בִּשְׁלָמָא לְעוּלָּא – דְּרַבָּנַן קָתָנֵי לָהּ, וּדְאוֹרַיְיתָא קָתָנֵי לָהּ. אֶלָּא לְרֵישׁ לָקִישׁ, אַמַּאי פָּטוּר מִן הַמַּעֲשֵׂר?

The Gemara asks: **Granted,** this is so **according to Ulla,** who explained **that the Rabbis taught** the previous *baraita*[N] and explains that although the Sages instituted that the ownerless status does not take effect completely until three days have passed, by Torah law it takes effect immediately, **and that** this *baraita* is **taught in accordance with Torah law.** That is the reason that one is exempt from tithing the grapes. **However, according to Reish Lakish, why is he exempt from** separating **the tithe?** Until three days after the declaration, neither by Torah law nor by rabbinic law does ownerless status take effect.

אָמַר לָךְ: כִּי אֲמַרִי אֲנָא – לְרַבִּי יוֹסֵי, הָא – רַבָּנַן הִיא.

The Gemara answers that Reish Lakish could have **said to you:** Although **when** I explained the first clause and the latter clause of that *baraita* **I said** that both are **in accordance with** the opinion of **Rabbi Yosei,** who said that an ownerless item leaves the possession of the owner only when it enters the possession of another, **this** *baraita* is in accordance with the opinion of **the Rabbis,** who hold that it leaves the possession of the owner immediately upon the declaration of ownerless status.

NOTES

Granted according to Ulla, who explained that the Rabbis taught the previous *baraita* – בִּשְׁלָמָא לְעוּלָּא דְּרַבָּנַן קָתָנֵי לָהּ: According to Ulla, who holds that the first *baraita* cited previously with regard to ownerless status is in accordance with the opinion of the Rabbis, the very declaration of the field as ownerless renders it ownerless according to the Rabbis. Therefore, once the field is declared ownerless there is no obligation by Torah law to tithe the produce. That is the reason it says in the *baraita*: And he is exempt from the obligation to separate the tithe. Although the Sages instituted that one is required to tithe the produce, he is exempt by Torah law. There is an obligation by Torah law only to leave the gifts for the poor, i.e., single grapes, incompletely formed clusters of grapes, forgotten sheaves, and *pe'a*. However, according to the opinion that the *baraita* is in accordance with the opinion of Rabbi Yosei, who holds that by Torah law the field is not rendered ownerless by means of the declaration until another takes possession of it, why would he be exempt from separating the tithe? According to Reish Lakish, even Rabbi Yosei agrees that for the first three days following his declaration he is not exempt from separating the tithe, even by rabbinic law (see Rabbi Avraham min HaHar).

Perek **IV**
Daf **45** Amud **a**

אִיבָּעֵית אֵימָא: הָא – דְּאַפְקְרֵיהּ בְּאַנְפֵּי תְּרֵין, וְהָא – דְּאַפְקְרֵיהּ בְּאַפֵּי תְּלָתָא. דְּאָמַר רַבִּי יוֹחָנָן מְשׁוּם רַבִּי שִׁמְעוֹן בֶּן יְהוֹצָדָק: כָּל הַמַּפְקִיר בִּפְנֵי שְׁלֹשָׁה – הֲוֵי הֶפְקֵר, בִּפְנֵי שְׁנַיִם – לֹא הֲוֵי הֶפְקֵר.

