רב הונא ורב יהודה אמרי חייב – ר''י and ר''ה maintain that he is חייב

Overview

רב הונא and רב יהודה maintain that in a case of ברי ושמא, the ברי can be מוציא from the שמא. This תוספות will initially discuss what ramifications this ruling has concerning a person who is unable to swear. The remainder of this תוספות will attempt to reconcile the ruling of ר"י (ור"ה) that a ברי can be מוציא from a מוחזק, and the general rule of המוציא מחבירו עליו הראיה; which would seemingly require a more convincing ראיה than a ברי ושמא.

לכאורה נראה דלית להו דרבי אבא דאמר מתוך שאינו יכול לישבע משלם -

It seemingly appears that ר"ה ור"י **disagree with ר''א then who maintains that 'since he cannot swear** he is required **to pay'.** According to ר"א, in any case where the defendant is required to swear in order not to pay, if for any reason the נתבע cannot swear he is obligated to pay.[1]

תוספות will now explain why (seemingly) ר"ה ור"י cannot agree with ר"א.

דטעמיה דרבי אבא משום דדריש משבועת ה' תהיה בין שניהם[2] (שבועות דף מז,א) -

For the reason that ר''א maintains מתוך שאינו יכול לישבע משלם, is based on the following דרשה **where he derives from** the פסוק of **'the oath of ה' should be between both of them';** where seemingly the words בין שניהם are superfluous; it should have merely stated that the שוכר is obligated to swear. This פסוק is interpreted[3] to mean that an oath is required only when the litigation is between the two principles (בין שניהם) –

ולא בין שני היורשין -

but not between the heirs of the principles. In a case where the principles died, and the litigation continues between the respective heirs, there is no rule of שבועה. The גמרא there continues to clarify this דרשה and concludes that the exemption of יורשים from a שבועה is discussing (only) the following case, where -

כגון אמר מנה לאבא ביד אביך ואמר חמשין ידענא וחמשין לא ידענא -

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[1] There are some exceptions to this rule, notably if the נתבע is suspect of swearing falsely; in that case the rule is that the plaintiff swears and collects his debt. The ruling of ר"א comes (also) into play in the instance where both the תובע and the נתבע are חשודים אשבועתא; in that case ר"א will rule that since the נתבע cannot swear he must pay. Others (רב ושמואל) maintain that in the case where they both are חשודים, the נתבע is פטור. They do not agree that מתוך שאינו יכול לישבע משלם. See (also) 'Thinking it over' #1.

[2] This is a פסוק in שמות (משפטים) כב, י, regarding a שומר שכר. The תורה states that if the ש"ש claims there was an אונס he is required to take an oath to appease the משכיר. Even though the פסוק is discussing שבועת השומרין, nevertheless the following דרשה includes all types of (דאורייתא) שבועות.

[3] This דרשה was actually cited by רבי אמי. It is רבא who claims that this דרשה is the source for the דין of רב אבא, that מתוך שאיל"מ.

For instance[4] if the heir of the מלוה says to the heir of the לוה **your father owed my father a hundred זוז and** the heir of the לוה said to the heir of the מלוה, **"I know** that my father owed **fifty** זוז; **however** the other **fifty** זוז, **I am not certain";** it is in this case that the דרשה of בין שניהם ולא בין היורשין is applicable. The גמרא there continues to explain that the פסוק is teaching us that there is a difference between בין שניהם (where there is a חיוב שבועה) and ולא בין היורשין (where there is no חיוב שבועה) -

ואבוה כהאי גוונא מתוך שאין יכול ישבע משלם -

For if this would have occurred **to the father in a similar manner;** if the לוה would have told the מלוה that חמשין ידענא וחמשין לא ידענא, the rule would be (according to ר"א) that **since he cannot swear** the שבועה of a מודה במקצת, since he is unsure if he owes the remaining fifty (and there is a חיוב שבועה), he is obligated **to pay** the second fifty זוז as well. In a sense the father is a מודה במקצת; he is willing to pay fifty, but not the other fifty, since he is unsure if he owes it. If the father would have clearly denied owing the other fifty, he would be obligated to take the oath of a מודה במקצת (if he does not want to pay the second fifty), which means that he has to swear that he does not owe the other fifty. However since in our case he is not certain whether he owes the other fifty, he cannot swear that he does not owe it. On the other hand since he admits to owing fifty, the only way he can exempt himself from paying the second fifty is by taking an oath. ר"א maintains that since he cannot take the oath to exempt himself, he is obligated to pay the remaining fifty. This is the ruling if the father would claim חמשין ידענא וחמשין לא ידענא. If however it is the יורשין who claim חמשין ידענא וחמשין לא ידענא, the פסוק teaches us that שבועת ה' תהיה בין שניהם but not בין היורשין; there is no חיוב שבועה on the יורשים.[5] Therefore by the יורשין, the דין of מתוך שאינו יכול לישבע משלם is not applicable, since there is no חיוב שבועה, and they are exempt from paying the remaining fifty.

