

שתא קמייתא לא קפיד וכולי – The first year he is not annoyed, etc.

OVERVIEW¹

תוספות. שור המועד חזקה ר' ישמעאל גמרא that only ר"י and the רבנן argues that the reasoning of ר"י should also be able to derive שנים ג' חזקה from שור המועד.

תוספות asks:

תימה² מנא לן דר' ישמעאל דוקא יליף משור המועד ולא רבנן –

It is astounding! [If it is indeed so that the reason a חזקה requires three years, is because that by the third year we are certain that a person takes offense and would have been מוזה, then] how do we know that it is only ר"י who derives שנים ג' חזקה from שור המועד but not the רבנן. Perhaps –

אינהו נמי מצי גמרי משור המועד –

The רבנן too can derive חג"ש from שור המועד –

דהיינו טעמא נמי דלעיל³ דגמר משור המועד –

for this reason that רבא is giving according to the רבנן, was also previously given according to ר"י who derives חג"ש from שור המועד –

דכיון דקפיד בג' זמנין ולא מיחה אם כן ודאי מכרה או נתנה לו –

that since a person is offended by someone eating his produce three times and (yet) he did not protest, then certainly he sold it or gave it to him; otherwise he would have protested since it occurred three times already. This same thought is being now voiced by רבא according to the רבנן. Why can they not derive it from שור המועד as well?

תוספות answers:

ויש לומר דלא דמי דודאי דרבי ישמעאל דאזיל בתר אכילות שפיר מצי למיגמר משור המועד –

And one can say; that ר"י and the רבנן are not comparable; for that is certain that according to ר"י we can derive חג"ש from שור המועד since he takes note of the consumption of the produce; and is not necessarily concerned with the amount of time required for a חזקה he can properly derive from שור המועד the laws of חזקה, in the following manner –

דמה התם הוחזק נגחן בג' פעמים אף כאן בשלש אכילות אם לא שמכרה לו היה מקפיד –
for just as there by שור המועד, the ox is established as a goring ox by goring

¹ See 'Thinking it over' # 1 (and 'Appendix').

² The תימה **אם כן** מנא **אם כן** amends this to read מנא **אם כן** הגהות הב"ח

³ See תוס' כח,ב ד"ה אלא (הא') and תוס' כח,א ד"ה עד

three times, here too by חזקה **through three consumptions** he is considered a מוחזק; because **if not** for the fact **that he sold it to him he would take offense** and certainly protest.

ואין זה וזה תלויים בשהוי זמן –

And neither שור המועד nor חזקה **are dependent on any elapsed time** frame; the חזקות are established through incidents, not elapsed time frames. Therefore it is a proper comparison.

אבל לרבנן דתלוי בשהוי זמן כמה ישהה ויקפיד לא שייך למגמר משור המועד:

However according to the רבנן **that a חזקה is dependent on elapsed time;** that it is necessary to establish **how much time must elapse until he is offended,** therefore **it is not possible to derive חג"ש** from שור המועד.

SUMMARY

We can derive חזקת קרקע from שור המועד, only if the חזקה is dependent on recurring incidents, similar to שור המועד. If the חזקה is dependent on elapsed time it cannot be derived from שור המועד.

THINKING IT OVER⁴

1. How are we to understand תוספות question, when the גמרא just stated⁵ that the ג' אכילות cannot derive חג"ש from שור המועד, since the חכמים disagree with תוספות which is seemingly the same answer that תוספות gives!⁶

2. How does שור indeed know that רבא is not incorporating the לימוד from שור המועד in his answer?⁷

3. What advantage would there be if the חכמים do derive חג"ש from שור המועד?⁸

4. Why did not תוספות asks this question on the first answer of רבא?⁹

5. It would seem more appropriate that the ד"ה of תוספות should be 'תלת קפיד', as opposed to 'שתא קמייתא לא קפיד וכו'!¹⁰

⁴ See 'Appendix'.

⁵ כח,ב.

⁶ See footnote # 16.

⁷ See footnote # 14.

⁸ See footnote # 19.

⁹ See footnote # 20.

¹⁰ See footnote # 17.

APPENDIX¹¹

The גמרא inquired as to the source of חזקת ג' שנים. We will assume that the question is that a חזקה should be immediately when the original owner (מערער) becomes aware that someone (the מחזיק) is using his property, and remains silent (שותק). The גמרא answers that we derive it from שור המועד. By a שור even if he gores twice he is considered a תם. Seemingly, since he gores (even once) he is no longer a תם; he is a goring ox. Nevertheless the תורה teaches us that to change the status from a תם to a מועד it requires that the שור act like a מועד three times.¹² Similarly in order to change the חזקת קרקע from the מערער to the מחזיק it requires three acts of שתיקה.¹³

The גמרא stated that if this is the source of חזקה, then if the מחזיק ate three אכילות and the מערער was silent all three times it should be a חזקה, regardless if it was three years (similar to שור המועד, where there is no time limit, only three incidents are required to establish a חזקה). The גמרא concluded that this is indeed so; according to ר' ישמעאל three אכילות are sufficient to establish a חזקה.

The גמרא asks that according to the חכמים who maintain that three אכילות are insufficient, but rather three years are required, from where do they derive חג"ש. The גמרא understood that since three אכילות are not sufficient to establish a חזקה, that indicates that a חזקה cannot be established by merely three incidents, but rather a (single) long period of three years (almost eleven hundred days) are required to establish this חזקה. The question remains; why is such a long period of time (eleven hundred days) required to establish this חזקה? It should be established as soon as the מערער is aware and is שותק.

