ואוקי ממונא בחזקת מריה –

And we place the money by its presumptive owner

Overview

The ברייתא taught that when there is a שטר מקויים, and other עדים claim that the עדי השטר were פסולים עדים, the עדים הפוסלים are not believed. The גמרא assumed this to mean, that since the עדים הפוסלים are not believed, the מלוה can therefore collect with this שטר. The גמרא challenges this assumption; for since it is תרי ותרי, the עדי השטר against the עדים הפוסלים, the מלוה cannot collect with this שטר. The גמרא concludes that רב נחמן rules since it is תרי ותרי therefore אוקי ממונא בחזקת מריה. This seemingly means that the לוה is exempt from paying, since he is the מוחזק in the ממון. The question arises, what is therefore meant by אין נאמנים; seemingly the עדים הפוסלים are נאמנים, for the לוה is פטור. תוספות will cite רש"י's explanation and discuss it.

There is a rule of המוציא מחבירו עליו הראיה; that the burden of proof is on the one who wishes to extract money. The question arises what is the דין if the מוציא was תופס from the מוחזק; he seized the money from the original מוחזק after it was established that it is a ספק and המע"ה. Now the original מוציא is the מוחזק. Is this תפיסה לאחר שנולד הספק effective and the תופס becomes the מוחזק, so that the original מוחזק must bring a ראיה to be מוציא from the תופס; or do we say that a תפיסה לאחר שנולד הספק is ineffective, and the תופס must return whatever he seized back to the original מוחזק.

פירש בקונטרס[1] ואינן נאמנין דקתני לאו דמגבינן בשטרא אלא דלא קרעינן ליה - **רש"י explains and that which the ברייתא states** that the עדים הפוסלים **are not believed** to invalidate the שטר **it does not** mean **that we collect** the debt **with the שטר,** for there is a תרי ותרי situation **but rather** the term אינן נאמנין means **that we do not tear up** the שטר. The ברייתא rules that a שטר which is מקויים and other עדים claim that the עדי השטר were unqualified to sign, the עדים הפוסלים are not believed. This does not mean that the מלוה may collect his debt based on this שטר; for it is תרי ותרי and the monies remain by the מוחזק, who, in this case, is the לוה. Rather, אין נאמנים means that בי"ד does not insist that the שטר be destroyed on the basis of the testimony of the עדים הפוסלים; but rather that the מלוה may keep the שטר.

[1] בד"ה ואוקי

תוספות continues to cite רש"י who explains what benefit there is to the מלוה by the fact that we do not destroy the שטר. Seemingly he still cannot collect his debt:

ונפקא מינה דאי תפס[2] לא מפקינן מיניה -

And the outcome of this ruling**;** that we do not destroy the שטר, is **that if** the מלוה **seized** from the לוה whatever the שטר claims is owed to the מלוה **we do not extract it from him** and return it to the לוה. The מלוה is entitled to keep whatever he seized. If the עדים הפוסלים would be believed, then even if the מלוה was תופס his חוב, he would be obligated to return it to the לוה, since there is no proof at all that the לוה owes him any money. The שטר was invalidated by the עדים הפוסלים. However since the meaning of אין נאמנין is that we are not sure whether the עדים הפוסלים are truthful or not, for it is תרי ותרי, therefore the ruling is that the מלוה cannot collect from the לוה, because perhaps the עדים הפוסלים are truthful. On the other hand if the מלוה was תופס, the לוה cannot claim his money back, because perhaps the עדים הפוסלים were not truthful and the שטר is a valid שטר. The monies always remain in the possession of the מוחזק. בי"ד does not take away monies from the מוחזק since there is a ספק (of תרי ותרי).

תוספות has a difficulty with s'רש"י explanation:

וקשה דאמר בפרק קמא דבבא מציעא (דף ו,ב ושם) גבי ספק בכור -

And it is difficult, for the גמרא **states in the first פרק of** מסכת **ב"מ concerning a questionable first born** [sheep]. A firstborn (kosher animal) is given to the כהן. The status of this animal was in doubt whether it was a בכור or not. The ישראל owner is not obligated to give it to the כהן, for we apply the rule of המוציא מחבירו עליו הראיה. The כהן must prove that it is a בכור, in order to claim it.[3]

The גמרא there rules that if –

תקפו כהן מוציאין אותו מידו -

The כהן seized it from the ישראל, and it is now in the possession of the כהן, nevertheless **we remove it from his possession.** בי"ד returns the ספק בכור back to the original ישראל owner. This concludes the citation from the גמרא in ב"מ.