This is the explanation of the דרשה that states בין שניהם ולא בין היורשין. There is a difference whether we are dealing with the principles or the יורשים. Concerning the principles we say מתוך שיל"מ; however by the יורשים (since there is no חיוב שבועה, on account of the פסוק) there is no חיוב to pay. ר"א derives the דין of מתוך שיל"מ from the fact that the תורה is differentiating between the principles and the יורשים. If the דין would be that a שאינו יכול לישבע is פטור from paying, then there would be no difference between the principles and the יורשים; in both cases they are פטור from paying. There would be no need for the פסוק to

[4] The גמרא there maintains that if in the litigation between the יורשין there is an executable חיוב שבועה דאורייתא; for instance if the יורשים were מודה במקצת and claimed with certainty that only half is owed, there is no reason why the יורשים should not swear. The פסוק could not be coming to exclude the יורשין from a שבועה in such a case. See following footnote # 5.

[5] In this case the difference between the principles and the יורשין is apparent. If the לוה claims איני יודע he is liable to swear since he should know whether he borrowed or not. However the יורשין are not obligated to swear since it is understandable that they may have not known if their father owes an additional fifty זוז. See previous footnote # 4. See also later in this תוספות the difference between a שמא טוב and a שמא גרוע.

differentiate between the principles and the יורשים. This concludes the quote from the גמרא in מס' שבועות.

תוספות continues with his contention that ר"ה ור"י disagree with ר"א:

ואי מנה לי בידך והלה אומר איני יודע חייב אין כאן שבועה -

And if we maintain like ר"ה ור"י that in a case where the מלוה claims **you owe me a מנה and** the לוה **responds I do not know** if I owe you a מנה, the ruling is that the לוה is **חייב** to pay the מלוה, then **there is no** obligation of taking an **oath here** in the case of חמשין ידענא וחמשין לא ידענא. If the father, the לוה, would claim חמשין ידענא וחמשין לא ידענא, there would be no חיוב שבועה according to ר"ה ור"י -

דאפילו הוא אומר איני יודע בכל חייב -

For even if he claims, 'I don't know if I owe anything', he is obligated to pay; certainly in a case of חמשין ידענא וחמשין לא ידענא, he will be obligated to pay. He has to pay because he is a שמא, and not because of מתוך שאיל"מ. Therefore the בין שניהם of פסוק cannot be referring to a case of חמשין ידענא וחמשין לא ידענא (and is coming to exclude the יורשין from a חיוב שבועה), for in this case there is no חיוב שבועה (even) on the principles.[6] Once we establish that the בין שניהם of פסוק is not discussing a case of חמשין ידענא וחמשין לא ידענא, there is no source in the תורה for the rule of ר"א, that מתוך שאיל"מ.[7]

תוספות concluded that ר"ה ור"י (who maintain that ברי עדיף even against a מוחזק) do not agree with ר"א concerning the rule of מתוך שאיל"מ. Rather they maintain that even if אינו יכול לישבע he is פטור מלשלם. The above is a prelude to the upcoming question in תוספות:

ותימה דבפרק יש נחלין (ב"ב דף קלה,א ושם) גבי האומר זה אחי[8] -

And it is astounding! For in פרק יש נוחלין concerning the case of **one who claims 'this is my brother' -**

משמע דאביי אית ליה מנה לי בידך והלה אומר איני יודע חייב -

It seems that אביי maintains that in a case where the מלוה claims, '**you owe me a מנה', and the** לוה claims **'I do not know** if I owe you a מנה', the ruling is that the לוה is **חייב.** This means that אביי agrees with ר"ה ור"י. תוספות has previously concluded that if we maintain ברי ושמא ברי עדיף, then we disagree with ר"א who maintains

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[6] At this point it is assumed that ר"ה ור"י will maintain that the בין שניהם of פסוק is teaching us a different דרשה and is not teaching us the דרשה of ולא בין היורשין; for it is not applicable.

[7] See however, footnote # 29.

[8] The case under discussion there is concerning two brothers who inherited their father's estate. Brother 'A' claims that there is a third brother 'C'. Brother 'B' claims that he does not know if brother 'C' in indeed his brother. The rule is that brother A must give 'brother' C a third of his property; however brother B, who is not sure, is exempt from giving brother C anything; and retains his half share of the estate. It seems from that גמרא that a ברי (brother A) is not sufficient to extract money from a שמא (brother B). אביי there however maintains that even if ברי ושמא ברי עדיף, nevertheless this is not a case of ברי ושמא, because 'brother' C himself is not sure that he is a brother. It seems from that גמרא that אביי maintains that ברי ושמא ברי עדיף.

מתוך שאיל"מ. Therefore אביי who maintains ברי ושמא ברי עדיף should disagree with ר"א. -

ובפרק חזקת הבתים (שם לד,א ושם) **משמע דאית ליה לדרבי אבא -**

However in פרק חזקת הבתים it appears that אביי **agrees with ר"א** that מתוך שאיל"מ.[9] This seems to be a contradiction!

