

They surely relinquished their claim against him – אחולי אחילו¹ גביה

OVERVIEW

The גמרא explains that if the rule of טוענין ללוקח was taught only regarding the case of זיזין which extend into the רה"ר, I would say that only in that case do we say טוענין ללוקח for we assume that the בני רה"ר forgave him this trespass and allowed him to extend his זיזין into the רה"ר,² however by a שובך which belonged to an individual perhaps we are not טוענין ללוקח. Our תוספות explains what is meant that the בני רה"ר are מוחל; who are these בני רה"ר that have the right to be מוחל?

פירוש ז' טובי העיר במעמד אנשי העיר שהרשות בידם כדאמר פרק בתרא זמגילה (דף כו,א) -
The explanation that the בני רה"ר were מוחל is that we are referring to the טובי ז' העיר³ in the presence of all the people of the city,⁴ who were מוחל this person to extend his זיזים, for they have permission to do so, as the גמרא states in the last פרק of מסכת מגילה -

שובך explains why we assume מחילה here more than by תוספות

וכיון דליכא לכל חד בדרך אלא פורתא⁵ מחלי טפי מיחיד:

And since each individual only owns a minute portion of the road, they are quicker to be מוחל their small share than one individual who is prone to a greater damage.

SUMMARY

The מחילה is done by all the people who, since they each have a minimal share, are

¹ The גמרא in our texts reads גביה (instead of אחולי אחילו בני רשות הרבים גביה).

² Otherwise, if they were not מוחל, how was he able to extend them into the רה"ר? The people (who are many) would certainly not allow him to keep it there. This proves that they came to a certain arrangement. This explanation is according to פרש"י (see אימא ד). However see later in this תוספות that according to תוספות there is a different reason to differentiate. See 'Thinking it over'.

³ The טובי העיר are the appointed representatives of the people of the city, to deal with all the needs of the city (like the city councilmen today). They are permitted, on their own, to do a limited number of dealings on behalf of the city; however, their power is greatly extended if they make their decision אנשי העיר במעמד.

⁴ This presumably means that (a majority of) the people agree to take this action. We will assume that תוספות maintains that the ז"ה alone cannot be מוחל this person to extend his זיזים לרה"ר; however, אנשי העיר במעמד they can be מוחל (since all/most of the city agrees).

⁵ Since we are discussing אנשי העיר במעמד, so each one has a very small interest in the street (it is a shared 'ownership' with all the other people), therefore we can assume that they are willing to forgo this small interest which they have in the street. However, by a שובך where the neighbor may bear the entire loss from these birds, we cannot assume that he was מוחל. [This all is in the ה"א, according to the מסקנא we say טוענין and he retains the right to the שובך.]

willing to be מוחל, easier than one individual who carries the entire loss.

THINKING IT OVER

Why does תוספות not accept פרש"י as to the reason⁶ why by a רבים there is more reason to assume that they were מוחל?⁷

⁶ See footnote # 2.

⁷ See נחלת משה.