

תדע שכך כתב¹ כולי – You should know; for he writes thus, etc.

OVERVIEW

שמואל ruled that a בע"ה collects the שבה (as well). רבא said we know שמואל is right since the seller writes to the buyer in the מכר; 'I guarantee the שבה', etc.; thus proving that a בע"ה is גובה את השבה. Our תוספות discusses and explains this statement of רבא.

רבא's first negates one explanation of proof:

אין לפרש דהכי מוכח דבעל חוב גובה את השבח –

One cannot explain that this is how רבא proves that a בע"ה is גובה את השבח (proof) - (soon to be rejected) continues with the תוספות

דבשביל דבעל חוב גובה את השבח כותב מוכר ללוקח שישלם לו את השבח –

That since the בע"ה is גובה את השבח, this explains why the seller writes to the לוקח in the מכר שטר that he will pay him for the שבה if it is taken away by a בע"ה. If a בע"ה is not גובה את השבח then why would the מוכר obligate himself to pay if the שבה is taken away by a בע"ה? Obviously this proves that a בע"ה is גובה את השבח.

תוספות rejects this explanation (and proof):

דאם כן מאי פריך מתנה דלא כתיב בה הכי נמי דלא טריף שבח –

For if indeed this is the proof, what did רבא ask ב"א regarding מתנה where it is not written so (that the benefactor is guaranteeing the שבח), is it indeed so that the בע"ה cannot collect the שבח from the מתנה? This is the question of רבא on רחב"א -

והלא אין תלוי גביית הבעל חוב בכתיבת המוכר –

However according to the proposed explanation **the collecting** of the שבה by **the בע"ה is not dependent on the writing of the seller**, that he guarantees the שבה, but rather it merely proves to us that the בע"ה collects the שבה; otherwise why the need to guarantee it. The fact that the מתנה does not guarantee the שבה is no reason that the בע"ה cannot collect it from the מתנה. The מתנה does not guarantee anything. Does that mean the בע"ה cannot collect the שבה from a מתנה? Why did רחב"א assume that since שבה of אחריות is not written into the מתנה, the בע"ה cannot collect it?! Writing שטר according to this explanation merely proves that the בע"ה collects it; however it does not explain why he collects it! There is no reason to distinguish between מכר and מתנה and to assume that there is no שבה by גביית מתנה.

רבא offers his explanation of the תדע which תוספות offers:

אלא יש לומר מדמשלם מוכר ללוקח את השבח –

¹ In the גמרא it reads כותב.

But rather² one can say that since the מוכר pays back to the לוקח the שבה
which the לוקח lost to the מלוה -

אין לחוש אם יגבהו בעל חוב ממנו³ דאין הלוקח מפסיד כל כך⁴ -

There is no concern (to בי"ד) if the בע"ח collects it from the לוקח for his
debt, **for the לוקח is not losing that much** (since he will be reimbursed
(eventually) by the מוכר. However by מתנה the מקבל מתנה will not be reimbursed by the
מתנה if the בע"ח takes away his שבה (since there is no אחריות by a מתנה), therefore
א"א assumed and asked רבא, that according to your explanation a בע"ח should not
collect שבה from the מקבל מתנה since he will suffer an irredeemable loss. רבא responded
that indeed the בע"ח cannot collect שבה from the מקבל מתנה because of his loss.

תוספות asks:

ואם תאמר ומאי ראייה היא דלמא מיירי בלוקח⁵ מגזלן דנגזל ודאי אית ליה שבחא⁶ -

And if you will say; and what proof is this that the בע"ח is השבח
;גובה את השבח **perhaps this text of אחריות which is written in the שטר is in a case where**
one buys from a (suspected) thief⁷, in which case the גזלן surely collects
the שבה⁸; however it is possible that a בע"ח cannot collect the שבה!

תוספות answers:

ויש לומר דאי בלוקח מן הגזלן⁹ איירי הוה ליה למכתב נמי ופיריהון -

² מלוה understands the תדע (of רבא) not (so much) as a proof, but rather as an explanation, why the מלוה has the right to collect from the לוקח something which the לוקח invested and profited. This seems to be in agreement with אינון ד"ה אינון.

