

Before he took possession, etc.

עד שלא החזיק בה כולי -

OVERVIEW

אביי taught (in the first version) that if a field was sold without אחריות and there were עוררין on this field; if the buyer did not make a חזקה he may cancel the sale; however once he made a חזקה he cannot cancel the sale. תוספות explains what is meant by חזקה [here] and why he can or cannot cancel the sale.

תוספות asks:

תנימה היכי מיירי אי גם לא נתן מעות -

It is astounding! What are we discussing; if the buyer did not even pay money for the field, then -

פשיטא דיכול לחזור בו דאפילו מי שפרע¹ ליכא² -

It is obvious that the buyer can retract (before he made a חזקה), for there is not even a מי שפרע -

ואי נתן המעות אמאי יכול לחזור בו והא קרקע נקנית בכסף -

And if the buyer paid the money for the field, why can he retract from the purchase, since land is acquired through כסף קנין כסף?!

תוספות offers a possible solution:

אם לא נעמיד באתרא דלא קנו בכספא³ -

Unless we will establish this ruling in a place where קרקע is not acquired with money; but rather only with שטר or חזקה.

תוספות asks another question:

ועוד משהחזיק בה אינו יכול לחזור בו אבל באחריות יכול לחזור בו⁴ -

And in addition; אביי rules that once he made a חזקה in the field, the buyer cannot retract; however if it was sold באחריות, the buyer may retract.

תוספות asks:

אמאי יכול לחזור בו כיון שנתן מעות והחזיק כמשפט -

¹ See מד, א. ב"מ מד, א. are acquired through משיכה, etc., but not through כסף. If a buyer paid money for מטלטלין (but made no other קנין), legally he may retract; however בי"ד will pronounce a 'מי שפרע' on him for renegeing on the transaction. בי"ד will say בדיבורו עומד שאינו עומד בדיבורו. [Roughly translated: Hashem, who punished the wicked, will punish one who does not keep his word.]

² There was no קנין; it was merely a verbal agreement which is not binding at all.

³ The תירוץ will be that there is no מי שפרע. This answer is not satisfying however, for the גמרא does not mention that we are discussing an קנו בכספא.

⁴ According to this (first) לשון, the distinction between החזיק בה and לא החזיק בה is only if he bought it without אחריות, if however he bought it with אחריות then seemingly he can always cancel the sale.

Why may he retract since he paid money⁵ and made a proper חזקה⁶; why should the fact that he has אחריות allow him to retract from the sale?! The אחריות guarantees his money; it does not however give him the option to cancel the sale.

תוספות asks a different question:

ועוד חזקה דדייש אמצרי לא אשכחן בשום מקום⁷ –

And furthermore we do not find the חזקה of אמצרי in any other place
in the גמרא -

ולמה הניח חזקה דתנן במתניתין (בבא בתרא דף מב,א) דנעל גדר ופרץ⁸ –

So why did the גמרא here omit the חזקה of ופרץ גדר which we learnt in the משנה?!

תוספות adds one final question:

ועוד מאי שנא הכא ששואל מאימתי הוי חזקה יותר מבשום מקום –

And also, why is here different from all other places that the גמרא asks, 'from when is it a חזקה'; this question is unusual -

– דבכמה מקומות מזכיר חזקה ולא בעי מאימתי הוי חזקה –

For in many places the גמרא mentions 'חזקה' and the גמרא does not ask, 'from when is it considered a חזקה', for it is obvious that נעל גדר ופרץ is the חזקה!

To summarize; תוספות asks four questions:

1. If he did not pay; he may certainly cancel the sale, and if he paid how can he cancel [even if he did not make a חזקה (unless it is בכספא)].
2. [Assuming he paid] why can he cancel the sale בה, משהחזיק, just because he has אחריות?!
3. Why does he not mention the usual חזקה of ופרץ גדר (why אמצרי)?
4. Why ask מאימתי הוי חזקה when it is a מפורשת?