תוספות answers:

ויש לומר דאפילו למאן דאמר חייב איכא למידרש -

And one can say; that even according to the one who maintains that the שמא **is obligated** to pay, nevertheless **we can** still **interpret** the פסוק of -

שבועת ה' תהיה בין שניהם ולא בין היורשים -

'The oath of ה' shall be between them', to teach us **'and not between the heirs';** by the heirs there is no שבועה. However this cannot refer to a case of חמשין ידענא וחמשין לא ידענא, as explained previously; rather the distinction between the principles and the יורשין will be in the following case:

דשניהם לא ידעי אלא שעד אחד מעיד שאחד חייב לחבירו מנה -

That they both do not know for sure; neither the מלוה nor the לוה are sure if a debt is owed **however one witness testifies that one owes the other a מנה.** The rule is that an עד אחד obligates the opposing litigant to swear. Therefore -

דבאבוה מתוך שאינו יכול לישבע משלם -

If this would have taken place **by the father;** if the principles (the מלוה and לוה themselves) were involved in such a case (where neither was sure if monies are owed and an ע"א claims that it is owed), the ruling[10] would be that **since** the לוה **cannot swear** to contradict the עד אחד (for he says I do not know), the לוה is required **to pay.** However by the יורשים there is no חיוב שבועה in this case (this is what the פסוק of[ולא בין היורשים] שבועה ה' תהיה בין שניהם is coming to exclude),[11] therefore they are פטור.

תוספות explains that ר"ה ור"י can agree with ר"א that משיל"מ. We derive it from the דרשה of שבועת ה' תהיה בין שניהם ולא בין היורשין. However, this מיעוט is neither necessary nor applicable in a case of חמשין ידענא וחמשין לא ידענא (according to ר"ה ור"י), since there is no חיוב שבועה there regardless. However there is a need for this דרשה in the case where the מלוה ולוה are

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[9] The גמרא there sought to prove from the ruling of ר"א (that מתוך שאיל"מ) concerning a case of חזקה. אביי argued that we cannot derive the case of חזקה from the case of ר"א for they are different. It appears that אביי agrees with the ruling of ר"א; otherwise he would (seemingly) not be concerned to refute a proof from the ruling of ר"א.

[10] There is no חיוב on the שמא to pay on account that he is a שמא, because there is no ברי opposing him. See 'Thinking it over' # 2.

[11] See footnote # 5 above that there is no חיוב שבועה on the יורשים, for their ignorance is acceptable.

unsure and there is an עד המחייב.[12]

תוספות asks a different question:

תימה דרב יהודה גופיה אית ליה בריש הפרה[13] (בבא קמא מו,א ושם) -

It is astounding! For ר"י himself maintains in the beginning of הפרה פרק**,** that **-**

אפילו ניזק אמר ברי ומזיק אומר שמא המוציא מחבירו עליו הראיה -

Even if the victim (the בעל הפרה) **claims** that he is **certain** that the ox caused the miscarriage **and the perpetrator** (the בעל השור) **claims** that he is **uncertain** whether his ox caused the miscarriage; and seemingly we should say ברי ושמא ברי עדיף, nevertheless the חכמים maintain that **he** who wishes **to extract** money **from his friend, the** onus of **proof is upon him;** the one who is מוציא ממון must prove his case (with עדים, etc.). Otherwise he cannot collect even if he is a ברי and the נתבע is a שמא. We see from that גמרא that (אמר שמואל) רב יהודה maintains that a ברי cannot be מוציא from a שמא. Our גמרא states, however that (ורב הונא) רב יהודה is of the opinion that ברי ושמא ברי עדיף, which is in direct contradiction to the גמרא in ב"ק.[14]

תוספות anticipates a possible solution to this question, but rejects it:

ואין לומר דרב יהודה כסומכוס דאמר ממון המוטל בספק חולקין -

And we cannot answer this question by maintaining **that רב יהודה** (who says ברי ושמא ברי עדיף) follows the opinion of **סומכוס who maintains that monies which lie in a questionable** state; we do not know if there is an obligation to pay or not, the rule is that the monies **are divided;** there is an obligation to pay half the claim -

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[12] We derive it in the same manner as the גמרא derives it in the case of חמשין ידענא וחמשין לא ידענא. If the דין would be that a פטור is שאינו יכול לישבע then there is no need to differentiate between the principles and the יורשים in the case of an ע"א. They are both פטור. However if we maintain משאיל"מ, then it is understood that the חייב is לוה to pay on account of מתוך and the יורשים are פטור, for there is no חיוב שבועה for the יורשים.

[13] The משנה there cites a case of an ox that gored a [pregnant] cow, and the cow aborted; however we do not know whether it aborted due to the goring (which would make the owner of the ox responsible to pay for the aborted fetus) or if it aborted prior to the goring (which would absolve the ox owner of any liability). The משנה rules that the owner of the ox must pay half (one quarter by a תם) the damages of the fetus. The גמרא however cites the view of רב יהודה (אמר שמואל) who states that the משנה (which rules יחלוקו) is expressing the view of סומכוס, however the חכמים maintain that זה כלל גדול בדין המוציא מחבירו עליו הראיה, and therefore the בעל השור is פטור, since the בעל הפרה cannot prove when the goring took place. The גמרא comments on the phrase זה כלל גדול בדין and interprets it to mean that the rule of המע"ה applies even in a case of ברי ושמא as explained in the text. See footnote # 20.

[14] There is no question on ר"י from the fact that the חכמים maintain המע"ה; for it is possible that the חכמים maintain המע"ה only by ברי וברי and not by שמא ברי. However, since ר"י (אמר שמואל) states clearly that זה כלל גדול בדין and the גמרא teaches us that this phrase means that the חכמים maintain המע"ה even by ברי ושמא, this contradicts the opinion of ר"י that ברי ושמא ברי עדיף.

