

I was in the inner apartments

בשכונני גוואי הואי -

OVERVIEW

The גמרא is discussing the following case. The מחזיק had witnesses that he lived in the house for three years. The מערער claimed that during these three years he – the מערער – lived in an inner apartment. [The גמרא does not clarify what the מערער meant by that.¹] The ruling was that the מחזיק had to disprove the claim of the מערער.

והוא לי אורח² עלך –

And I (the מערער) had a right of way through you.³ This right of way disqualifies the חזקה. The מחזיק did not use his property exclusively; the מערער used it as well; as a pass through. A חזקה established jointly with the מערער is not considered a חזקה.

תוספות qualifies this ruling:

ונראה לי שהיה לו עדים שהיה בשכוני גוואי אבל לא היו יודעים באיזה דרך היה יוצא –

And it appears to me that this ruling is valid (only) in a case where the מערער **had witnesses that** the מערער lived **in the inner apartments, however** the witnesses **did not know by which way did** the מערער **exit** his apartment. They were not sure if he exited through the apartment of the מחזיק (thereby invalidating the חזקה), or if he used a different exit; not through the apartment of the מחזיק (in which case, the חזקה would be maintained).

תוספות now explains the necessity for this requirement:

דאי לא היה לו עדים כלל דהוה בשכוני גוואי היכי הוה קאמר רב נחמן זיל ברור אכילתך –
for if the מערער had no witnesses at all that he lived in the inner apartments;
 but rather it is a claim that the מערער is making without supporting evidence, then
how could have רב נחמן ruled, saying to the מחזיק **go verify your consumption;**
 prove that your חזקה was not invalidated by the מערער passing through your house, this cannot be

¹ The (ד"ה אנא) explains the argument of the מערער to be as follows. I lived in the inner rooms and I would pass through your home (to exit) and I would use, together with you, the outer room, where you lived with my permission. That is why I did not protest י"ט ק"מ ס' ק"מ ס' (See however the ד' ה' (רא"ש ס' ד' ה')).

² The הגהות הב"ה amends this to read **לי דרך עליך**.

³ It seems that תוספות disagrees with the רשב"ם (see footnote # 1), and requires only that the מערער claim that he used the s'מחזיק' house as a pass through. However the מערער need not claim that he used the outer room for his other needs. See 'Thinking it over' # 1.

דאטו יש להם לעדי חזקה לידע שלא היה המערער באותו בית כל שלש שנים –

For is it indeed a requirement that the witnesses, who testify on the חזקה, should know that the מערער was not in the house of the מחזיק the entire three years! It does not seem reasonable; for if that indeed were the case, then it would turn out that -

ואם יאמר המערער הייתי עמך שני ימים ואין לך שלש שנים שלימות –

if the מערער will claim I was with you for two days in your house and therefore you do not have three complete years of חזקה -

והעדים אינן יודעים יפסיד:

And the witnesses do not know for sure whether the מערער was there or not; then it would turn out that the מחזיק **would lose** his חזקה and property because the witnesses cannot substantiate that the מערער never trespassed into the domain of the מחזיק. This seems too extreme.⁴ Therefore it is more reasonable to assume that the מערער had עדים that he lived in the inner apartments. The only question is how did the מערער exit his apartment; through the house of the מערער or an alternate exit. Therefore since this is a reasonable doubt it is up to the מחזיק to resolve it; otherwise he has no חזקה. If however the מערער claims that he spent time in the s'מחזיק's house, but has no evidence to support it, the חזקה will be valid.

SUMMARY

A right of way by the מערער through the property of the מחזיק is sufficient to invalidate the חזקה. However there must be at least reasonable doubt that the מערער had this right of way. In our case the מערער needs to prove that he lived in an inner apartment; even though he may not have exited through the s'מחזיק's property, it casts sufficient doubt on the חזקה to invalidate it, unless the מחזיק proves otherwise.

THINKING IT OVER

1. Why should a right of way invalidate a חזקה? Perhaps the מחזיק bought the house with the stipulation that the מערער has a right of way.⁵

2. How can תוספות compare a right of way to being in someone's house (for two days!)?⁶ A right of way means that you may trespass this property at will; however being in someone's home for a while merely indicates that you were his guest.

⁴ See 'Thinking it over # 2.

⁵ See footnote # 3. See (סעי' ב) רמב"ן וכו' ועי' סוכ"ד אות ע"ז (סעי' ב).

⁶ See footnote # 4.