

But they established themselves there

והא אחזיקו¹ להו –

OVERVIEW²

The גמרא asked even if we maintain בגזקין אסור, nevertheless רב יוסף would have no right to evict the אומנים, since they already have a חזקה to ply their craft there. חזקה תוספות discusses the nature of this חזקה.

פירש רבי יצחק בן רבי מרדכי כיון שלא בא להחזיק בקרקע של חבירו ולומר שלו הוא -
The ר"י explained, since the אומנים did not come to take possession of someone else's property and say that it belongs to him -

אלא לתשמיש בעלמא שנהנה ממנה מועלת חזקה שלא בטענה⁴ -
Rather the אומנים are deriving benefit from the land, in that case a חזקה without a claim is effective –

The ר"י proves this distinction:

דמסתמא לא היו אומרים שמכר⁵ להם רב יוסף תשמיש זה -
For presumably the אומנים were not claiming that רב יוסף sold them the rights to this usage, rather their claim seems to be that since he did not protest in the past, he implicitly conceded to them this right.

The ר"י supports his view:

והווי כי הנהו דלעיל (דף נא) דאחזוק להורדי⁶ דמועלת חזקה שלא בטענה -
And the case here is like the cases previously where one made a חזקה for הורדי,

¹ In our גמרות the text reads אחזיק (not אחזיק).

² See 'Overview' to the previous תוספות ד"ה אתו.

³ See 'Thinking it over'.

⁴ In general if ראוּבן is the known owner of a property and שמעון made a חזקה in this property for three years and claims that ראוּבן sold it to him, the חזקה is effective and the property remains in the possession of שמעון. However if חזקה שאין עמה claims that he lived on this property for three years and no one protested, this is referred to as a חזקה שאין עמה (there is no claim as to how שמעון owns this property) and this חזקה is not effective and the property reverts back to ראוּבן. The ר"י distinguishes between a חזקה which claims ownership (for which a טענה is required, as mentioned above), and a חזקה for usage rights (where no ownership is claimed), in which case no טענה is required. The mere fact that the owner did not protest (over a certain period of time) indicates that the owner conceded this usage to the user.

⁵ Firstly, there is no mention of such a claim. Additionally, if this was their claim (and presumably they were not lying), why would רב יוסף want to evict them, he would certainly have remembered that he sold them this right. Rather it makes more sense that nothing happened, but the אומנים inferred from the lack of protest that רב יוסף was מוחל, when in fact this מחילה is debatable as the גמרא continues to explain.

⁶ הורדי are (small) beams. The case there is where שמעון built a wall between his property and ראוּבן's property. ראוּבן placed small beams on the wall and שמעון did not protest. The rule is that ראוּבן has the right to keep his beams on that wall.

that we assume **that the חזקה is effective without a claim**, for we assume -

דמדלא מיחה ג' שנים מחל לו -

That since the owner of the wall **did not protest for three years, he conceded to him** that right to place his beams on his wall. Similarly here, the fact the רב יוסף did not protest (for three years) indicates that he was מוחל the אומנים the right to practice there.

טענה: disagrees that חזקת תשמישין does not require a

ואין נראה דאם לא הקנה לו כי החזיק להורדי אמאי החזיק לכשורי? -

And this does not appear to be correct, for if (in the case of הורדי) **the owner of the wall did not transfer the rights to him, so if he established the rights for the small beams why did he establish the rights for large beams -**

אלא על כרחך התם שטוען שהקנה לו ולהכי אחזיק לכשורי דאין⁸ אדם עושה קנין למחצה?
Rather perforce you must say in that case there regarding the הורדי that he claims that the owner of the wall **was מקנה** to him the rights to place beams on the wall, **so therefore** even though he was only להורדי החזיק nevertheless he is also **אחזיק לכשורי, for a person does not make half-a-transaction [and similarly here too it is a case where the אומנים claim that he was מקנה to them the rights to practice their trade there, so it is a טענה עמה שיש].**

SUMMARY

חזקה שיש עמה טענה requires a תשמישין חזקת תשמישין.

THINKING IT OVER

Does this תוספות agree with the previous תוספות that the אומנים were working on their own¹⁰ property?¹¹

⁷ there maintained (in opposition to רב נחמן) that if he made a חזקה for הורדי, that חזקה is effective even for כשורי. If we assume that ראובן claims that he bought the rights from שמעון to place (all types of) beams on his wall, it is understood that even though until now he placed only הורדי but since he claims that he bought the rights for all beams, the fact the שמעון did not protest the הורדי indicates that s'ראובן claim is valid (see shortly in this תוספות that תוספות that שמעון did not protest the הורדי indicates that s'ראובן claim is valid (see shortly in this תוספות that תוספות that שמעון did not protest (but ראובן does not claim that he bought the rights from שמעון), how can רב יוסף say that a חזקה for הורדי is a חזקה, perhaps שמעון did not mind small beams, but he certainly would mind large beams.

⁸ ראובן claims that שמעון gave him the right to place all types of beams [even heavy ones] on the wall. We know that he made a חזקה for the הורדי, which proves that שמעון certainly agreed to the הורדי, however since a person does not make a half-transaction, we can be sure that he purchased the rights to place all types of beams on s'שמעון wall.

⁹ The הגהות adds; והכא נמי מיירי שהיו טוענים שהקנה להם והוי חזקה שיש עמה טענה.

¹⁰ See footnote # 3.

¹¹ See TIE there 'Thinking it over'. See (לר' בנימין חשין).