But now it would appear that **- אלא מעתה חזקה שאין עמה טענה כולי**
a חזקה **without an accompanying claim, etc.** should be a חזקה.

OVERVIEW

תוספות previously explained[1] that (in order to understand the question מה אי שור המועד וכו' ה"נ עד שנה רביעית וכו' we have to interpret that) the inference from שור המועד is that three years establishes a חזקה. We consider the field in the possession of the מחזיק. Generally when there is a dispute between ראובן ושמעון over an object; שמעון claims that he bought it from ראובן; however ראובן maintains that he never sold it to שמעון (and ראובן can prove that he originally owned the object) the rule is that the person who is not in possession of the object must prove his case. If ראובן, the alleged seller, is in possession, then שמעון must prove that he bought it from ראובן; if שמעון, the alleged buyer, is in possession, then ראובן has to prove that he did not sell it to שמעון. The same rule should apply to קרקע. However it is difficult to establish who is in possession of the קרקע (they can both be standing in the field, etc.). This is the rule of חזקה, which we derive from שור המועד that whoever was in the field for the last three consecutive years is considered the מוחזק, He is in possession. The other party, the מערער, must prove his case that he did not sell the field to the מוחזק.

It would seem obvious, however, that if someone is in possession of an article and another person (proves that it was his and) claims that he never sold it; then if the מחזיק argues that it should be his, merely because he is in possession of this article, it would be a ludicrous claim. The fact that he is in possession may deem him to be a thief, but does not confer upon him any rights of ownership. The only way that a מחזיק can claim ownership is if he argues that he bought the article from the (known) original owner (or it was gifted to him, etc.) Similarly by קרקע, if one is established as a מוחזק; and claims that he bought it, that necessitates the מערער to prove otherwise. Possession by itself however, gives one no right to anything that was known to have belonged to someone else previously. תוספות questions: If the לימוד from שור המועד is that three years merely establishes the מחזיק as a מוחזק, that is no reason that he should be awarded the קרקע without a טענה (claim).

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[1] See previous תוס' (כח,א) ד"ה עד.

תוספות asks:

תימה מאי סלקא דעתיה דמקשה דהיכי מצי לאוקמי בידיה כיון דלא טעין מידי –

It is astounding! What did the questioner think when he asked that a חזקה שאין שאין עמה טענה should be a valid חזקה?! **For how is it possible to place** the property in question **in the possession** of the מחזיק and give him ownership **since he is not claiming anything.** He does not claim that he bought the property or that it was gifted to him, He merely states that he is living there for three years and no one bothered him. That does not give him any right to the property. We know for certain that the מערער was the original owner. How was that ownership transferred to the מחזיק?! He neither claims that it was bought by him nor gifted to him. It should remain in the possession of the מערער – the original owner!

תוספות answers:

ויש לומר דהכי פריך כיון דילפת משור המועד[2] מה התם בשלש נגיחות הוי בחזקת נגחן –

And one can say; that this is what the גמרא **is asking: since you are deriving** the rule of חזקת ג' שנים **from a שור המועד**, therefore we can say as follows, **just as there** by שור המועד **by goring three** times, the ox **is an established goring** ox –

הכא נמי כיון דאכלה שלש שנים ולא מיחה הויא בחזקת שלא ימחה עוד[3] –

here too by חזקת ג' שנים **since** the מחזיק **consumed** the produce for **three years and** the original owner **did not protest, it is established that he will never protest again;** meaning that he is relinquishing his interest in this property **–**

ובלא טענה נמי תהא שלו[4] דאית לן למימר שמחל לו[5] –

And therefore even **without a claim it should belong to** the מחזיק **for we should**

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[2] If the purpose of a חזקה is to establish the מחזיק as a מוחזק, that he is in possession, then obviously if it is a חזקה שאין עמה טענה, it would be a meaningless חזקה, for there is no claim. However according to this גמרא, the לימוד from שור המועד, is that we are establishing the status (of the שור and) of the מערער. The מערער by not being מוחה for three years is conceding ownership; therefore, as תוספות continues, there is reason to argue that even a חזקה שאין עמה טענה is sufficient to place the field in the possession of the מחזיק.

