

There, both are not grasping it

התם דלא תפסי תרוייהו –

OVERVIEW

The גמרא explains that the רבנן who maintain the הראיה in the cases of ¹ שור שנגח את הפרה and ² פרה בחמור do not contradict our משנה. The difference is that in our משנה both litigants are grasping the טלית (therefore we cannot rule המע"ה, since there is no [real] מוציא or מחזיק), however in the cases where the רבנן rule המע"ה, both parties are not grasping the contested item, but rather only one is grasping it. תוספות will explain why in the case of פרה בחמור it is considered as if one is grasping it.

תוספות first explains that the expression of דלא תפסי תרוייהו does not mean that neither of the two parties are in possession,³ but rather that -

כי אם האחד⁴ –

Only one is [considered to be] in possession and the other is a מחבירו.

תוספות anticipates a difficulty:

ואף על גב דאפילו בעומדת באגם⁵ אית להו לרבנן המוציא מחבירו עליו הראיה –

And even though the רבנן maintain the ruling of המע"ה, even in a case where the calf is presently in a swamp (in which case no one is in possession of the contested object [the calf]), so how can the גמרא say that the רבנן maintain המע"ה only

¹ The case there is that an ox gored a [pregnant] cow and a dead fetus was found near the cow. We are not certain whether the cow aborted the fetus prior to the goring (thereby exempting the ox's owner from paying for the fetus), or whether the fetus was aborted due to the ox's goring (making the owner liable for the fetus). יחלוק סומכוס (the ox's owner must pay for half the damage to the fetus), while the רבנן rule המע"ה, thus exempting the ox's owner from paying (unless there is proof that the ox caused the abortion).

² The case there is where the respective owners of a [pregnant] cow and a donkey agreed to swap their animals. This was accomplished through the קנין חליפין, the original owner of the cow made a משיכה in the חמור, thus acquiring the חמור for himself and transferring the פרה to the original החמור. The פרה was not present during this transaction. When the פרה was retrieved it has already given birth to a calf. We are not certain whether the calf was born before the משיכה (transaction) took place (in which case it belongs to the original בעל הפרה) or if gave birth after the משיכה החמור (and then it would belong to the original בעל החמור). The ruling according to סומכוס is יחלוק (they sell the calf and divide the proceeds), while the רבנן maintain המע"ה. In the event where the calf was initially found in the domain of either of the owners then that owner gets to keep it, since he is presently the מוחזק. However if the calf was found in a neutral property then according to the רבנן the original בעל הפרה is considered the מוחזק, since he is the קמא; מרא קמא; the original owner of the פרה and the fetus, while the בעל החמור is the מוציא.

³ The fact that neither is in possession is no reason why we should rule המע"ה; on the contrary if neither is in possession, then who is the מוציא and who is the מוחזק.

⁴ This is readily understood in the case of שור שנגח, where the בעל הפרה wants to be מוציא ממון from the בעל מוציא מחבירו ועליו הראיה (in the money) and the בעל הפרה is the מוחזק.

⁵ See footnote # 2.

when one is in possession! Here we find a case where no one is in possession and nevertheless the חכמים maintain the המע"ה, and they do not rule בשבועה (as in our משנה).

replies: תוספות

מכל מקום מיקרי האחד תפיס מחמת חזקת מריה קמא⁶ –

Nevertheless even in the case of עומדת באגם **the one** who originally owned the calf, **is considered in possession** of the calf, **on account of the presumptive** ownership that is assigned to **the original owner**.

offers an alternate solution: תוספות

ואית דגרס⁷ התם דחד מינייהו הוא:⁸

And some text read (not תפסי לא תפסי, but rather); **there** (in the cases where the רבנן rule המע"ה), **it belongs to one of them**, therefore we do not say but rather המע"ה יחלוקו.

SUMMARY

The רבנן maintain that we rule המע"ה even when there is no actual תפיס, but there is a חזקת מרא קמא, or alternately where יכולה להיות אמת (and there is a מ"ק).

THINKING IT OVER

Is there a practical difference between the two explanations of תוספות?⁹

⁶ The original בעל הפרה owned the cow and the fetus (turned calf). The בעל החמור is attempting to take possession away from the original owner. The רבנן maintain that the original ownership is tantamount to actually being in possession of the calf, and therefore the בעל החמור is מחבירו מוציא מחבירו.

⁷ The אית דגרס is perhaps not satisfied with תוספות explanation that a חזקת מרא קמא is considered תפיס, for we find that תפיס is stronger than חזקת מ"ק (see footnote # 2). See סוכ"ד אות קיב (בקטע האחרון).

⁸ This answer (seemingly) maintains, that the reason the רבנן do not rule יחלוקו (in those two cases) is because it is not יכולה להיות אמת [as opposed to how it is in our משנה where יכולה להיות אמת (see (תוס' ב,א ד"ה ויחלוקו)]. The ox either caused the abortion of the fetus or not; the calf was either born before the transaction or after. It cannot belong to both litigants. Therefore we cannot make him pay for half the fetus or divide the calf, since someone is certainly being cheated.

⁹ See בל"י אות לז (בקטע 'ולאית').