ולא אזיל בתר חזקת ממון ולהכי כי איכא ברי ושמא נוטל הכל -

For סומכוס **does not follow** the logic that cases should be resolved by determining who is in **possession of the money,** as the חכמים maintain. סומכוס is of the opinion that if there is a realistic doubt[15] to בי"ד whether or not there is a חיוב ממון, then בי"ד should reward half to the נתבע and half to the תובע, **and therefore;** since רב יהודה agrees with סומכוס that we prefer the ruling of יחלוקו rather than המע"ה, **so when there is** a case of **ברי ושמא,** the ברי **takes all** the money[16], not just half as in a case of ברי וברי or שמא ושמא, for since it is a ברי ושמא, the ברי is stronger.[17] It is only if we (always) maintain המע"ה, then the ברי is not sufficiently powerful to extract money from a מוחזק; however if we maintain that a ספק can be מוציא half (even) from a מוחזק, then a ברי can extract everything from a שמא.[18] This explains why ר"י maintains that ברי ושמא ברי עדיף, since he agrees with סומכוס that ממון המוטל בספק חולקים.

Now תוספות will explain the גמרא in ב"ק where (אמר שמואל) ר"י states the position of the חכמים that המע"ה; not like סומכוס -

והתם דקאמר אמר רב יהודה אמר שמואל זו דברי סומכוס -

And there in ב"ק where the גמרא **states** that **ר"י said** in the name of **שמואל this** משנה **is the opinion of סומכוס -**

אבל חכמים אומרים זה כלל גדול בדין כולי -

However, the חכמים argue with סומכוס and **maintain** that **this is a great rule in jurisprudence, etc.**; that המע"ה. This would seem to indicate that ר"י subscribes to the ruling of the חכמים and disagrees with סומכוס; contrary to what תוספות suggested. תוספות explains that this is not necessarily so, because there in ב"ק, ר"י -

אליבא דרבנן קאמר וליה לא סבירא ליה -

is saying this **according to the חכמים;** (אמר שמואל) ר"י is merely teaching us that there is another opinion besides סומכוס; the opinion of the חכמים that המע"ה (even by בו"ש), however **he** (ר"י himself) **does not agree with them;** rather he

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[15] סוכמוס rules יחלוקו only in case of דררא דממונא, when there is a realistic doubt to בי"ד (even if the parties both admit they are not sure as to what occurred); as in the cases of שור שנגח את הפרה or המחליף פרה בחמור, etc. However in cases of a מלוה ולוה where the לוה is כופר הכל, סומכוס will definitely agree that המע"ה.

[16] The reason why others maintain that a ברי cannot be מוציא from a שמא is because the שמא is a מוחזק. However since סומכוס maintains that ממון המוטל בספק חולקין, this indicates that by a ספק (of a דררא דממונא) there is no דין of מוחזק. [The reason for this may be that since there is a serious doubt by בי"ד, to whom the money belongs, the fact that someone has possession of the money is not sufficient to render him a מוחזק.] Therefore there is no reason why the ברי cannot be מוציא from the שמא. See footnote # 26.

[17] This is merely a suggestion on the part of תוספות. There is no proof that according to סומכוס the דין will be that ברי ושמא ברי עדיף (according to anyone). The reason תוספות makes this assumption is because it will resolve the contradiction in the statements of ר"י.

[18] The fact that the תובע is a ברי and the נתבע is merely claiming שמא would render this a דררא דממונא [In addition, the fact that the נתבע is the שמא will allow the תובע who is a ברי to receive his claim.]

agrees with סומכוס that ממון המוטל בספק חולקין; therefore by בו"ש the דין would be ברי עדיף.

This would seem to resolve the contradiction. רב יהודה agrees with סומכוס that ממון המוטל בספק חולקין (we do not say המע"ה) by ברי וברי or שמא ושמא. However by ברי ושמא then ברי receives payment in full. When ר"י (אמר שמואל) stated that the חכמים and the ברי עדיף maintain המע"ה even by ברי ושמא, he was just stating the opinion of the חכמים, but not his own opinion. According to this proposed answer we may maintain that בו"ש ברי עדיף, only if we follow the opinion of סומכוס that ממון המוטל בספק חולקין. However if we follow the opinion of the רבנן that המע"ה, then ר"י (אמר שמואל) who says that המע"ה (according to the חכמים) is a כלל גדול בדין, must agree that המע"ה takes precedence even over ברי ושמא.

תוספות rejects this approach that ר"י follows the ruling of סומכוס:

דהתם (בב"ב דף צב,ב[19]) משמע דסבר כרבנן גבי מוכר שור לחבירו ונמצא נגחן[20] -

For there it seems that ר"י agrees with the רבנן, that המע"ה, **concerning** the case where one **sold an ox to his friend and** the ox turned out to be **a goring** ox.

תוספות will offer an additional proof that ר"י must agree with the חכמים that המע"ה, and cannot follow the opinion of סומכוס that יחלוקו.