תוספות offers his explanation:

– ופירש רבינו יצחק בן אשר⁹ דמיירי כגון שקנאה בקנין גמור¹⁰ כגון בחליפין¹¹ –

And the ריב"א explained that the case is, where for instance he acquired

⁵ See 'Thinking it over' # 1.

⁶ This question is even if we assume that we are discussing an אחריות קנו בכספא (for even אחריות קנו בכספא, nevertheless כסף combined with חזקה is certainly קנו). It is not logical to assume that the buyer can always cancel the sale.

⁷ (יד,ב ד"ה מ"ז) explains אמצרי to mean ומגביהם, which would include it in the חזקה of גדר. However תוספות may be reluctant to interpret it in this way, for the גמרא could have said גדר. Therefore תוספות (later) explains אמצרי that he walked around the perimeter of the property.

⁸ These are the three recognized modes of חזקה קרקע; either נעל which means he locked the property, גדר, he made a fence around the property, or פרץ, where he made a new opening in the fence.

⁹ עיין שם הגדולים להחיד"א בערכו.

¹⁰ This answers question # 1.

¹¹ See 'Thinking it over' # 2.

the field through a proper קנין for instance – ולא נתן מעות¹² –

However the buyer **did not give any money** towards the purchase –
וקאמר עד שלא החזיק בה חזקה דמפרש בתר הכי דייש אמצרי –

And **ruled that before the buyer made a חזקה**; we are referring to the חזקה of דייש אמצרי which the גמרא will shortly explain to mean (not a חזקה of חזקה, for the קנין was already accomplished with the חליפין, but rather) –
שלא הלך לארכה ולרחבה ולא סמכה דעתיה יכול לחזור בו¹³ –

That he did not walk along the length and width of the property (this is the meaning of חזקה, עד שלא החזיק בה), so in his mind he was not assured that he is satisfied with this property, therefore he can cancel the sale. However –
משהחזיק בה שהלך לארכה ולרחבה אינו יכול לחזור בו –

After he made the חזקה of דייש אמצרי meaning that he walked the length and breadth of the property, the buyer cannot cancel the sale. This ruling applies if the field was sold without אחריות –

אבל באחריות יכול לחזור כיון שלא נתן מעות ויש עוררים –
However if the field was sold with אחריות, the buyer can cancel the sale even משהחזיק בה, since he did not pay and there are עוררים who claim it is their field. He can cancel the sale –

הואיל וסופו לשלם מעותיו עתה שהם בידו יעכבם¹⁴ –
Since eventually the seller will be required to pay back the monies of the sale (should the buyer pay now), now that the buyer is in possession of the monies he may withhold them and cancel the sale. תוספות concludes –

ואתי שפיר דדייש אמצרי אינה חזקה גמורה¹⁵ אלא לראותה אם היא מיושבת על לבו –
And now it is properly understood, for דייש אמצרי is not a proper חזקה, but rather an opportunity for the buyer to see if he is heartily satisfied with the transaction, therefore it is not the usual חזקה of ופרץ חזקה.

תוספות asks:

ואם תאמר כשהחזיק בה אמאי אינו יכול לחזור בו כיון שלא נתן מעות –
And if you will say; even when he made a חזקה, why cannot the buyer

¹² In such a case the rule generally is that the property belongs to the buyer who in turn owes the money of the purchase price to the seller.

¹³ It seems that even though there was a קנין מעשה, nevertheless it was generally agreed that the sale is not completed [if there are עוררים and there was no המעות] until the buyer surveys the field and is satisfied. See however נח"מ [קנין] who maintains that according to the ריב"א, the buyer can cancel the sale even if there are no עוררים.

¹⁴ This answers question # 2. The explanation may be that it is illogical for the buyer to pay the seller now, only to have it (shortly) returned to him when the עוררים occupy the field.