תוספות concludes the question:

אלמא תפיסא דלאחר ספיקא לאו כלום הוא[4] -

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[2] This תפיסא is effective even if עדים saw the תפיסא. If there were no עדים by the תפיסא then the תופס is certainly believed to claim דידי חטפי with a מיגו of לא חטפי (since there are two עדים who support him).

[3] The ישראל is nonetheless prohibited from working and/or shearing this animal for it is a ספק בכור. In a ספק (דאורייתא) we are strict and the prohibitions relating to a בכור apply to a ספק בכור.

[4] This (seemingly) implies that a תפיסא קודם שנולד הספק is a valid תפיסא. This would mean that if the בכור was originally in the רשות of the כהן (or the לוה had a פקדון or a מלוה by the מַלוה) the כהן could keep the ספק בכור (and the מַלוה would not be obligated to return the פקדון or pay back the מלוה). See the ועוי"ל later in this תוספות (footnote # 22). See 'Thinking it over' # 1.

it is evident from that גמרא that **seizing after there is a doubt;** as the case is there (and here) that the כהן seized the ספק בכור after it was known that it is a ספק בכור (and here too, the מלוה seized the s'לוה assets after we knew it was a ספיקא of תרי ותרי). This type of seizing **is meaningless.** The כהן must return the ספק בכור. Here too the מלוה should be required to return any monies he seized after it was established that it is a ספיקא דתרי ותרי. How can רש"י state that if the מלוה is תופס we are not מוציאין מידו?!

תוספות does not immediately answer this question. Rather תוספות anticipates that there may be an additional difficulty (on the סוגיא of תקפו כהן), which תוספות will subsequently dismiss:

ומיהו אההוא דסוף השואל (שם דף קב,ב ושם) לא קשה מידי -

However, concerning **that** גמרא **in the end of** פרק **השואל, there is no difficulty at all** from the סוגיא of תקפו כהן –

תוספות continues to cite the גמרא in השואל –

דאמרינן גבי משכיר בית לחבירו בי״ב זהובים לשנה מדינר זהב לחודש -

For the גמרא **states concerning** a case where one **rents out a house to his friend for** the rate of **twelve golden** dinars **for the year** and the landlord additionally specified that it is being rented at the rate of **one golden דינר per month.** The year subsequently turned out to be a leap year of thirteen months.[5] The ruling is as follows:

בא בתחילת החודש כולו למשכיר -

If the landlord **came** to collect the rent **at the beginning of** the thirteenth **month the entire** rent of one דינר must be paid **to the landlord.**

תוספות now derives a concept from this ruling that the משכיר receives the extra month's rent, even though it is a ספק if he is entitled to it –

אלמא דבחזקת משכיר הוא -

This ruling **implies that** the rented property is considered to be **in the possession of the landlord.** This explains why he can force the tenant to either pay the extra month's rent or be evacuated, since the landlord is the מוחזק of the rented property. Therefore when there is a ספק, we award it to the מוחזק, who in this case is the landlord.

[5] The question here is whether we follow the (opening) statement of twelve זהובים per year, in which case the renter is not obligated to pay for the extra month, or do we follow the (closing) statement of a דינר לחודש, in which case the renter is obligated to pay an additional דינר for the thirteenth month. This is the ספק.

תוספות continues to cite the ruling in that גמרא –

ואפילו הכי קאמר בא בסוף החודש כולו לשוכר -

And nevertheless the גמרא there **states** that if the landlord **came at the end** of the thirteenth **month, it is entirely the tenant's;** the משכיר cannot force him to pay up the rent for the thirteenth month. Seemingly there too the שוכר was תופס the rent from the משכיר, since the משכיר is the מוחזק. What is the difference between the case of תקפו כהן, where if the כהן seized the בכור we are מוציא מידו, since the ישראל is the מוחזק; and the דין of משכיר where we are not מוציא from the תפיסא of the שוכר?![6]

תוספות answers that this is not a valid comparison:

דשאני התם דכיון דלא בא בתחלת החודש[7] איכא למימר דאודויי אודי ליה -

For there by משכיר ושוכר **it is different** than by תקפו כהן, **for since** the משכיר **did not come at the beginning of the** thirteenth **month** to collect the rent due to him, **it is possible to say** and deduce from his lack of prosecution **that** the משכיר **has indeed admitted to** the שוכר that there never was any intention of collecting an extra month's rent. However by תקפו כהן (and similarly here by the מלוה ולוה) there is no indication at all that the ישראל is forfeiting any rights to the בכור (or that the מלוה is exempting the לוה from paying).

