ואוקי ארעא[1] בחזקת בר שטיא

And we place the field in the presumptive possession of בר שטיא

Overview

רב אשי ruled that if a בר שטיא (who was alternately lucid and deranged) sold a field when his metal health status could not be determined (it was תרי ותרי), the sale is void. The land returns to the בר שטיא since he is (certainly) the original owner, even though the buyer is currently occupying the field.

תוספות qualifies this ruling of רב אשי

דוקא בקרקע הוא דאמרינן הכי אבל במטלטלין אמרינן דהוו בחזקת המוחזק[2] -

It is only specifically concerning land (real estate) **that we rule thus;** that the presumptive original owner (not the present owner) retains possession, **however, concerning movable assets, we rule that they are** considered **presumptively owned by the actual possessor;** not by the original owner (as in the case of בר שטיא), but rather by whoever is presently in possession of the items in question –

כדאמר בפרק השואל (בבא מציעא דף ק,א) גבי המחליף פרה בחמור -

As the גמרא **states in פרק השואל concerning** the case of **'one who exchanged a cow for a donkey'.** The cow gave birth during the transaction and we are not certain whether it was before the transaction (whereby the calf belongs to the original בעל הפרה) or it was after the transaction (whereby the calf belongs to the original בעל החמור).[3] The גמרא there comments –

וליחזי פרה ברשותא דמאן קיימא ולהוי אידך המוציא מחבירו עליו הראיה -

And let us see in whose domain the פרה and the calf **are to be found**; whether it is in the domain of the בעל הפרה or the בעל החמור, **and let the other party** in whose רשות the פרה (and the calf) was not found be considered as **one who** attempts **to extract** money **from his friend,** and the ruling is **that it is incumbent** on the מוציא **to prove** his claim. The one in whose רשות the ולד was found should retain the ולד, unless his adversary can prove that it belongs to him; i.e. he brings witnesses as to when the calf was born.

ומשני דקיימא באגם[4] -

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[1] In our גמרות the גירסא is בחזקת **<u>ממונא</u>** ואוקי. See the marginal notes on the גמרא.

[2] תוספות is (perhaps) distinguishing between the expression אוקי ממונא בחזקת מריה (which refers to the current מוחזק) regarding the שט"ח and אוקי ממונא בחזקת בר שטיא (which refers to the מ"ק).

[3] See previous תוספות ד"ה ואוקי ממונא (footnotes # 12-14).

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

And the גמרא there **answers that** the cow **was standing in a swamp;** in a place that belongs neither to the בעל הפרה nor to the בעל החמור. There is no מוחזק. It is evident from that גמרא that if the פרה was found on the property of the original בעל החמור, then the calf (and the פרה) would belong to the original בעל החמור, even though the מרא קמא was the בעל הפרה. This proves that concerning מטלטלין we do not award ownership (in the case of a ספק) to the מרא קמא, but rather to the current מוחזק.

תוספות anticipates a (different) difficulty and resolves it.

אומר רבינו יצחק דהכא לא שייך למימר -

The ר"י says that it is not applicable to say here in our גמרא -

כדאמרינן בסוף קדושין (דף עט,ב) **ובמי שמת** (בבא בתרא קנג,ב)[5] **-**

that which the גמרא **states in the end of** מסכת **קדושין and in** פרק **מי שמת;** namely –

אם שכיב מרע הוא עליהם להביא ראיה שבריא היה -

If the benefactor **is currently a שכיב מרע it is incumbent upon them** (the recipients) **to prove that he was healthy then** when he wrote the שטר מתנה, and only then can they receive the gift. Otherwise we assume that since he is currently a שכיב מרע, he was also a שכיב מרע at the time of gifting, and therefore he may retract his gift –

ואם בריא הוא כולי -

And if the benefactor **is currently healthy, etc.** then the benefactor must prove that he was a שכיב מרע at the time of gifting (and may retract the gift); otherwise it remains in the possession of the recipients. It is evident from that גמרא that the status of the benefactor at the time of (the writing of) the שטר is determined by his current status. Seemingly here too by the בר שטיא his status at the time of writing the שטר מכירה should be determined by his current status; whether he is currently חלים (the sale should be valid) or whether he is currently a שוטה (and the sale is void). Why is it that by the בר שטיא we follow the חזקת מרא קמא of ownership and by the שכיב מרע we follow the current health status?!

תוספות answers that our case is different than the case of the שכיב מרע:

דבר שטיא דהכא כיון דעתים חלים ועתים שוטה אין ראיה ממה שהוא עכשיו:

For the בר שטיא whom we are discussing **here, since at times he is lucid and at** other **times he is deranged**; there is no consistency in his status; it

[5] The משנה there (קנג,א) discusses a gift document (שטר מתנה) that did not indicate whether the benefactor was healthy (בריא) or seriously ill (שכיב מרע) at the time the שטר מתנה was written [it was customary to indicate the health status of the benefactor] . A שכיב מרע may retract all gifts that he wrote while he was a שכיב מרע (while he is still alive). A בריא however can (obviously) not retract any gifts given while he was a בריא. The benefactor and the recipients were arguing whether the benefactor was a בריא or a שכיב מרע when he made this gift.

varies continuously, therefore **there is no proof from whatever he is presently** as to how he was previously, at the time of the sale. Normally, we can depend on the status quo; we assume whatever he is now this is how he was previously. However the בר שטיא is always in a state of flux; we cannot derive anything from his current status.

Summary

In a ספק concerning קרקע we award it to the מרא קמא; in a ספק concerning מטלטלין we award it to the current מוחזק.
A חזקה דהשתא is not valid when the status of the item in question fluctuates.

Thinking it over

1. Why is the ruling by מטלטלין different than by קרקע? Why is a ספק בקרקע awarded to the מרא קמא and not the current מוחזק; and by מטלטלין it is awarded to the current מוחזק and not to the מרא קמא?!

2. Why does not תוספות prove his contention (that there is a difference between קרקע and מטלטלין) from our גמרא of אנוסים היו וכו'. Here it is תרי ותרי and the monies remain by the current מוחזק (and not by the מרא קמא)?

3. Why was it necessary for תוספות to cite the answer באגם דקיימא?[6] Seemingly תוספות can prove that by מטלטלין we award it to the current מוחזק, from that which the גמרא says וליחזי ברשותא דמאן קיימא ולהוי אידך המע"ה?!

4. What connection is there (if any) between תוספות original differentiation between קרקע and מטלטלין, and the latter distinction between the שכיב מרע and the בר שטיא?

[6] See footnote # 3.