ועוד דתנן בפרק השואל (ב"מ צז,א ושם) המשאיל אומר שאולה מתה[21] -

And furthermore we learnt in a משנה in פרק השואל, the lender said the borrowed cow **died -**

והלה אומר איני יודע חייב -

And the other one (the borrower/renter) **said I do not know** which cow died. The ruling is that the borrower/renter **is obligated to pay.** It would seem that this משנה maintains ברי ושמא ברי עדיף.

וקאמר בגמרא לימא תיהוי תיובתא דרב נחמן ור' יוחנן -

And the גמרא there indeed **comments** on this משנה and says **can we say that**

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[19] See רש"ש who changes this מראה מקום to (ב"ק מו,א) ריש הפרה (the גמרא we have been discussing all along).

[20] The גמרא there (ב"ק מו,א) offers an additional explanation what the phrase זה כלל גדול בדין teaches us (see previous footnote # 13.) It comes to let us know that המע"ה is stronger (even) than רוב. In the case where a sold ox turned out to be a goring ox, the buyer (according to שמואל) cannot get his money back, because the seller can claim I sold it to you for slaughtering and not for plowing. This ruling holds true even if the majority of oxen are sold for plowing; the rule of המע"ה is stronger than the רוב. It is evident from this גמרא that שמואל certainly agrees with the חכמים that המע"ה (for according to סומכוס the דין would be יחלוקו; see 'Thinking it over' # 3). The fact that ר"י cites this statement of 'זה כלל גדול וכו, in the name of שמואל, his רבי, is a strong indication that he too agrees with this ruling of המע"ה.

[21] The משנה there is discussing a case where 'A' gave 'B' two cows; one was borrowed and the other was rented. Subsequently one of the cows died and there is no proof whether it was the borrowed cow (in which case the borrower 'B' would be liable) or if it was the rented cow (in which case the renter 'B' would be exempt from any liability).

this משנה which seemingly maintains ברי ושמא ברי עדיף **is a refutation of ר''נ ור' יוחנן** who maintain that לאו ברי עדיף. This concludes the quote of the גמרא.

תוספות continues with his proof that ר''י who maintains ברי עדיף cannot agree with סומכוס but must agree with the חכמים; otherwise the question of the גמרא there in השואל is not understood.

ומאי קושיא הא על כרחך מתניתין כסומכוס אפילו לרב יהודה -

And what is the difficulty! What refutation is there from that משנה on the opinion of ר''נ ור' יוחנן (if ר''י agrees with סומכוס); **for you must say that the משנה** in השואל, which rules that the שואל is חייב, follows the opinion of **סומכוס even according to ר''י** who maintains ברי עדיף; he maintains that, only because he agrees with סומכוס (this is the opinion of the previously proposed answer that תוספות is attempting to disprove) -

דלרבנן מודה רב יהודה דפטור -

For according to the רבנן, then even **ר''י would admit that** the שואל **is פטור.** The רבנן are of the opinion that המע"ה takes precedence even over ברי ושמא.[22]

ורב נחמן ורבי יוחנן על כרחך כרבנן דלסומכוס לכל הפחות חולקין -

And we must say that ר''נ ור' יוחנן who maintain לאו ברי עדיף and the ברי does not collect anything, **agree with the רבנן,** that המע"ה; they cannot agree with סומכוס **for according to סומכוס** in a case of ברי ושמא **they should at least divide;**[23] the שמא should pay half; for it is ממון המוטל בספק where according to סומכוס the דין is חולקין. If we were to assume (as the proposed answer assumed) that the דינים of ברי ושמא only if ברי ושמא ברי עדיף and המע"ה are mutually exclusive; and one can maintain ברי עדיף that one maintains ממון המוטל בספק חולקין, then there is no difficulty for ר''נ ור' יוחנן from the משנה in השואל. The משנה in השואל which maintains ברי עדיף, must follow the opinion of סומכוס, while ר''נ ור' יוחנן who maintain לאו ברי עדיף must follow the חכמים. There is no contradiction.

תוספות will now conclude his refutation of the proposed answer and explain that if we reject the proposed answer, and accept that ר''י agrees with the רבנן, then the קושיא in פרק השואל is understood.

אבל אי פליגי אליבא דרבנן ולסומכוס לעולם חולקין[24] אפילו בברי ושמא[25] -

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[22] This is what the phrase זה כלל גדול comes to teach us.

[23] In a case of ברי וברי (or שמא ושמא) if it is ממון המוטל בספק then סומכוס maintains that the מוחזק loses half; we say יחלוקו. Certainly in a case of ברי ושמא, the מוחזק should lose half. How can ר''נ ור' יוחנן maintain that the מוחזק retains all the money. Obviously they must disagree with סומכוס [see footnote # 18 that a ש"בו is considered a דררא דממונא].

[24] תוספות is compelled to say that according to סומכוס the דין is חולקין even by ברי ושמא (at least according to ר''נ ור' יוחנן). Otherwise ר''נ ור' יוחנן can respond by saying the משנה in השואל is according to סומכוס. See 'Thinking it over' # 4.

[25] This is in contrast to the assumption of the previously proposed answer which תוספות is now rejecting.