If you wish, say instead: **That** *baraita,* in which it is taught that the item does not leave the possession of the owner until it enters the possession of another, is referring to a case **where** one declared it ownerless **before two** people; **and this** *baraita,* in which it is taught that the item is ownerless when it is declared ownerless, is referring to a case **where** one declared it ownerless **before three** people. **As Rabbi Yoḥanan said in the name of Rabbi Shimon ben Yehotzadak:** With regard to **anyone who declares** an item **ownerless before three** people, that item **is ownerless;** if he does so **before two** people, **it is not ownerless.**[N]

NOTES

Before two people, it is not ownerless – בִּפְנֵי שְׁנַיִם לֹא הֲוֵי הֶפְקֵר: The Ran cites two explanations. According to the first, this means that there were two people there, one of whom declared the item ownerless; before three means that there are two others in addition to the one declaring the item ownerless. According to the second explanation, before two means that there are two others in addition to the one declaring the item ownerless, and before three means there are three in addition to him.

The difference between the explanations is somewhat dependent upon the understanding of Rabbi Yosei's opinion. It could be understood that if there is only one person other than the owner, it would not be considered a declaration of ownerless status; it would be considered a gift to that person. Alternatively, it could be explained that only when the declaration is before three people does it become public, and the item immediately becomes ownerless. However, when the declaration is before fewer than three it does not become public, and the status of the item is like that of a gift. *Tosafot* explain that in the case of a declaration before two, since it does not become public, there is concern that he might be employing artifice to avoid tithing; therefore, it is not considered ownerless. Another possibility is that the concern is that it is a gift like the gift of Beit Ḥoron (Ritva).

The Rabbis also disagreed with regard to the meaning of the phrase: It is not ownerless. Some interpret that it means that a field does not become ownerless immediately but only after three days, due to the concern that he is employing artifice to exempt himself from tithing. It does not have full-fledged ownerless status, in the sense that he can retract his declaration; however, if another took possession of it, he acquires it outright (Rosh). It could also be said that if the declaration was before two people, it is not considered ownerless at all (Rosh; *Talmidei Rabbeinu Peretz*). The Rosh comments that one could explain that there are three opinions: According to Rabbi Yoḥanan himself, not in the name of his teacher, until someone takes possession of the item, the item is not ownerless at all. In the name of his teacher, Rabbi Yoḥanan holds that there is a distinction between a declaration before two people and a declaration before three people. And Rabbi Yehoshua ben Levi holds that the item is ownerless by Torah law whether he declared it ownerless before two or he declared it ownerless before three.

וְרַבִּי יְהוֹשֻׁעַ בֶּן לֵוִי אָמַר: דְּבַר תּוֹרָה – אֲפִילּוּ בְּאֶחָד הָוֵי הֶפְקֵר, וּמַה טַּעַם אָמְרוּ בִּשְׁלֹשָׁה – כְּדֵי שֶׁיְּהֵא אֶחָד זוֹכֶה וּשְׁנַיִם מְעִידִין.

And Rabbi Yehoshua ben Levi said:[N] **By Torah law, even with one** person,[H] the item **is ownerless, and what** is the **reason** that the Sages **said** that ownerless status must be declared **with three** people?[N] It is **so that one will take possession** of the item **and two** will **testify** that the item was declared ownerless and that it was acquired by that person. It is not a requirement fundamental to the declaration of ownerless status.

הדרן עלך אין בין המודר

NOTES

And Rabbi Yehoshua ben Levi said, etc. – וְרַבִּי יְהוֹשֻׁעַ בֶּן לֵוִי אָמַר וכו׳: According to most commentaries (Rashi; Rabbeinu Tam, *Sefer HaYashar*; *Tosafot*; *Tosefot Rabbeinu Peretz*), the dispute between Rabbi Yoḥanan and Rabbi Yehoshua ben Levi parallels the dispute between Rabbi Yosei and the Rabbis. Rabbi Yoḥanan holds in accordance with the opinion of Rabbi Yosei that there are restrictions on ownerless status by Torah law, and full-fledged ownerless status can be achieved only before three people. However, Rabbi Yehoshua ben Levi holds in accordance with the opinion of the Rabbis that by Torah law the declaration of ownerless status renders the item ownerless. The requirement to declare ownerless status before three was instituted by the Sages only in specific cases.

