

## דלא תחזקו אהדדי –

### That you should not establish rights of possession against each other

#### OVERVIEW

רמי and רמא, the two sons of חמא, bought a maid in partnership. To insure that neither should be able to make a חזקה against his brother and claim sole ownership to this maid; they had the maid serve each brother on alternating years so neither would have three consecutive years of חזקה. Our תוספות questions and explains the need for such a scheme and what it accomplished.

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תוספות anticipates the following question:

ואף על גב דתנן לקמן (דף מב,א) השותפין אין להם חזקה זה על זה –

**And even though we learnt further in a משנה that partners cannot establish a חזקה against each other.** Any possessions which partners own in partnership cannot be subsequently claimed by either partner as belonging solely to him on the basis that he is in possession of this item or property. The reason is that since they are partners, neither of them minds if the object is in the possession of either partner. The question arises here, why did the two brothers have to make this special arrangement in order that neither can claim ownership on the basis of חזקה, since they bought this maid in partnership, neither can make a חזקה on this maid against his brother-partner?

תוספות cites an explanation:

פירש רש"י<sup>1</sup> דהכא הוזקו לעשות כן לפי שלא היה להם עדי שותפות –

**רש"י explained that here it was necessary for them to do this;** to divide the servitude of the maid in alternating years, **for they did not have witnesses** that they were **partners**. Therefore if one of the brothers would have been in possession of this maid for three consecutive years, he could have claimed that the maid is his, and his brother was never a partner with him in the maid. The ruling that שותפין have no חזקה is only if there are עדים that they were partners. In the absence of such עדים, if one partner makes a חזקה and claims that he is the sole owner, he is the מוחזק.

תוספות rejects this answer:

וקשיא לרבינו יצחק דאם כן אותו שהחזיק שנה ראשונה יאמר שהוא שלו –

**and the רש"י has a difficulty with s' answer for if this is so;** that there were no

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<sup>1</sup> It is not clear to which 'פירש"י' our תוספות is referring to. This lends some credence to the notion that there was an earlier manuscript of רש"י on ב"ב that did not reach us. Others maintain that the גירסא should be 'ר"ש', and תוספות is referring to the רשב"ם on ודו"ק on רשב"ם.

witnesses that the brothers were partners in this maid, then they have not accomplished much by their scheme, because **that one that was in possession** of the maid for the **first year will claim that** the maid is entirely **his** –

**כיון שאין עדים שיש לחבירו חלק –**

**Since there are no witnesses that his partner owns a share** in this maid. A חזקה of three years is required if the plaintiff - מערער - can prove that he was the original owner. If however the מערער cannot prove that he is the original owner, then the person in possession now, needs no חזקה to be the מוחזק. He is automatically the מוחזק, since he is in possession. If, in our case, there were no עדים that the brothers owned this maid in partnership, then whoever is in possession of the maid now, can claim sole ownership and is considered to be the מוחזק. He will not be required to give the maid to his brother at the end of the first year. What did they accomplish by alternating her years of servitude?!

תוספות offers a different solution:

**ונראה לרבינו יצחק דלא היו רוצים שיחזיק האחד שלש שנים שלא תשתכח השותפות:**

**And it appears to the ר"י** that even though there were עדים concerning the partnership, and seemingly there was no need to be concerned about any חזקות, nevertheless they made this alternating arrangement **because they did not want that any one of them should be in possession for three years, in order that the partnership should not be forgotten.** Presently there were עדים who knew that they were partners. Therefore there was no concern that the one who is in possession of the maid now (in the first year) will claim that it is solely his. However if one would be in possession of this maid for three years, then by that time, (even) the עדים would have perhaps forgotten the partnership. The fact that he is in possession for three consecutive years would lead to the false assumption that he is indeed the sole owner. Therefore by alternating yearly, that would serve as a reminder to all, that they are partners.

## **SUMMARY**

רש"י maintains that since there were no witnesses that the brothers were partners therefore either could have made a חזקה.

The ר"י argues that if there were no עדים, then whoever was in possession could have claimed ownership.

The ר"י maintains that there were עדים, nevertheless they did not want that either should possess the maid for three years, lest people forget that they are partners.

## **THINKING IT OVER**

Does the expression דלא תחזקו אהדדי lean more towards either one of the two interpretations given in תוספות<sup>2</sup>

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<sup>2</sup> See עליות דר' יונה.