However if ר"ה ור"י and ר"נ ור' יוחנן **argue according to the חכמים;** they all agree that המע"ה and disagree with סומכוס who maintains ממון המוטל בספק חולקין; **and according to סומכוס we always divide** the monies **even in a case of ברי ושמא,** because ר"ה ור"י who say ברי עדיף and ר"נ ור' יוחנן who claim לאו ברי עדיף maintain their respective opinions only because they agree with the חכמים, (because according to סומכוס the דין will always be יחלוקו according to everyone) then -

פריך שפיר ממתניתן דכרבנן אתיא דלסומכוס חולקין[26] -

There is a valid challenge from the משנה against ר"נ ור' יוחנן **for** the משנה **follows the view of the רבנן** and not the view of סומכוס **for according to סומכוס** the דין would always be that **חולקין.**

It is therefore evident that רב יהודה as well as ר"ה ור"נ ור' יוחנן all agree to the חכמים. However, the original question remains; if ר"י follows the view of the חכמים that המע"ה, and ר"י states that המע"ה is effective even in a case of ברי ושמא,[27] how can ר"י maintain that ברי ושמא ברי עדיף?!!

תוספות answers that there are two different types of ברי ושמא:

ויש לומר דהתם ברי גרוע ושמא טוב -

And one can say that there in ב"ק where we rule that המע"ה is effective even in a case of בו"ש, the claim of **ברי is defective and the** claim of **שמא is superior;** it is only by this type of בו"ש that the חכמים maintain המע"ה.

תוספות will now explain what is meant by a ברי גרוע ושמא טוב. In the case of שור שנגח את הפרה where the בעל הפרה claims ברי that the miscarriage was due to the שור and the בעל השור claims שמא, the ברי of the בעל הפרה is a ברי גרוע -

דלפי שהמזיק לא היה שם טוען זה ברי ושמא דניזק טוב דלא הוה ליה למידע -

For since the מזיק (the בעל השור) **was not there** by the goring (the בעל השור claims שמא), therefore **this** בעל הפרה **claims I am certain.** His argument is weak, he claims whatever he wants because he knows no one will contradict

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[26] The difference between תוספות proposed answer (which is rejected) and the מסקנא is as follows. According to the proposed answer the חכמים maintain that nothing can be taken away from a מוחזק without a ראיה; even a ברי cannot be מוציא from the שמא who is a מוחזק. סומכוס maintains that even a ספק of דררא דממונא can be מוציא half from the מוחזק, even by a ברי ובברי. A ברי can therefore be מוציא everything from a שמא. The דין of בו"ש ב"ע must follow the opinion of סומכוס. According to the מסקנא, however סומכוס agrees that one cannot be מוציא ממון from a מוחזק. However in a case of ממון המוטל בספק, according to סומכוס, both parties are considered מוחזקים; on account of the דררא דממונא, we view it as if each one has a certain right to the money. The דין is חולקין since both are considered מוחזקים (it is like שנים אוחזין בטלית, where the דין לכו"ע is יחלוקו). Therefore even by ברי ושמא the דין is יחלוקו, for סומכוס maintains that we cannot be מוציא from a מוחזק, on the basis of a ברי ושמא. The דין of בו"ש ב"ע must follow the opinion of the חכמים. The חכמים agree that (under certain circumstances) a ברי is stronger than a מוחזק who is a שמא. See previous footnote # 16.

[27] This is based on the interpretation of the phrase זה כלל גדול בדין.

him;[28] **and the שמא of the ניזק is good;** we cannot fault him for his טענת שמא, there is no reason to infer from his שמא that he is lying, etc. **for he could not have known;** he was not present at the time of the goring. In a case of ברי גרוע ושמא טוב, we maintain the דין of המע"ה. The ברי גרוע does not have the strength to be מוציא from a שמא טוב.[29]

אבל מנה לי בידך הברי טוב והשמא גרוע דהוה ליה לידע אם חייב אם לאו -

However by the case of **מנה לי בידך;** the case of ברי ושמא where ר"ה ור"י maintain that ברי עדיף and the ברי can be מוציא from the מוחזק **the ברי is** a **strong** ברי. There is good reason to accept the claim of the מלוה; because the מלוה is aware that the לוה can contradict him[30] **and** the claim of **שמא** by the לוה is **inferior, for** the לוה **should know if he owes** the money **or not.** The claim of שמא by the לוה leads us to think that he is not being forthright; for how is it that he does not know if he owes the money or not. In this case the claim of the ברי is much stronger than the claim of the שמא. Therefore the strong ברי can be מוציא from the weak שמא.

Thus the contradiction is resolved. In ב"ק it is a ברי גרוע ושמא טוב; that is why the דין is המע"ה. However here by מנה לי בידך it is a ברי טוב ושמא גרוע; therefore the דין is (according to ר"ה ור"י) that ברי עדיף (even from a מוחזק).