[3] See previous תוס' ד"ה עד. Even though, the מערער is protesting now; nevertheless at the end of the third year, when he did not protest, it became בחזקת שלא ימחה עוד, so at that point he relinquished his rights to the property, and was 'מוחל' the property to the לוקח then. Afterwards he can no longer renege on this 'מחילה'.

[4] It would seem that the two questions of the גמרא; the question of אי מה שור המועד and the question אלא מעתה חזקה are sort of a מה נפשך. If the לימוד from שור המועד is to establish the מחזיק as being in possession, then just as by שור המועד the new status is achieved only by נגיחה רביעית, then by חזקה the status of possession should be accomplished only in the fourth year. If, however, the לימוד from שור המועד is that the מערער is עוד ימחה שלא בחזקת, that this proves that he is conceding ownership; then even a חזקה שאין עמה טענה should also be sufficient.

[5] There is an inherent difficulty with this answer. It is generally assumed that ownership of property cannot be transferred through מחילה. Even if the owner would state specifically, 'I am מוחל this property to you', there would be no transfer of property even if a קנין was made. The prevailing view amongst many of the commentaries is that since the מחזיק was silent for three years it indicates that he is relinquishing all his rights to this property, and it is considered as if he is gifting it to the מחזיק and telling him לך חזק וקני.

assume that the original owner **forfeited to** the מחזיק the rights of the property.

תוספות offers another explanation:[6]

אי נמי הא דקא פריך למימרא דחזקה שלא בטענה תהא חזקה –

Perhaps we can **also** answer as follows: **that which** the גמרא **asks, 'do you** mean **to say that a חזקה without a claim should be a** valid **חזקה',** it does not mean that the מחזיק has no claim at all. If that were the case it would be unthinkable that it should be considered a חזקה, but rather חזקה שאין עמה טענה here means –

היינו כגון דאמר ליה[7] מפלניא זבנתה דזבנה מינך[8] –

That for instance the מחזיק **said to** the original owner, **'I bought it from someone who bought it from you'.** This is what the גמרא refers to as a חזקה שאין טענה עמה.[9] The גמרא asks that in this case the מחזיק should be believed –

אף על גב דלא אמר קמי דידי זבנה ולא דר בה אפילו חד יומא[10] –

Even though the מחזיק **did not say** that the individual from whom I bought the field, **bought it** from you (the מערער) **in my presence.** If the מחזיק would have claimed that he (the מחזיק) purchased the field from ראובן (his מוכר) and the מחזיק also claims that he was present when ראובן purchased the field from the מערער, then it would be a חזקה שיש עמה טענה, since the מחזיק claims that he knows for sure that his מוכר bought the field from the מערער and subsequently sold it to him (the מחזיק). However in our case the מחזיק does not claim that קמי דידי זבנה. In addition, we are discussing a case where the alleged מוכר who sold it to the מחזיק **did not live there** (in the house or field) **for even one day.** The מחזיק cannot prove that his מוכר lived in the house of the מערער for even one day. If the מחזיק can bring עדים that his מוכר lived in the house of the מערער for (even) one day, then it is considered a חזקה שיש עמה טענה and the מחזיק is entitled to the property. The reason for this is that since we know that the מוכר lived in the house, therefore the מחזיק is considered a bona fide buyer. The rule is that טוענין ללוקח, we argue on behalf of (a bona fide) buyer.[11] If the מוכר was here and claimed that he bought it from the מערער (and then

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[6] In this answer we can again assume that the שור המועד לימוד from is that the מחזיק becomes a מוחזק.

[7] See לקמן ל,סע"א.

[8] There are three people involved here: The מערער who can prove that he was the original owner (more than three years ago), the מחזיק who is presently in the field and brings עדים that he was there for three years, and the מוכר, from whom the מחזיק (allegedly) bought the field. The מחזיק claims that the מוכר bought the field originally from the מערער, and then sold it to the מחזיק. The מוכר is not presently here.

