכן<sup>22</sup> בפלוגתא דסומכוס ורבנן דסבר שמואל המוציא מחבירו עליו הראיה –**

**In the case between סומכוס and the רבנן, where there is no רוב opposing the המע"ה, there certainly maintains שמואל.**

המע"ה that חכמים agrees with the שמואל offers an additional proof תוספות

**וכן בפרק השואל<sup>23</sup> (בבא מציעא דף קב, ב ושם דיבור המתחיל ובא) קאמר –**

**And similarly the גמרא in פרק השואל states -**

**דשמואל מספקא ליה אי תפוס לשון ראשון או לשון אחרון –**

**That שמואל was in doubt whether we accept the initial statement (of י"ב דינרין) and he is פטור for the חודש העבור, or the concluding statement (of דינר לחודש) and he is חייב for the חודש העבור -**

**ומתניתין (דף קב, ב ושם) דקתני באחד ששכר מרחץ בציפורי –**

**And the משנה which relates regarding one who rented a bathhouse in צפורי -**

**בי"ב זהובים לשנה מדינר זהב לחדש –**

**For twelve זהובים for the year at the rate of one golden דינר per month -**

**ובא מעשה לפני רבן שמעון בן גמליאל ורבי יוסי ואמרו יחלקו את חדש העבור –**

**And the story came before ר"י and רשב"ג and they ruled; 'they should divide the leap month' -**

**ומוקי שמואל בבא באמצע החדש –**

**And שמואל established this ruling (of יחלקו) to be valid only if the landlord came in the middle of the leap month to collect his rent -**

**אבל בתחלת החדש כולו למשכיר בסוף חדש כולו לשוכר –**

**However if the משכיר came in the beginning of the חודש העבור, the entire month's rent would be due to the משכיר; if the משכיר came at the end of the month it belongs entirely to the שוכר (he need not pay for the extra month). -**

**אלמא סבר כרבנן דאזלי בתר חזקה<sup>24</sup> –**

---

issues, and the rule is that the sale is valid since המע"ה. The גמרא says that when שמואל said בדין זה כלל גדול, he was referring to this case, that we say המע"ה even when it is in conflict with a רוב.

<sup>22</sup> See 'Thinking it over'.

<sup>23</sup> The משנה there is discussing a case where a landlord rented out his bathhouse for 'twelve דינרים for the year at the rate of one דינר per month', and it turned out to be a leap year of thirteen months; is the renter obligated to pay rent for the extra month (since the owner concluded a דינר per month) or since he initially said twelve דינרים for the year, the renter is not obligated to pay for the leap month. There are various opinions in the גמרא there.

<sup>24</sup> שמואל's ruling will be understood if he maintains המע"ה, meaning you cannot make someone pay or change the status quo without proof. In this case where the משכיר wants his rent and the שוכר wants the premises for the extra

**It is evident that שמואל agrees with the רבנן that we follow the חזקה - דלסומכוס בכל ענין יחלוקו<sup>25</sup> –**

**For according to סומכוס they would divide the rent in any event (no matter when the משכיר came).**

יחלוקו and not המע"ה offers additional support that we rule

**ורב נחמן סבר נמי כרבנן דקאמר התם דקרקע בחזקת בעליה קיימא –**

**And ר"נ also agrees with the רבנן (המע"ה), for ר"נ rules there (in the case of the חודש העבור) that land is always in the possession of the owner -**

**ואפילו בא בסוף החדש כולו למשכיר<sup>26</sup> ואפילו אפיך מיפך<sup>27</sup> –**

**And therefore even if the משכיר came at the end of the month, the entire month's rent goes to the משכיר, and even if the order was reversed -**

**ועל כרחך היינו טעמא דסבר כרבנן ומתניתין דהתם אוקי כסומכוס דלא תקשי ליה מתניתין –**

**And perforce you must say that the reason for ר"נ's ruling is because he agrees with the רבנן (המע"ה), the שוכר is always considered the מוציא, and ר"נ will establish the משנה there (where ר"י rule rule רשב"ג ור"י), according to סומכוס, in order that ר"נ should not be contradicted from the משנה.**

**וכרב נחמן קיימא לן בדיני –**

**And it is established that we follow ר"נ in monetary rulings.**

קרקע בחזקת בעליה קיימא ר"נ regarding shows that we rule specifically like

**ובהדיא פסקין כוותיה בפרק המקבל (בבא מציעא דף קיא) –**

---

month; the שוכר is the מוחזק in the money, and the משכיר is the מוחזק in the property. If the משכיר comes after the month is over and wants to be מוציא money from the שוכר (the מוחזק), he must prove his case; if the משכיר comes in the beginning of the month, and the שוכר wants to be there another month (and take away the rights of ownership from the משכיר) the burden of proof is in the שוכר. When the משכיר comes in the middle of the month, so the half-month for which the שוכר was there, the משכיר is the מוציא, and for the half month the שוכר wants to continue living there, the שוכר is the מוציא and must pay for the last half of the month (יחלוקו).