רבא offered two explanation, initially. That for the first two years the מערער is either willingly giving up his claim to the produce (perhaps giving it as a gift to the מחזיק) - מחיל, or he is biding his time – לא קפיד; he will protest later. However once three years pass, we may safely assume that no one is willing to donate so much of his produce, and no one is willing to wait such a long time to lodge a complaint. Therefore after three years it is a חזקה.

¹¹ The ideas presented in this appendix are speculative and should be treated as such.

¹² We will assume that the reason is irrelevant; this is what the תורה teaches us.

¹³ An act of שתיקה is, presumably, when the מערער should have protested but did not.

There is a basic difference in understanding the חזקה whether we derive it from שור המועד or whether we accept רבא's ideas. If we derive it from שור המועד, then the שתיקה of the first (two) year(s) is not to be interpreted as a מחילה of the פירות or even not as a קפיד.¹⁴ Rather it may be a sign of genuine שתיקה which perhaps should transfer the חזקה to the מחזיק immediately. However we derive from שור המועד that two נגיחות, even though they indicate that he is a שור נגח, nevertheless they cannot change the status of the שור. Similarly (even) two שתיקות do not have the power of transferring the חזקה from the מערער to the מחזיק. Three שתיקות are required just as ג' נגיחות are required.

However, according to רבא, even one שתיקה would make a חזקה. It is only that רבא claims that during the first two years we cannot be sure that there was a real שתיקה; a tacit admission of a relinquishment of rights. Perhaps it was a מחילה; or perhaps he was biding his time (לא קפיד). If however we would be sure that it is an authentic שתיקה, as by the דבי בר אלישיב, there is no doubt that it would be a חזקה immediately, even with one שתיקה.¹⁵

There seems to be a difference between the two answers of רבא; whether שתא or whether קמייתא לא קפיד וכו', when we view it retroactively after the three years. If we assume that קמייתא מחיל, then even after the three years, that assumption does not necessarily change. During the first two years it still may have belonged to the מערער; he was merely מוחל the פירות. It is only after the third year, that the חזקה is transferred to the מחזיק, because a person would not be מוחל so much of his produce. The שתיקה of (only) the third year is a genuine שתיקה. However if we assume that קמייתא לא קפיד; שתא מערער may have been biding his time; he was planning to protest at a future date, then after three years pass, the assumption is no longer true. He never protested at all. That indicates that he was שתיק right from the beginning. The לא קפיד of the first two years wasn't merely a biding of time; it was an actual שתיקה.

Once רבא gave his two answers that it depends on שתא קמייתא וכו' and תלת (שנים), it seemed to תוספות that (even) according to the חכמים the three years חזקה is not

¹⁴ See 'Thinking it over' # 2.

¹⁵ If, however, we derive חזקה from שור המועד, then even by the דבי בר אלישיב, three שתיקות would be required to establish a חזקה.

merely a single (long) stretch of time, but rather the חזקה can be broken down into three (repetitive) segments, similar to שור המועד. Therefore, even though the חכמים maintain that three אכילות alone are insufficient to establish a חזקה (perhaps because they are not as significant incidents as the נגירות are by שור המועד), nevertheless they can still maintain that חזקה is dependent on three repetitive yearly incidents. This makes ש"ח similar to שור המועד. That is why תוספות felt justified asking his question after רבא gave his answers.¹⁶

רבא asks (only) on the second answer of רבא that שתא קמייתא לא קפיד. Even רבא agrees that after three years have passed and he was not מוחה, we may assume that he was (probably) a שותק all three years; not merely a קפיד. Therefore תוספות asks why does רבא say that he is קפיד only on the third year, which is an arbitrary estimation, forced on us by the משנה, when we can simply say that he may be a genuine שותק all three years (which is the natural assumption)¹⁷ for a person is קפיד immediately, but we derive from שור המועד that there has to be a genuine שתיקה three times, not less.¹⁸ The advantages of this interpretation are dual. The three years are not arbitrary (but derived from שור המועד), and mainly that there would be no question from the דבי בר אלישיב.¹⁹ The תורה requires three (yearly) שתיקות.

שתא קמייתא could not have posed this question (as strongly) on the answer of תוספות מחיל כו'. According to that answer even after the three years passed there is no proof that there was שתיקה the first two years; he could have been מוחל as an owner. There may have been no שתיקה at all. It is not a חזקה comparable to שור המועד where he is actually נוגח the first two times; acting as a full fledged מועד.²⁰ However according to the answer of קפיד, לא, once three years passed that indicates that he was not merely קפיד, but actually שותק.

תוספות answers that we cannot derive three segments of time establishing a חזקה from שור המועד where three incidents, independent of time, create a מועד. Therefore we have to assume that he could not have been קפיד immediately, otherwise the חזקה would have been established right away.

¹⁶ See 'Thinking it over' # 1.

¹⁷ See 'Thinking it over' # 5.

¹⁸ This may be the reason that תוספות phrases his question: 'דכיון דקפיד בג' זימנין ולא מיחה' and not 'כיון דקפיד בפעם הג'.'

¹⁹ See 'Thinking it over' # 3.

²⁰ See 'Thinking it over' # 4.