

אין חזקה לנזקין –

There is no established presumption regarding damages

OVERVIEW¹

derived from the fact the רב יוסף wished to evict the אומנים, even though they had a חזקה to practice their craft there, that תוספות discusses what type of חזקה they had.

אומר רבינו תם דאפילו הקנה² יכול לחזור בו דקנין בטעות הוא³ -

The ר"ת states that even if the owner transferred the rights of the נזקין [to him in the presence of witnesses] nevertheless the owner is able to retract this קנין, for it is a קנין which was made mistakenly -

דסבור היה שיכול לקבל ועכשיו אין יכול לקבל -

For the owner assumed that he is able to bear it, but now he is not able to bear it; therefore, the קנין is void.

ר"ת disagrees with the תוספות

ואין נראה דמדקאמר אין חזקה לנזקין⁴ איכא למידק הא ראייה יש -

And this does not appear to be correct, for since רב נחמן stated there is no חזקה for נזקין; we can infer that if there is however proof that would allow a חזקה נזקין -

אין חזקה הא ראייה יש: תוספות proves that we make such an inference of

כדדייקינן בחזקת הבתים (לקמן דף מט,ב) גבי הא דתנן⁵ ולא (לאשה⁶ חזקה בנכסי בעלה):

¹ See 'Overview' to the previous two תוס' ד"ה אתו וד"ה והא

² The (הקנה יכול) הקנה לו בעדים (instead of יכול הגהות הב"ח).

³ This means (according to the (הגהות הב"ח) that not only if there were no witnesses to the קנין, there was only the חזקה (of three years) to bolster the claim of the מחזיק, that we say אין חזקה לנזקין (where the owner can perhaps claim, 'I was never מקנה them this right, and I was not מוחה because I thought I could bear it'), but furthermore even if there are witnesses that the owner was מקנה to them this חזקה, nevertheless the קנין is void since it is a בטעות קנין. Alternately תוספות may mean that not only if the owner was merely מוחל by being quiet (for three years), can he retract, but even if he explicitly was מקנה to them this right, nevertheless he can retract because it is a בטעות קנין.

⁴ A חזקה generally proves something; in our case that the owner was מקנה the right for this usage. For if he was not מקנה, why did he not protest. However, it is not a definite proof like if witnesses would testify that he was מקנה. If as the ר"ת maintains that even if there were witnesses to the קנין (as the (הגהות הב"ח) explains our (תוס') he can still retract, רב נחמן should have said אין ראייה לנזקין that even if one brings definite proof such as עדים, nevertheless the owner can retract, so we will definitely know that a חזקה without עדים is certainly insufficient to have them retain this right. The fact that ר"נ merely stated אין חזקה לנזקין, indicates that a חזקה is insufficient, however if there are עדים then the קנין would be valid and they would retain the rights for this usage even though it is נזקין. See 'Thinking it over'.

⁵ שם מב, א.

⁶ A marginal gloss amends this to read (לאשה חזקה בנכסי בעלה) (instead of לאיש חזקה בנכסי אשתו).

As the גמרא infers in פרק חזקת הבתים, regarding the משנה which taught, 'there is no חזקה (for a woman in her husband's assets) [for a man in his wife's assets]'.⁷

SUMMARY

There is a dispute whether there is a ראייה בנזקין (the view of 'תוס') or not (ר"ת).

THINKING IT OVER

Why indeed is it that regarding נזקין, we accept a ראייה but not a חזקה?⁸ Seemingly a חזקה supports the claim of the מוחזק that he granted them the right, otherwise why did he not protest the נזק?⁹

⁷ The גמרא there infers that the משנה only means that if a man lived for three years in his wife's property, it is not considered a חזקה and proof that he bought the house from her. However, we can infer that if he has a שטר or עדים that she sold him the property that is sufficient and it belongs to him (the גמרא there questions this ruling). In any event we see that when the term חזקה אין לו is used it only means that a חזקה is insufficient proof in these cases, but a valid proof such as עדים or שטר are effective. Therefore, here too if the אומנים would bring עדים that רב יוסף granted them this (damaging) usage, ר"י would not be able to recant even though it may be a בטעות.

⁸ See footnote # 4.

⁹ See נחלת משה and רא"ש.