<sup>25</sup> **ממון המוטל בספק**, we rule **ממון**, but rather in any case where there is a **ממון**, we rule **ממון**, regardless of who is the מוחזק (for in the view of סומכוס the fact the someone is in possession of the money does not establish at all that he does not owe it). Therefore no matter when the משכיר came, there is a legitimate doubt whether or not the שוכר owes him the money, therefore in all case we rule יחלוקו.

<sup>26</sup> See **ד"ה ור"נ** who states: **לא עכשיו נולד אלא מתחילת החדש נולד והעמד**. The issue here is whether, at the beginning of the חודש העבור, the שוכר had a right to be there (without paying, since the משכיר said לשנה, and the שוכר paid [only] **זהובים**), or did it revert to the משכיר already (since twelve months had passed from when the משכיר said לחודש, and the שוכר paid [only] **זהובים**). The issue is resolved (according to ר"נ) in favor of the משכיר, since קרקע בחזקת בעליה קיימא (and it is a הספק).

<sup>27</sup> According to ר"נ it makes no difference whether he first said, **זהובים לשנה** and then concluded **זהובים לשנה**, or he first said **זהובים לשנה** and then concluded **זהובים לשנה**, in both cases it is **זהובים לשנה**. According to ר"נ, since it is **זהובים לשנה**, we rule **זהובים לשנה** whether we maintain (elsewhere) or תפוס לשון אחרון or תפוס לשון ראשון.

And we rule explicitly like<sup>28</sup> ר"נ in פרק המקבל that קרקע בחזקת בעליה קיימא; this is -  
גבי ההוא שטרא דהוה כתיב ביה שנים שתמא –  
Regarding that שטר, where it was written an unspecified amount of 'years'<sup>29</sup> –

חודש העבור ר"נ regarding הלכה is like ר"נ anticipates a difficulty with his view that the  
ואף על גב דקיימא לן כרבן שמעון בן גמליאל במשנתנו –  
And even though we have established that the הלכה is like רשב"ג in a משנה, and  
– ר"נ like (in the case of העיבור); not like ר"נ ruled יחלוקו רשב"ג

תוספות responds:

הני מילי בסתמא אבל הכא<sup>30</sup> דפליג רב נחמן לא:  
ר"נ When is this so (that הלכה כרשב"ג במשנתנו) only generally; however [w]here  
argues with רשב"ג (based on other תנאים), the הלכה is not like רשב"ג, but like ר"נ.

### SUMMARY

The הלכה in a case of בספק המוטל is ממון המוטל במע"ה, and not יחלוקו (unless there is no מוחזק/חזקה).

### THINKING IT OVER

תוספות proves that the הלכה is המע"ה since שמואל maintains so. תוספות derives this that since שמואל maintains that the rule of המע"ה applies even when it contradicts a שור שנגח את הפרה (in the case of נגחן גזל), so he *certainly* maintains so in הפרה (where there is no contradicting רוב).<sup>31</sup> Why cannot תוספות simply say that since שמואל maintains המע"ה by נגחן גזל, this proves that this is the הלכה; why the need for a כ"ש?<sup>32</sup>

<sup>28</sup> Previously תוספות stated that (generally) קי"ל כר"נ בדיני, now תוספות indicates that concerning this ruling, of קרקע ר"נ. the גמרא explicitly states that we follow this ruling of קי"ל. בחזקת בעליה קיימא

<sup>29</sup> The case there is where a מלוה held a (signed) שטר, that he had the right to harvest the פירות of the לוה's field for (an unspecified amount of) years as payment for his loan. The מלוה claimed that it was for three years and the לוה claimed it was only for two years. The מלוה had already harvested the פירות of the third year. There is a dispute whether we say קרקע בחזקת בעליה קיימא (and the מלוה must return the פירות of the third year) or whether we say פירות, and פירות בחזקת אוכליהן קיימא (actually) גמרא rules (and the מלוה does not have to pay). The גמרא immediately challenges this ruling since דאמר קרקע בחזקת בעליה עומדת עומדת [The גמרא there explains why that case is different, עיי"ש]. It is evident that the הלכה is like ר"נ ruled. קרקע בחזקת בעליה עומדת

<sup>30</sup> The הגהות הב"ה amends this from הכא to היכא.

<sup>31</sup> See footnote # 22.

<sup>32</sup> See נה"מ.