[9] It is considered a חזקה שאין עמה טענה, since the מחזיק himself is not sure whether the מוכר actually bought the field from the מערער and subsequently that the field is his.

[10] See לקמן מא,ב.

[11] This ruling is to protect innocent buyers. When someone buys a field, he cannot be certain how the field came to be in the possession of the seller. There is always the concern that some original owner will claim that he never sold

sold it to the מחזיק), the מחזיק would receive the field, since it is a חזקה שיש עמה טענה. Now even though the מוכר is not present, we argue on behalf of the לוקח – מחזיק, that if the מוכר would be here he would claim that he bought it from the מערער, and coupled with the חזקה of the מחזיק it would be sufficient to remove the property from the רשות of the מערער. In our case however, the מחזיק could not prove that the מוכר ever lived in this property, therefore he is not a bona fide לוקח; he may have been duped by a swindler (or there was no 'מוכר' at all, it is a fiction created by the מחזיק).[12] בי"ד therefore will not argue on his behalf that the מוכר bought it from the מערער.[13] The מחזיק is also not claiming that he was present when the מוכר allegedly bought the house from the מערער.

ולא ידע אי זבנה מיניה אי לא אלא דהכי אמר ליה –

And therefore the מחזיק **does not know whether** his מוכר **bought** the property **from** the מערער **or not.** When he claims מפלניא זבנתה דזבנה מינך, he does not mean that 'I know that he bought it from you' **But rather** he claims **that this is what** his מוכר **said to him** (the מחזיק). The מחזיק claims that his מוכר told him that I (the מוכר) bought it from the מערער. This is called a חזקה שאין עמה טענה, because even if we believe what the מחזיק says, we do not know for sure (as the מחזיק himself does not know) that the מערער ever sold the field![14]

תוספות asks a different question:

תימה לרבינו שמשון בן אברהם[15] הא דמיבעיא לן בפרק כיצד הרגל (בבא קמא כד,א ושם) –

The רשב"א is baffled concerning **that which** the גמרא **queries in פרק כיצד הרגל** regarding the three day requirement to establish a שור המועד -

אי לאיעודי תורא אי לאיעודי גברא[16] –

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it to the seller. The new buyer will be at a loss. Therefore בי"ד steps in and argues on behalf of the last buyer, that his seller bought the field from the original owner.

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

[13] When the מוכר was דר בו חד יומא there is some connection between the מוכר and the property, therefore the לוקח was acting within reason when he purchased the property. He is a bona fide לוקח. In such a case בי"ד is טוען ללוקח. However if we cannot associate the מוכר with the property, we do not know that the מוכר had any connection with the property; it is possible (and probable) that the מחזיק bought the field from a person in the street. It was extremely careless and unreasonable on the part of the מחזיק to buy a field from a person who has no known connection to the property. This מחזיק is not a bona fide לוקח; therefore there is no טענינן ללוקח.

[14] We can now understand that the גמרא argues that even in a case where the מחזיק claims that he bought the field from someone who bought it from the מחזיק it should be a valid חזקה. The reason is that since we derive from שור המועד that in three years he becomes a מוחזק (the גמרא stated that we derive from שור המועד that נפק ליה מרשות מוכר וקיימא ליה ברשות לוקח), and he is claiming that he bought it, the onus of proof should be on the מערער that he did not sell it to that מוכר. Until the מערער proves otherwise, it should remain in the רשות of the מחזיק.

[15] See תוס' ב"ב נד,ב ד"ה וישראל (ועדיין צ"ב).