Others question that parallel, as if that were the dispute between Rabbi Yoḥanan and Rabbi Yehoshua ben Levi they should have stated their dispute in terms of whether the *halakha* is in accordance with the opinion of Rabbi Yosei or the opinion of the Rabbis (*Shita*). Therefore, they raise the possibility that even Rabbi Yehoshua son of Levi stated his opinion in accordance with the opinion of Rabbi Yosei. In his opinion, a declaration before one is effective by Torah law; however, by rabbinic law, due to concern for artifice or the gift of Beit Ḥoron, the declaration must be before three.

And what is the reason that the Sages said with three people – וּמַה טַּעַם אָמְרוּ בִּשְׁלֹשָׁה: According to this, even according to Rabbi Yehoshua ben Levi, by rabbinic law the declaration must be before three people. If so, how did the Rabbis in the mishna permit one to declare his food ownerless for the benefit of one for whom benefit is forbidden, before fewer than three people? Furthermore, there are several *halakhot* concerning Shabbat where one can privately declare an item ownerless to avoid violating a Shabbat prohibition. Some commentaries hold that these questions are without basis, as even Rabbi Yehoshua ben Levi holds that three are required by rabbinic law only according to Rabbi Yosei, and the *halakha* is not ruled in accordance with his opinion. However, according to the Rabbis, a private declaration is also effective (Meiri).

Tosafot explain that a declaration before three is necessary only in cases involving land, due to the concern that one is employing artifice to avoid tithing; however, there is no such requirement for moveable property. Alternatively, the requirement of a declaration before three people was instituted only with regard to tithing; however, with regard to other *halakhot*, e.g., Shabbat and one for whom benefit is forbidden, it was not instituted. Others explain that when the objective is to circumvent a prohibition, a declaration before one is sufficient; however, to enable others to take possession of it, the declaration must be before three.

The Ritva holds that in exigent circumstances, e.g., where the one for whom benefit is forbidden has nothing to eat, the Sages did not enforce their ordinance, and therefore declaration before one person is sufficient, in keeping with Torah law. Re'em Horowitz explains that there is no proof from the *halakhot* of Shabbat, as the ordinance according to Beit Shammai that one can declare his pot ownerless on Shabbat to avoid violating a prohibition is something that is commonly done, and everyone is familiar with the procedure. Therefore, it is tantamount to a public declaration and there is no need for three people (see *Tosafot* on *Shabbat* 18b).

HALAKHA

By Torah law, even with one person – דְּבַר תּוֹרָה אֲפִילּוּ בְּאֶחָד: By Torah law, if one declares his property ownerless before even one person, he thereby renders the property ownerless. However, by rabbinic law, it is ownerless only if he declared it ownerless before three people, so that one acquires the property if he wishes and the other two serve as witnesses. Others hold that even if he declared ownerlessness while alone it is effective (*Tur*, citing Rosh; Rambam *Sefer Hafla'a*, *Hilkhot Nedarim*, 2:16; *Shulḥan Arukh*, *Ḥoshen Mishpat* 273:7).

מתני׳ הַשּׁוּתָּפִין שֶׁנָּדְרוּ הֲנָאָה זֶה מִזֶּה – אֲסוּרִין לִיכָּנֵס לָחָצֵר. רַבִּי אֱלִיעֶזֶר בֶּן יַעֲקֹב אוֹמֵר: זֶה נִכְנָס לְתוֹךְ שֶׁלּוֹ, וְזֶה נִכְנָס לְתוֹךְ שֶׁלּוֹ.

