

ואוקי ארעא¹ בחזקת בר שטיא

בר שטיא And we place the field in the presumptive possession of

OVERVIEW

רבי אשי ruled that if a בר שטיא (who was alternately lucid and deranged) sold a field when his mental health status could not be determined (it was תרי ותרי), the sale is void. The land returns to the בר שטיא since he is (certainly) the original owner, even though the buyer is currently occupying the field.

רבי אשי qualifies this ruling of תוספות

דוקא בקרקע הוא דאמרין הכי אבל במטלטלין אמרין דהוה בחזקת המוחזק² -

It is only specifically concerning land (real estate) **that we rule thus;** that the presumptive original owner (not the present owner) retains possession, **however, concerning movable assets, we rule that they are considered presumptively owned by the actual possessor;** not by the original owner (as in the case of בר שטיא), but rather by whoever is presently in possession of the items in question –

כדאמר בפרק השואל (בבא מציעא דף ק,א) גבי המחליף פרה בחמור -

As the גמרא states in פרק השואל concerning the case of ‘one who exchanged a cow for a donkey’. The cow gave birth during the transaction and we are not certain whether it was before the transaction (whereby the calf belongs to the original הפרה) or it was after the transaction (whereby the calf belongs to the original בעל החמור).³ The גמרא there comments –

וליחזי פרה ברשותא דמאן קיימא ולהוי אידך המוציא מחבירו עליו הראיה -

And let us see in whose domain the פרה and the calf are to be found; whether it is in the domain of the בעל הפרה or the בעל החמור, **and let the other party** in whose רשות the פרה (and the calf) was not found be considered as **one who attempts to extract money from his friend,** and the ruling is **that it is incumbent on the מוציא to prove** his claim. The one in whose רשות the וילד was found should retain the וילד, unless his adversary can prove that it belongs to him; i.e. he brings witnesses as to when the calf was born.

ומשני דקיימא באגס⁴ -

¹ In our גמרא the גירסא is גמרא. See the marginal notes on the גמרא.

² אוקי ממונא בחזקת מריה (which refers to the current) is (perhaps) distinguishing between the expression מריה (which refers to the current) regarding the שט"ח and בר שטיא (which refers to the current) (מוחזק).

³ See previous תוספות ד"ה ואוקי ממונא (footnotes # 12-14).

⁴ See ‘Thinking it over’ # 3.

And the גמרא there **answers that the cow was standing in a swamp**; in a place that belongs neither to the בעל הפרה nor to the בעל החמור. There is no מוחזק. It is evident from that גמרא that if the פרה was found on the property of the original בעל החמור, then the calf (and the פרה) would belong to the original בעל החמור, even though the מרא was the בעל הפרה. This proves that concerning מטלטלין we do not award ownership (in the case of a ספק) to the מרא קמא, but rather to the current מוחזק.

anticipates a (different) difficulty and resolves it.

אומר רבינו יצחק דהכא לא שייך למימר -

The גמרא says that it is not applicable to say here in our -

כדאמרין בסוף קדושין (דף עט,ב) ובמי שמת (בבא בתרא קנ"ג,ב) ⁵ -

that which the גמרא **states in the end of קדושין and in שמת**; namely –

אם שכיב מרע הוא עליהם להביא ראיה שבריא היה -

If the benefactor is currently a שכיב מרע it is incumbent upon them (the recipients) **to prove that he was healthy then** when he wrote the שטר מתנה, and only then can they receive the gift. Otherwise we assume that since he is currently a שכיב מרע, he was also a שכיב מרע at the time of gifting, and therefore he may retract his gift –

ואם בריא הוא כולי -

And if the benefactor is currently healthy, etc. then the benefactor must prove that he was a שכיב מרע at the time of gifting (and may retract the gift); otherwise it remains in the possession of the recipients. It is evident from that גמרא that the status of the benefactor at the time of (the writing of) the שטר is determined by his current status. Seemingly here too by the שטיא בר his status at the time of writing the מכירה should be determined by his current status; whether he is currently חלים (the sale should be valid) or whether he is currently a שוטה (and the sale is void). Why is it that by the שטיא בר we follow the מרא קמא of ownership and by the שכיב מרע we follow the current health status?!

answers that our case is different than the case of the שכיב מרע:

דבר שטיא דהכא כיון דעתים חלים ועתים שוטה אין ראיה ממה שהוא עכשיו:

For the שטיא בר whom we are discussing here, **since at times he is lucid and at other times he is deranged**; there is no consistency in his status; it

⁵ The משנה there (קנ"ג,א) discusses a gift document (שטר מתנה) that did not indicate whether the benefactor was healthy (בריא) or seriously ill (שכיב מרע) at the time the שטר מתנה was written [it was customary to indicate the health status of the benefactor]. A שכיב מרע may retract all gifts that he wrote while he was a שכיב מרע (while he is still alive). A בריא however can (obviously) not retract any gifts given while he was a בריא. The benefactor and the recipients were arguing whether the benefactor was a בריא or a שכיב מרע when he made this gift.

varies continuously, therefore **there is no proof from whatever he is presently** as to how he was previously, at the time of the sale. Normally, we can depend on the status quo; we assume whatever he is now this is how he was previously. However the **בר שטיא** is always in a state of flux; we cannot derive anything from his current status.

SUMMARY

In a **ספק** concerning **קרקע** we award it to the **קמא**; in a **ספק** concerning **מוחזק** we award it to the current **מוחזק**.

A **חזקה דהשתא** is not valid when the status of the item in question fluctuates.

THINKING IT OVER

1. Why is the ruling by **מוחזק** different than by **קרקע**? Why is a **ספק בקרקע** awarded to the **קמא** and not the current **מוחזק**; and by **מוחזק** it is awarded to the current **מוחזק** and not to the **קמא**?!

2. Why does not **תוספות** prove his contention (that there is a difference between **קרקע** and **מוחזק**) from our **גמרא** of **אנוסים היו וכו'**. Here it is **תרי ותרי** and the monies remain by the current **מוחזק** (and not by the **קמא**)?

3. Why was it necessary for **תוספות** to cite the answer **באגם**?⁶ Seemingly **תוספות** can prove that by **מוחזק** we award it to the current **מוחזק**, from that which the **גמרא** says **המע"ה** אידך **קיימא** ולהוי **אידך** **המע"ה**!

4. What connection is there (if any) between original differentiation between **קרקע** and **מוחזק**, and the latter distinction between the **שכיב מרע** and the **בר שטיא**?

⁶ See footnote # 4.