תוספות explained that there is no contradiction between the גמרא in השואל (where תפיסה is seemingly effective) and the סוגיא of תקפו כהן (where תפיסה is not effective). However there still remains the original question on רש"י; why תפיסה is effective here (by a מלוה ולוה) and not effective by תקפו כהן (even though both are a תפיסה לאחר שנולד הספק and by neither is there a semblance of אודויי אודי ליה). תוספות will now explain רש"י:

ויש לומר דשאני גבי בכור שכהן תופס מספק דאין יודע אם בכור הוא -

And one can say; that by בכור it is different than here, **for the כהן is seizing** the בכור in a **doubtful** manner, **since** the כהן himself **does not know if this** animal **is a בכור;** therefore the תפיסה is not effective, since the ישראל is the original מוחזק, and the כהן has no valid claim against him, only a שמא claim[8] –

אבל הכא שטוען ברי מהניא תפיסה[9] -

However, here by the מלוה ולוה **where** the מלוה **claims** that the לוה **certainly**

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[6] If these two גמרות cannot be reconciled and there is a dispute between the גמרא of משכיר ושוכר (which maintains that תפיסה מהני) and the גמרא of תקפו כהן (which maintains that תפיסה לא מהני), then תוספות original question on רש"י (from תקפו כהן) is not that difficult. רש"י can maintain that he follows the גמרא of משכיר ושוכר, which maintains that תפיסה לאחר שנולד הספק מהני.

[7] See 'Thinking it over' # 2.

[8] Regarding the case of משכיר ושוכר where (seemingly) it is also a שמא claim (whether תפוס לשון ראשון or לשון אחרון), nevertheless the סברא of אודויי אודי ליה, is sufficient to allow a תפיסא לאחר שנולד הספק.

[9] See 'Thinking it over' # 3.

owes me the money **the תפיסה is effective;** and the מלוה can retain that which he seized.

In conclusion, according to רש"י a תפיסה לאחר שנולד הספק is valid if the תופס has a טענת ברי.[10] תוספות therefore asks:

ואם תאמר בחזקת הבתים (דף לד,ב) גבי זה אומר של אבותי[11] כולי -

And if you will say; in חזקת הבתים פרק **concerning** the case where **this one said it belonged to my ancestors, etc.** The other litigant claimed the same.

אמר רב נחמן כל דאלים גבר -

ר"נ ruled whoever is stronger overpowers and takes possession.

ופריך מהמחליף פרה[12] בחמור[13] זה אומר ברשותו ילדה וזה אומר כולי יחלוקו -

And the גמרא there **challenges** the ruling of ר"נ **from** the case where one **exchanges a** (pregnant) **cow for a donkey; this one said it was born** when the פרה was **in his possession and this one said, etc.[14]** The ruling is **they divide** the newborn calf between them. The question on ר"נ is why do we not say יחלוקו in the similar case of זה אומר של אבותי כו'. This concludes the citing of the גמרא in חזקת הבתים.

תוספות continues with his question on שיטת רש"י:

ומאי קושיא הא ההיא אתיא כסומכוס ורב נחמן כרבנן[15] -

And what question is there on ר"נ from המחליף פרה בחמור?! **For that** משנה of ממון המחליף פרה בחמור יחלוקו **follows** the opinion of **סומכוס** who maintains that המוטל בספק חולקים **and ר"נ** follows the opinion **of the רבנן –**

דלרבנן דאמרי המוציא מחבירו עליו הראיה היינו דינא דכל דאלים גבר -

For the רבנן who maintain that המע"ה that is exactly the same **ruling as** כל **דאלים גבר –**

כיון דמהניא תפיסה כשטוען ברי[16] -

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[10] We do not assume that it remains in the possession of the מוחזק at the time of the ספק; but rather either party has the right to (continually) seize the item from the opposing litigant. There is no definitive settlement.