³ רש"י ד"ה אינון ruled that the בע"ח is גובה השבח in order to insure that he collects his debt. Otherwise people will be reluctant to lend money (שלא תנעול דלת בפני לווין). The question is however why the buyer should suffer and lose his שבה. רבא explains that there is no loss for the לוקח either since his שבה is guaranteed by the מוכר. We know that it is guaranteed (this may clarify the use of the word 'תדע') from the text of the שטר.

⁴ The לוקח will not retain his desired field (he may also have to wait till he is paid up), but will not suffer a monetary loss.

⁵ This question applies to both interpretations. We can argue that this שבה for קבלת אחריות is only written by a לוקח מגזלן, so we do not know that there is אחריות השבח by a לוקח from a ליה. There is therefore no proof (according to the rejected פירוש), nor any explanation (according to פ"ה התוס' since we do not know whether the לוקח is compensated for the שבה from the ליה. See סוכ"ד אות כה).

⁶ The גזלן rightfully collects the שבה (from the לוקח מן הגזלן) for he claims you improved my land. [The גזלן will have to pay the לוקח his expenses (כדין יורד לשדה חבירו שלא ברשות), but he retains the שבה.] However a ליה cannot claim that the לוקח improved his land, for the בע"ח merely had a שעבוד on the property of the ליה for the value of the field as it was worth when the ליה sold it to the לוקח. The improvements of the לוקח belong to the לוקח and should not be משעבוד to the מלוה.

⁷ The מוכר writes in the שטר that if the field will be taken away by the גזלן the מלוה will be responsible for the שבה. It is not referring to a בע"ח, since the בע"ח (according to תוספות question) cannot collect the שבה; therefore there is no need for the guarantee. See (however) אות תקו.

⁸ We are discussing שמואל now. Therefore it will be necessary to assume either that קנו מידו or יש לו קרקע. Otherwise שמואל maintains that the buyer does not collect the שבה from the גזלן.

⁹ This means if the buyer is concerned that this field is stolen. See TIE שערב ד"ה תוס' דף יד,א footnote # 9.

And one can say that if we are discussing one who buys from a (suspected) thief the אחריות should have included the produce (besides the שבה), for a נגזל also collects the פירי (since it is his field), and since it does not mention פירי -

אלא מיירי בבעל חוב¹⁰ דלית ליה פירי –

We must rather be discussing a case of a בע"ה who does not collect פירי and since it mentions שבה, we can derive that a בע"ה is גובה את השבה.

גזלן offers an alternate reason why it cannot be discussing a תוספות

אי נמי מדקאמר ועמליהון היינו הוצאה ושבחהון היינו השבח היתר על היציאה –

Or you may also say, that since it states (among the items that the seller is guaranteeing), ועמליהון (and their toil) which refers to the expense and it also mentions ושבחהון (and their improvements) referring to the improvement which exceeds the expense. The seller is guaranteeing the buyer that he will compensate him for the entire loss including the expenses and improvements.

ואי בנגזל הא נגזל גופיה יהיב ליה יציאה כדין יורד לתוך שדה חבירו שלא ברשות :

But if we are discussing a נגזל, then it is the נגזל himself who pays for the expenses as the ruling is regarding one who enters into his friend's field without permission and improves it. The owner must pay him the expenses for the improvement (up to the amount of the improvement). Why then should the מוכר accept responsibility for the expenses?! Therefore we must be discussing a בע"ה who collects the entire שבה (up to the amount of the loan), without paying the לוקה for his expenses. It is the מוכר who will compensate him for the expenses (and the שבה).

SUMMARY

רבא explains; the בע"ה may collect the שבה from the לוקה since the לוקה has recourse. A בע"ה cannot collect פירי from the לוקה and a נגזל can. A בע"ה does not pay the expenses (of the שבה) to the לוקה and a נגזל does.

THINKING IT OVER

1. When רבא said his 'תדע', was it a proof, an explanation or both?
2. תוספות offers two reasons why we cannot say that we are discussing a לוקה. What is the point of contention between these two answers?

¹⁰ The לוקה was only interested in protecting his purchase from a בע"ה. He knew it was not stolen.