MISHNA **Partners**[H] **who vowed** not to derive **benefit from one another are prohibited from entering into a courtyard** that they jointly own, since each one has a portion in it and benefits from the share owned by the other, thereby leading to a violation of the vow. **Rabbi Eliezer ben Ya'akov says:** It is permitted for both to use the courtyard, as it can be said that since each has a portion in the courtyard; **this one enters**[N] **into his own** portion **and that one enters into his own** portion.[N]

HALAKHA

Partners, etc. – הַשּׁוּתָּפִין וכו׳: If there are two partners in a courtyard, each of whom vows not to derive benefit from the other, and the courtyard is not large enough to be divided into four square cubits for each partner, it is permitted for them to enter the courtyard. This is in accordance with the opinion of Rabbi Eliezer ben Ya'akov and the subsequent explanation in the Gemara (Rambam *Sefer Hafla'a*, *Hilkhot Nedarim* 7:4; *Shulḥan Arukh*, *Yoreh De'a* 226:1).

NOTES

This one enters – זֶה נִכְנָס: *Tosafot* write that Rabbi Eliezer ben Ya'akov permits entering only as much of the courtyard as can be said to be his own portion. However, he cannot make use of a majority of the courtyard at one time, since that would certainly entail using his partner's portion as well.

That one enters into his own portion – וְזֶה נִכְנָס לְתוֹךְ שֶׁלּוֹ: The reasoning of Rabbi Eliezer ben Ya'akov is apparently predicated upon a halakhic principle known as *bereira* (see *Bava Kamma* 51b). *Bereira*, retroactive clarification or designation, means that a later decision can be applied retroactively and thereby viewed as if it had been decided from the outset. Rabbi Eliezer ben Ya'akov appears to hold that due to retroactive clarification, one may consider every step that he takes in the courtyard as if it were taken in his own territory. Since there are several instances in this tractate where the Gemara rules in accordance with the opinion of Rabbi Eliezer ben Ya'akov, the Ri understands the principle of *bereira* as the accepted *halakha*. Elsewhere, however (*Beitza* 38a), the Talmud rejects *bereira* with regard to matters of Torah law. Rabbeinu Tam explains that the Gemara rules in accordance with Rabbi Eliezer ben Ya'akov in this instance for a different reason: Rights which are ordinarily waived, such as exclusive passage in a courtyard, are not forbidden by prohibitory vows.

וּשְׁנֵיהֶם אֲסוּרִים לְהַעֲמִיד רֵיחַיִם וְתַנּוּר וּלְגַדֵּל תַּרְנְגוֹלִים.

And all agree that **they are both prohibited**[NH] **from setting up a mill**[B] **or an oven** in the jointly owned courtyard, **or to raise chickens** in it.

NOTES

And they are both prohibited – וּשְׁנֵיהֶם אֲסוּרִים: *Tosafot* and the Ran explain that although partners generally do not mind one another performing these types of activities in their shared courtyard, each has a theoretical right to prohibit the other from doing so, thereby rendering these activities a tangible benefit and consequently, forbidden. *Tosafot* provide another reason for the prohibition. Since mills are normally set up for commercial purposes, they may lead to heavy foot traffic of clients who will end up on the partner's property as well. Rabbi Eliezer of Metz adds that chickens raised in the courtyard might eat food that belongs to the other partner. Other commentaries explain that the activities mentioned are forbidden because they create the appearance of establishing the courtyard as one's own, which is prohibited (*Tosefot Rabbeinu Peretz*; Rabbi Avraham min HaHar; see Rid).

HALAKHA

And they are both prohibited – וּשְׁנֵיהֶם אֲסוּרִים: When two partners in a courtyard prohibit each other from deriving benefit from their portions by means of a vow, they are both prohibited from setting up an oven or a millstone and from raising chickens in the courtyard. If only one of them was forbidden by means of a vow, then it is prohibited only for him to derive benefit from the other's portion. The *Shakh* notes that this holds true even with regard to a courtyard which is too small to be divided (Rambam *Sefer Hafla'a*, *Hilkhot Nedarim* 7:4–5; *Shulḥan Arukh*, *Yoreh De'a* 226:2).

BACKGROUND

Mill – רֵיחַיִם:

Roman bas relief of a donkey and mill dating back to the first century