[11] The argument was concerning a ship or property, etc.; an item over which neither of the litigants had physical possession.

[12] The cow gave birth sometime during the transaction; but not in the presence of the parties.

[13] The transaction was effected by the original בעל הפרה making a משיכה on the חמור; thus exchanging the ownership of the two animals.

[14] It cannot be determined if the birth took place before the transaction (thereby the calf belongs to the original בעל הפרה) or if it took place after the transaction (thereby belonging to the original בעל החמור).

[15] The גמרא (in ב"מ ק,א) states that according to the רבנן (if the ולד is in neither's רשות) we award the newborn calf to the מרא קמא, the original בעל הפרה, and the בעל החמור is a מוציא מחבירו ועליו הראיה.

[16] It is evident from this תוספות that כדא"ג is continual. Each litigant may continually be תופס from the other.

since (according to רש"י) **תפיסה is** (always) **effective when there is a ברי claim.** If we were to disagree with רש"י and maintain that we award the settlement to the מוחזק at the time of the ספק, then המע"ה would mean that תפיסה from that מוחזק would not be effective; only a ראיה can be מוציא from the מוחזק בשעת הספק. The ruling of המע"ה would be different than כל דאלים גבר; for by כדא"ג they can continually be תופס one from the other, as opposed to המע"ה, where the object remains by the original מוחזק at the time of the ספק. The question of the גמרא is understood. ר"נ is not following the opinion of the רבנן; the רבנן never mentioned כדא"ג, only המע"ה, which is a different ruling. כדא"ג seems to be an original ruling of ר"נ. The גמרא rightfully asks that we should follow the ruling of יחלוקו (since המע"ה is irrelevant by זה אומר של אבותי, for no one is a מוחזק [or a מרא קמא]). However, according to רש"י that המע"ה and כדא"ג are synonymous (for in each case continual תפיסה is effective), then ר"נ is not stating an original פסק but rather following the ruling of the חכמים.[17] Why is there a question on ר"נ according to רש"י?![18]

תוספות answers:

ויש לומר דהכי פריך דאפילו רבנן לא פליגי אסומכוס -

And one can say that this is the challenge to ר"נ; **that even the רבנן** (who maintain המע"ה) **do not argue with סומכוס –**

אלא משום דחד מינייהו מוחזק ואיכא למימר המוציא מחבירו עליו הראיה -

Only because one of them (either the בעל הפרה or the בעל החמור) **is a מוחזק;** (the ולד is in someone's possession and/or the בעל הפרה is the מרא קמא) **and** therefore **it is possible** for the חכמים **to maintain that המע"ה –**

אבל הכא דאין אחד מוחזק יותר מחבירו[19] מודו לסומכוס דיחלוקו[20] -

However, here in the case of זה אומר של אבותי כו' **where neither is more מוחזק that the other the** חכמים **admit to סומכוס that they should divide** the item in question; why then does ר"נ maintain כדא"ג when there is no מוחזק.[21]

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[17] כדא"ג (where there is no מוחזק) seems to be an obvious result of המע"ה. If we rule that even if a person was a מוחזק (בשעת הספק), nevertheless his opponent may seize it from him and retain it, then certainly in a case where neither was a מוחזק, that each of the litigants is entitled to (continually) seize it. See footnote # 20.

[18] See מהרש"א (הארוך) ומהר"ם שי"ף.

[19] They are arguing over a boat or a property without any documented proof, and neither has physical possession of the disputed item.

[20] We would be required to say that the חלוקה where there is no מוחזק is more rightfully awarded to both parties, than where we allow the present מוחזק to retain ownership by המע"ה. In the latter, the other litigant can always be תופס; in the former, once the חלוקה is made, it is permanent. The reasoning may be as follows: In any ספק each party has an equal right, therefore the obvious ruling should be יחלוקו (as סומכוס maintains). The חכמים basically agree to this; however they maintain that if one party is a מוחזק, we have no 'right' to remove him (even partially) from this item, unless there is proof. We are not awarding him the item; it is his merely by default. If the situation changes and the other litigant retains possession then it remains by him, again only by default. However when there is no מוחזק then the ruling is יחלוקו. We award half the item to each litigant in a legal and binding manner. There can be no תפיסה. See footnote # 17.

In summation; according to תוספות the view of רש"י is that when there is a טענת ברי then תפיסה לאחר שנולד הספק is effective and may continue indefinitely.