¹⁵ This answers questions # 3&4.

cancel the sale; since the buyer did not give any money to the seller –
לימא ליה שקול ארעא בזוזך¹⁶ אפילו אית ליה זוזי –

Let the buyer say to the seller, ‘take the land for your money’; the buyer should be able to pay the seller with שוה כסף even if the buyer has money -

לפי המפרשים דאפילו אית ליה זוזי מצי לסלק ליה לבעל חוב בשאר דברים –

According to those who explain that even if debtor has money he can satisfy the creditor with other items (שוה כסף). These מפרשים maintain this -

וגרסינן¹⁷ בהמוכר פירות (בבא בתרא דף צב,ב ושם דיבור המתחיל אי) אי לתנהו להנהו¹⁸ זוזי כולי –

For they are גורס in the פירוק המוכר פירות, ‘if these זוזים are not present, etc.’

answers: תוספות

ויש לומר דהכא מצי אמר ליה האי ארעא אינה שוה כפי מעותי –

And one can say; that here the seller can say to the buyer this land is not worth the money which you owe me -

לפי שיש עליה עוררים –

Because now there are עוררים on this field which reduces the value of the field -

אבל שור שנגח כיון דאייקר שוה מעותיו שפיר:

However regarding the goring ox since the price of meat became more expensive, the ox is indeed worth his original price.¹⁹

SUMMARY

One may cancel a purchase if he did not pay for it yet, even if he made a קנין; provided he did not have the opportunity to inspect his purchase. A debtor may pay with the (bought) item provided it retains its original price.

¹⁶ See ‘Thinking it over’ # 3.

¹⁷ The case there is where an ox was purchased and it turns out that this is a goring ox, and the buyer cannot use it for plowing. The seller claims that he sold it to for slaughtering. רב rules that it is a מקח טעות and the seller must refund the money, while שמואל maintains the seller can claim I sold it for שחיטה and is not required to return the money. The גמרא explained that the rule of רב that it is a מקח טעות and the מוכר must refund the money is if the מוכר has money; otherwise the seller can tell the buyer keep the ox instead of your money (since [in this case] the ox is worth the same whether for שחיטה or plowing). It seems from that גמרא that if the seller has money, he must pay the money and he cannot tell the buyer keep the ox for your money (not like these מפרשים).

¹⁸ These מפרשים are גורס ‘if ‘these’ monies (the actual money the buyer gave the seller) are not available’, then the seller can tell the buyer keep the ox; indicating that if these monies are not available but other monies are available to the seller, nevertheless he can tell the buyer keep the ox; here too let the buyer tell the seller, ‘take back the field instead of the money’.

¹⁹ See footnote #17 that the price of the oxen is the same (for שחיטה or plowing), therefore the seller can have the buyer keep the ox in exchange for his money because he is not losing anything monetarily.

THINKING IT OVER

1. In the second question תוספות asks why he can cancel the sale if he gave the money and made a חזקה.²⁰ Why does תוספות mention the money, since תוספות assumes (now) that it was a valid חזקה that is sufficient reason that he should not be able to cancel the sale?²¹
2. The חליפין answers that the buyer made a קנין גמור, for instance חליפין.²² Why did the ריב"א mention חליפין, it could just as well be שטר or חזקה?²³
3. תוספות asks why is the buyer obligated to pay the money כשהחזיק בה (presumably שלא באחריות), let the buyer say to the seller שקול ארעא בזוּך.²⁴ Seemingly the seller can reply since you bought this field באחריות, therefore you (the buyer) have to suffer the loss caused by the עוררין, and not me. Therefore the buyer should be required to pay and suffer the loss; how can תוספות ask that the buyer should say שקול ארעא בזוּך?²⁵

²⁰ See footnote # 5.

²¹ See מהודרא בתרא (להמהרש"א).

²² See footnote # 11.

²³ See מעין החכמה.

²⁴ See footnote # 16.

²⁵ See נה"מ.