[16] The גמרא there in ב"ק explains that the difference להלכה between these two options is in a case where עדים came at one time and testified that this ox has already gored three times. If we maintain לאיעודי תורא, then the ox becomes a מועד immediately, and the next time he gores he is חייב בתשלומי מועד. If, however we maintain לאיעודי גברא, then since

Is it to establish **the ox as a habitual** gorer, or **is it to establish the person as a habitual** derelict in his duty to control his ox. This is the query in כיצד הרגל. The question is -

תפשוט מהכא דלאיעודי תורא הוא –

Resolve the query **from** the גמרא **here that it is לאיעודי תורה -**

דקאמרי[17] הולכי אושא מה שור המועד כיון שנגח ג׳ נגיחות נפקא ליה כולי –

since the הולכי אושא say; 'just as a שור המועד since he gored three times he is extracted, etc.' from being a תם and he becomes a מועד**.** We can derive from their statement that the three days is לאיעודי תורא -

ואי לאיעודי גברא לא מייעד עד נגיחה רביעית דאז הוא מועד לעבור בהתראות[18] –

For if the purpose is **לאיעודי גברא;** the owner **is not a** מועד **until the fourth נגיחה, for** only by the fourth נגיחה **is the** owner **a מועד to disregard the warnings** –

דכשנגח נגיחה שלישית והתרו בו עדיין לא עבר על שלש התראות עד שיגח פעם רביעית –

for when the ox **gored the third** נגיחה **and they warned him** a third time (once after the first נגיחה, a second warning after the second נגיחה, and a third time now after the third נגיחה), the owner **did not as of yet disregard three warnings until** the ox **will gore a fourth time**, only then should the owner be considered a מועד. The הולכי אושא said כיון שנגח ג' נגיחות נפק ליה מחזקת תם וקם ליה בחזקת מועד,[19] however according to the opinion of לאיעודי גברא, the owner ceases to be a תם only after the fourth נגיחה, not the third, as the הולכי אושא contend.

תוספות answers:

ויש לומר דסוגיא דהכא כמאן דאמר[20] לאיעודי תורא –

And one can say that the גמרא **here** in ב"ב follows the opinion **of the one who maintains לאיעודי תורא.** Therefore it is understood why the גמרא here says משנגח ג' נגיחות וכו'.

תוספות however anticipates the following question. The query of לאיעודי תורא or לאיעודי גברא is raised by the אמוראים. If the הולכי אושא, who were תנאים, state that משנגח ג' נגיחות וכו', that would imply that the הולכי אושא maintain that it is לאיעודי תורא, how can there then be a query by the אמוראים if it is לאיעודי גברא. תוספות responds:

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the owner was warned merely once, he is not obligated yet to pay תשלומי מועד for the next נגיחה, until the owner is warned three times.

[17] The הגהות הב"ח amends this to read מ<u>מ</u>דקאמרי.

[18] תוספות in this question (as well as in the first answer) assumes לאיעודי גברא to mean literally that the owner must be a מועד. He (deliberately) ignored the warnings three times.

[19] תוספות is seemingly interpreting יצא מחזקת תם וכו' as referring to the owner as a תם and a מועד.

[20] There are no actual מ"ד in ב"ק who maintain לאיעודא גברא or לאיעודי תורא. Rather, תוספות is referring to each side of the query as a מ"ד.

והולכי אושא לא אמרו אלא דגמרינן משור המועד ולא יותר –

And the הולכי אושא **did not say** the statement that מה שור המועד משנגח ג' נגיחות וכו', **but** rather they merely said **that we derive** חזקת ג' שנים **from שור המועד and** they did not say **any more.** The statement of מה שור המועד משנגח ג' נגיחות וכו', was not made by the הולכי אושא but rather by the סוגית הגמרא here, who indeed maintains לאיעודי תורא. However the מ"ד לאיעודי גברא will maintain -

וילפינן משלש התראות דגברא ולא משלש נגיחות דתורא –

That we derive חזקת ג' שנים **from the** transgressing of the **three warnings** given **to the owner and** we do not derive חזקת ג' שנים **from the three gorings of the ox.** The מ"ד of לאיעודי גברא would have worded the derivation from שור המועד differently.[21]

תוספות offers a different resolution of the matter:

ועוד דלמאן דאמר לאיעודי גברא אין צריך שיהו מוחזקות לעבור בהתראות –

And furthermore; we can say that our סוגיא can be in accord even with the מ"ד of לאיעודי גברא, **for** even **according to the** מ"ד **of לאיעודי גברא it is not required that it should be established that** the owner **is disregarding the warnings,** i.e. that he must disregard the warnings three times before it is considered לאיעודי גברא. This is not so –