תוספות offers another approach,

ועוד יש לומר[22] דהכא מיירי כשתפס קודם שנולד הספק -

and in addition we can say that in truth a תפיסה לאחר שנולד הספק is invalid as indicated by the סוגיא of תקפו כהן (and the סוגיא in חזקת הבתים which challenged the ruling of ר"נ), **however here** (by the מלוה ולוה) **we are discussing** a case **that** the מלוה **seized** the assets of the לוה **before the ספק was created;** the מלוה had in his possession assets of the לוה before the עדים הפוסלים came to בי"ד, therefore now that there is a ספק, the מלוה is the מוחזק and he may retain the assets that are in his possession prior to the ספק. According to this answer when the ברייתא states אין נאמנים, this ruling is in the favor of the מלוה, only if he was תופס קודם שנולד הספק however once the ספק was נולד, the לוה is פטור from paying and תפיסה לאחר שנולד הספק לא מהני.

תוספות offers a different interpretation:

ורבי שמשון בן אברהם נראה לו להעמיד הברייתא בשובר -

And the רשב"א prefers to establish that the **ברייתא** is discussing **a receipt**. The מלוה presented a שטר הלואה, and the לוה countered with a receipt that was מקויים. Subsequently other עדים came and were פוסל the עדי השובר. If the עדים הפוסלים would be believed, the מלוה would collect with his שטר הלואה. The ruling is that the עדים הפוסלים are not believed and therefore the שובר is valid (even though it is תרי ותרי).[23]

ולהכי אין נאמנים דאוקי ממונא בחזקת מריה ומחזקינן עדי שובר בכשרים ולא יפרע -

And the cause why the עדים הפוסלים **are not believed** (even though it is תרי ותרי), is **for we place the money in the presumptive possession of its owner**; who is the לוה **and we presume the witnesses of the receipt** (who claim that the לוה repaid his debt) **as being valid and** the לוה is **not** required **to pay.**

SUMMARY

According to (תוספות first interpretation of) רש"י, a תפיסה לאחר שנולד הספק,

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[21] The גמרא there subsequently explains that יחלוקו is said only by a דררא דממונא (the ספק is there even without their claims [as in the case of המחליף פרה בחמור]), however by זה אומר של אבותי וכו', there is no דררא דממונא (the ספק is created only by the litigants) and יחלוקו does not apply.

[22] It is not clear (from this תוספות) whether the ועוי"ל is an alternate interpretation of רש"י (that תפיסא מהני לאחר שנולד הספק, in a case of ברי; however by a case of שמא it is מהני only קודם שנולד הספק), or if it is תוספות own interpretation of the גמרא (and תפיסא לאחר שנולד הספק לא מהני even by טענת ברי).

[23] See 'Thinking it over' # 5.

where there is a טענת ברי is מהני. By תקפו כהן the תפיסה is not מהני since it is a טענת שמא. [By משכיר ושוכר we can assume that (perhaps) the משכיר was מודה.] According to the alternate interpretation (and the רשב"א) a תפיסה לאחר שנולד הספק is ineffective.

THINKING IT OVER

1. What would be the דין by a תפיסה קודם שנולד הספק with a טענת שמא?[24]

2. תוספות explains that by משכיר ושוכר it is not considered a תפיסא לאחר שנולד הספק, since the משכיר did not come בתחילת החודש therefore אודויי אודי ליה.[25] However, the rule by שכירות is that אינה משתלמת אלא בסוף; what proof is there from the tardiness of the משכיר?![26]

3. Why is there a difference between a case of שמא ושמא (by תקפו כהן) where תפיסה is not effective and a case of ברי וברי (by the מלוה ולוה) where תפיסה is effective?[27]

4. What would be the דין of a ספק by a דררא דממונא where there is no מוחזק; do we say יחלוקו or כדא"ג?

5. According to the רשב"א that we are discussing a שובר,[28] what does the גמרא mean when it asks 'ומגבינן ביה כבשטרא מעליא'?! We are discussing a שובר, not a שטר הלואה![29]

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[24] See footnote # 4 & 22.
[25] See footnote # 7.
[26] See רש"ש.
[27] See footnote # 9. See משכנות הרועים אות שצא.
[28] See footnote # 23.
[29] See ח"ב מ"ת אות רנו.