תוספות asks an additional question:

אבל קשה דבעי למימר הכא הא דרב יהודה דשמואל היא דפסק כרבן גמליאל -

However there is a difficulty, for the גמרא here **attempts to maintain that what ר"י** maintains (that בו"ש ברי עדיף) **is** the opinion of **שמואל who rules as ר"ג**; that we believe the woman who is a ברי against the husband who is a שמא. The גמרא states the שמאול rules like ר"ג in the case of our משנה where the woman claims (ברי) that משארסתני נאנסתי and the husband claims (שמא) that (perhaps) עד שלא ארסתיך נאנסת. When the גמרא states הא דרב יהודה דשמואל היא it is understood that the (sole) reason that שמאול rules like ר"ג is on account of ברי ושמא (the ruling of ר"י). It is however difficult to say that on account of the ruling of ר"י that בו"ש ברי עדיף, we should maintain in the case of ר"ג as well, that ברי

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[28] The level of the believability of an argument is directly related to the level of difficulty in presenting this argument. A litigant is reluctant to present a (false) claim which the other litigant will certainly deny. He is more comfortable in presenting a (false) claim which the other litigant may not be able to contradict. בי"ד will give more weight to the former than to the latter. In the former case there is reason to believe him; for otherwise why is he making such a claim which is open to contradiction; obviously he may be saying the truth. However when his claim cannot be contradicted there are no grounds to support his claim. There is no reservation to his lying. He is saying it because no one can disagree with him.

[29] According to this view that by a ברי גרוע ושמא טוב we do not say ברי עדיף, we can maintain that the ראיה from תוספות mentioned in the beginning concerning the דין of מ"משאיל) is in a case of שבועת ה' תהיה בין שניהם (which שבועות states in גמרא the (as ב"ש), however it is in a case of ברי גרוע ושמא טוב, where the דין is לאו ברי עדיף, therefore there is a חיוב שבועה. See footnote # 7.

[30] See previous footnote # 28.

עדיף.

והתם ברי גרוע ושמא טוב שהבעל אינו יודע מתי נבעלה -

For there, in the case of our משנה, **the ברי is defective and the שמא is superior, since the husband does not know** (and rightfully cannot know) **when she was נבעלה.** In a case of ברי גרוע ושמא טוב, there is no ruling that ברי עדיף, on the contrary the רבנן maintain המע"ה.

ואם כן תיקשי דשמואל אדשמואל דפרק הפרה (נ"ק מו,א ושם) -

And if this is so, that the reason שמואל maintains that the הלכה is כר"ג, is because ברי ושמא ברי עדיף, then **there is a contradiction of שמואל** here (who maintains that even by a ברי גרוע ושמא טוב we rule that ברי עדיף to be מוציא from the בעל who is a (שמא טוב) **against פרק הפרה of שמואל** who maintains that המע"ה overrides a ברי ושמא (at least by a ברי גרוע ושמא טוב)!![31] The question is how could have the גמרא even entertained this idea that שמואל rules like ר"ג, on account of בו"ש, when שמואל maintains that by a בגוש"ט the דין is המע"ה.

תוספות answers:

ויש לומר דהוה מצי למימר וליטעמיך -

And one can say that indeed the גמרא **could have responded** to the proposition that הא דר"י דשמואל היא, by saying **'and according to your reasoning'** is it properly understood?! How can you even think that the reason of שמואל is connected to the opinion of ר"י in the case of בו"ש? There is obviously no connection, for ר"י is discussing a ברי טוב וכו', while שמואל is agreeing with ר"ג even by a ברי גרוע וכו'.[32]

תוספות offers an additional answer:

ועוד יש לומר דסוגיא דהכא סברה דזה כלל גדול בדין -

And furthermore, one can say that our גמרא here maintains that the phrase of **'זה כלל גדול בדין'**, which[33] ר"י said in the name of שמואל **-**

לא לניזק אומר ברי ומזיק אומר שמא -

Is not referring to a case where **the victim claims ברי and the perpetrator claims שמא** as the גמרא states in the first explanation in ב"ק. Our גמרא does not agree with this interpretation. In fact it maintains that in a case of ברי ושמא (even a ברי גרוע ושמא טוב) we do not say המע"ה. The phrase זה כלל גדול בדין is not referring to בו"ש -

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[31] If the גמרא would not have said that הא דר"י דשמואל היא, we could have explained (as the גמרא eventually does) that the reason שמואל rules like ר"ג is not on account of בו"ש ברי עדיף, but for different reasons (חזקת הגוף, מיגו וכו'); then there would be no contradiction. However since the גמרא maintains הא דר"י דשמואל היא that the reason of שמואל is on account of ברי ושמא, then there is the contradiction from ב"ק.

[32] In essence תוספות is saying (in this answer) that there is no way to reconcile these two rulings of שמואל.

[33] See footnote # 13.

אלא כדקאמר התם אי נמי לכי הא -

But rather, as the גמרא **states there** in ב"ק **'or** you may say, **it may also be referring to this'** case of רוב;[34] that המע"ה is stronger than רוב. However it is not stronger than ברי ושמא. According to this answer of תוספות, our גמרא here maintains that בו"ש ברי עדיף, even in a case of ברי גרוע ושמא טוב. There is no contradiction from שמואל אדשמואל, because according to this interpretation המע"ה is not applicable in a case of בו"ש, only against a רוב.