דאם כן עד נגיחה חמישית לא יחייב –

For if this were so, that according to the מ"ד לאיעודי גברא, the person does not become a מועד until he disregarded three warnings, then the ruling should be **that until the fifth goring,** the owner **should not be obligated to pay** full damages of a מועד. At the fourth goring the owner was not as of yet a מועד. The owner will only be a מועד if he disregarded three warnings. Before the fourth נגיחה he has only disregarded two warnings, the ones after the first and second נגיחה. He will have disregarded the third warning only after the fourth נגיחה. It is only then that he is a מועד. Therefore, he should be חייב a נזק שלם only on the fifth נגיחה after it was established that he is a מועד.[22] Since everyone agrees that he is חייב even on the fourth נגיחה, therefore it is obvious that לאיעודי גברא, does not meant that the owner must be a מועד לעבור בהתראות -

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[21] Perhaps he would have said מה שור המועד כיון שעבר על ג' התראות יצא מחזקת תם וכו', or something similar.

[22] תוספות in his question (as well as according to the first answer) maintains that even if לאיעודי גברא means that it is necessary for the owner to be a מועד לעבור בהתראות, nevertheless he would be מחויב בתשלומי מועד even after the fourth נגיחה. The reasoning is that when the owner was warned after the third נגיחה, the owner was warned three times and has already disregarded two of these warnings (נגיחות ב' וג'); when the נגיחה ד' actually occurred it was because the owner already disregarded the third warning, hence he is a מועד לעבור בהתראות even before the fourth נגיחה, by allowing his ox to be נוגח the fourth time (ועי' בחת"ס). The second answer of תוספות, however will maintain that in order to be עובר בהתראה the ox must actually inflict a damage for which it is liable. The mere fact that his ox was not being watched is not sufficient to consider him a מועד בהתראה. Therefore the גברא will not become a מועד until after the נגיחה רביעית and will not be liable for נ"ש until the נגיחה חמישית.

אלא צריך שיודיעוהו[23] בכל פעם כשיגח כדי שישמור שורו –

But rather לאיעודי גברא means that **it is necessary to inform** the owner **every time** his ox **gores in order that he guard his ox.** The warnings to the owner are simply to make him aware of his ox's doings, so he should not claim later I was not warned sufficiently. Three warnings are sufficient.

ומכל מקום חיובא דשור תליא במה שהוחזק ליגח:

But nevertheless, even if we maintain לאיעודי גברא the obligation of payment for the damages of the ox depends on the fact **that** the ox **became accustomed to gore.** Therefore as soon as the ox gored three times and the owner was warned three times he is חייב נזק שלם, even though the owner was not established as a מועד. It is the שור who is the מועד not the owner.

Summary

The question אלא מעתה חזקה וכו', can be understood in two ways. A. It should be considered as a מחילה, on part of the מערער. B. If the מחזיק claims מפלניא זבנתה דזבנה מינך, he should be believed even if it was not קמי דידי and also not דר ביה חד יומא.
The סוגית הגמרא which states "כיון שנגח ג' נגיחות יצא מחזקת תם וכו', can either go according to the מ"ד of לאיעודא תורא, and it was not said by the אושא הולכי; or it was said by the הולכי אושא and even the מ"ד of לאיעודי גברא does not require that the owner should be a מועד לעבור בהתראות.

Thinking it over

1. תוספות explains the question of אלא מעתה חזקה וכו' in two ways. What answer does the גמרא give to this question according to each of these explanations?

2. In the case of מפלניא זבנתה וכו'; what would be the דין if the מחזיק has a valid שטר from the מוכר; would we say טענינן ללוקח?[24]

3. Why does the רשב"א ask his question after the גמרא asks אלא מעתה חזקה וכו'; the question should be asked when the גמרא previously stated מה שור המועד משנגח ג' נגיחות?

[23] The term לאיעודי (at least according to the מ"ד לאיעודי גברא) would mean to warn or testify as in העדאת עדים, but not in the usual term of מועד that he is habitually derelict.
[24] See footnote # 12.