תוספות questions this last answer:

וקשה על זה דאפילו לפי אי נמי דהתם לא אתי שפיר -

And there is a difficulty with this explanation that our סוגיא does not agree that המע"ה applies even by בו"ש, **for even according to the 'אי נמי' there** in ב"ק, that המע"ה is only stronger that a רוב, but not (necessarily) stronger than a ברי, nevertheless **it is not properly resolved -**

דהא בסוף המניח[35] (שם דף לה,ב ושם) אית להו לרבנן בהדיא דאפילו ניזק אומר ברי כולי -

For in the end of המניח פרק **the רבנן clearly maintain that even if the ניזק claims ברי, etc.** and the מזיק claims שמא,[36] the rule is[37] המע"ה -

ושמואל סובר כרבנן[38] כדמוכח בהמוכר שור לחברו:

And שמואל (generally) **agrees with the רבנן** that we rule המע"ה, **as is evident in the** case where **one sells an ox to his friend** and it was a goring ox. שמואל maintains there that המע"ה. This proves that שמואל agrees with the חכמים. The חכמים clearly maintains that המע"ה overrides בו"ש as is evident in the גמרא of המניח. Therefore in order to avoid the contradiction between שמואל of המוכר שור (where שמואל maintains המע"ה) and שמואל who rules like ר"ג purportedly on account of בו"ש (that ברי עדיף even against a מוחזק), we will be forced to say that the גמרא could have asked 'ולטעמיך'. There seems to be no way to reconcile these two דינים of שמואל according to the הו"א that שמואל rules like ר"ג on account of בו"ש ברי עדיף.

SUMMARY

Those who maintain ברי ושמא ברי עדיף can agree with the ruling of מתוך שאיל"מ; it may only require that the דרשה of בין שניהם ולא בין היורשין is referencing a case of עד אחד and not a case of חמשין ידענא וחמשין לא ידענא.[39]

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[34] See previous footnote # 20.

[35] The גמרא there is discussing various cases where oxen of the מזיק damaged oxen of the ניזק and we are not certain if they were damaged by the oxen who were מועדים or תמים, etc.

[36] In all the cases there, it is a ברי גרוע ושמא טוב. The מזיק was not present at the time of the היזק.

[37] It is not necessary to derive from the phrase זה כלל גדול בדין, that the חכמים maintain המע"ה even in a case of בו"ש. It can be derived from this גמרא in המניח. Therefore everyone must agree that according to the חכמים the דין of המע"ה overrides בו"ש (at least a ברי גרוע ושמא טוב).

[38] See 'Thinking it over # 5.

The דין of ברי עדיף בו"ש is only if it is a ברי טוב ושמא גרוע, however by a ברי גרוע ושמא טוב, there is a מחלוקת between the חכמים (who maintain המע"ה) and סומכוס (who maintains ממון המוטל בספק חולקין [by all types of בו"ש]).

THINKING IT OVER

1. תוספות initially maintains that ר"ה ור"י (who claim בו"ש ברי עדיף) disagree with ר"א who maintains that משאיל"מ.[40] Seemingly, this is irrelevant, for both of them will agree in the case of חמשין ידענא וחמשין לא ידענא that the לוה is required to pay. According to ר"ה ור"י he is required to pay since he is a שמא and according to ר"א he is required to pay because of משאיל"מ. What difference is there whether ר"ה ור"י agree with ר"א or not?!

2. תוספות states that according to ר"י (who maintains בו"ש ברי עדיף) the proof that משאיל"מ from the דרשה of בין שניהם ולא בין היורשים is in a case of שמא ושמא and an ע"א claims that monies are owed.[41] However if בו"ש ברי עדיף then it would seem that the testimony of the ע"א (who is unbiased) should be at least as strong as the claim of the תובע (who is biased) and therefore the שמא should have to pay even without מתוך!![42]

3. How can תוספות derive from the fact that שמאול maintains by the case of המוכר שור לחבירו ונמצא נגחן that the דין is המע"ה, that שמואל agrees to the חכמים?[43] Seemingly in this case even סומכוס would agree that המע"ה since there is no דררא דממונא!

4. תוספות concludes that according to סומכוס, the דין is that לעולם חולקין even by ברי ושמא.[44] Seemingly this is difficult to understand. In a case of ברי וברי, the חכמים maintain that המע"ה and סומכוס maintains חולקין. How is it that by ברי ושמא, the חכמים are מוציא from the מוחזק (according to ר"ה ור"י) and say ברי עדיף,

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[39] See however, footnote # 29.
[40] See footnote # 1.
[41] See footnote # 10.
[42] See חידושי ר"ש הלוי.
[43] See footnote # 20. See קרני ראם on the מהרש"א on this תוספות.
[44] See footnote # 24.

and סומכוס (who maintains we are מוציא half from the מוחזק even by ברי וברי) will not agree to ברי עדיף to be מוציא (just) the other half![45]

5. תוספות states[46] that שמואל follows the opinion of the חכמים, as is evident from the case of המוכר שור לחבירו ונמצא נגחן. It is also evident from the גמרא in המניח that the חכמים maintain המע"ה even by ברי ושמא. It follows therefore that שמואל maintains המע"ה even by ברי ושמא. Seemingly all this is not necessary. The case of המוכר שור לחבירו itself appears to be a case of ברי ושמא; where the buyer is sure that he purchased it to plow and the seller can only argue that perhaps you bought it to butcher it. שמואל maintains that המע"ה even there where it is a בו"ש![47]

[45] See מהר"ם שי"ף ד"ה בא"ד אבל.
[46] See footnote # 38.
[47] See מהרש"א, קרני ראם.