לפיכך אם נפל הכותל וכולי – Therefore if the wall collapsed, etc.

Overview

The משנה teaches us initially that (under certain circumstances) either partner can coerce his neighbor to share in building a dividing wall. The משנה then concludes: 'לפיכך' – therefore, since either partner can coerce the other to build, we can safely assume that they both built it together. That is why in case the wall collapsed, they both share equally in the material and space of the original wall. We may infer from the משנה that without the 'לפיכך'; i.e. when one partner cannot coerce the other to build a wall, then the דין is not necessarily that they divide equally. If the דין would be that they always divide equally, regardless whether they can coerce one another to build the wall, why does the משנה state 'לפיכך'?! They always divide, regardless! תוספות will be discussing what is the דין without the 'לפיכך'; in a case where they cannot coerce each other to build. תוספות will argue that (seemingly) in such a case we will also say יחלוקו; if we do not know who built the wall. It will be necessary to explain why the משנה states that the דין of חולקים depends on the 'לפיכך'; on the power of coercion to build the wall.

פירוש – The explanation[1] of the word 'לפיכך' – 'therefore', is[2]:

לפי שבונים הכותל בעל כרחם – since we build the wall even **against the will** of one of the partners[3], *therefore* the rule is that they divide the material and the property[4].

תוספות will now explain how is it that we determine that indeed it is required that the wall be built in partnership, even בעל כרחו of one of the partners. There are two options, depending whether we maintain היזק ראיה שמיה היזק or not[5].

או משום דהקנו זה לזה לעשות גודא – Either because they contractually obligated to each other to build a wall.

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[1] One may think that the meaning of לפיכך is that since we know that they built the wall together, therefore they divide. תוספות negates this interpretation. That would be too obvious. If we know that they built it together, then obviously they divide the מקום ואבנים. Rather the explanation of לפיכך is, that we know that either partner can coerce the other to build, but not that we know that they actually built it in partnership.

[2] When we say לפיכך' – therefore', this presumes that there is a prior cause which triggers the effect, the resultant 'therefore'. תוספות is explaining what is causing the effect that they divide the material and the space.

[3] Either of the partners can coerce the other to build the wall according to the specification of the משנה.

[4] The assumption is that since either partner can coerce the other to build the wall in partnership, he will certainly do so. No one partner can later claim that he built the wall on his own (and solely on his property). We assume that neither built the wall alone; rather they built it together.

[5] See the גמרא immediately following the משנה. The concept of היזק ראיה is that either party may be suffering a loss of value of his property since he cannot use it to its fullest extent. He is hampered by his neighbor who can see all that he is doing. The dispute in the גמרא is whether this damage warrants that the aggrieved party can coerce the neighbor to join him in building a wall, or not.

ללישנא קמא - This is according **to** the **first opinion** in the גמרא, which maintains that היזק ראיה לאו שמיה היזק. This opinion maintains that the only way one partner can coerce the other to build a wall (according to the specification of the משנה), is if they initially agreed (with a קנין) to build a wall[6]. When this wall collapses they will divide everything between them as the משנה states, providing that it is –

וכגון דידוע לנו עדיין – in the instance where it is still known to us –

וזוכרים שהקנו זה לזה – and we remember that they contractually obligated to each other to build the wall. In such a case even though we are not aware of the details of their obligation, it is irrelevant. Once a general commitment was made, each partner is obligated to follow the specification of the משנה and can be coerced to do so[7]. This is the explanation according to the לישנא קמא who maintains היזק ראיה לאו שמיה היזק.

תוספות continues with the second option:

ולליטנא בתרא – And according to the concluding opinion which maintains that היזק ראיה שמיה היזק, there is no need to remember anything. We assume that they both built the wall –

משום היזק ראיה – on account of the היזק ראיה. Any partner can always coerce the other to build a wall between them. The other partner must contribute to this wall as the משנה specifies. According to this לשון, the 'לפיכך' of the משנה is universal. The דין of חולקים applies in all situations in a חצר.

According to either option mentioned above we divide the wall because we assume that both partners contributed equally to this wall. That is what the 'לפיכך', means. It would seem that if for any reason we cannot assume that both partners built the wall, then we would not say המקום והאבנים של שניהם, for we are not sure that it belongs to both of them. What would be the ruling in such an instance? תוספות is presently discussing this issue.

ואם תאמר ומאי איריא – You may ask; why is the משנה **teaching** us that the partners divide –

משום דבונין הכותל בעל כרחם – since they must[8] build they wall. We therefore assume that they indeed built the wall together.

בלאו הכי – without this assumption that they both built the wall –

נמי הוי של שניהם – it would also belong to both of them, when it collapses. There would be no choice. We do not know who built it. It is an equal ספק. Therefore בי"ד will rule that יחלוקו. How else can we rule?! The question is why the משנה implies that the (sole) reason for יחלוקו is 'לפיכך', since we assume that they both built it. The דין would be יחלוקו regardless; even if we are not sure who built the wall.

תוספות anticipates a possible solution to this question, and rejects it. It is possible that if we do not know who built the wall, בי"ד will award it to one of the partners. If the wall

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[6] They did not specify at the time of this agreement as to the details of the wall. Either partner can subsequently coerce the other to build it according to the prescribed specifications of the משנה.

[7] If, however, we do not remember that there was a קנין, then according to this opinion, it seems that if the wall collapses we may not necessarily say יחלוקו. We are not certain who built the wall. The משנה when it says 'לפיכך' is not discussing this case. It is only discussing the case where we know that there was a קנין.

[8] Each partner may coerce the other to build it.

collapsed into the property of one of the partners, and that partner claims that he alone built the wall, בי"ד will award it to him. That partner has possession of the stones. He will be considered a מוחזק[9]; בי"ד will say to the other partner המוציא מחברו עליו הראיה. Bring proof that you contributed to this wall, and we will award it (partially) to you (as well). This is the case the משנה is referring to[10]. It is understood now why the משנה says 'לפיכך'. It is only because we assume that both built the wall; that is why we say יחלוקו even if one is a מוחזק (the stones are in his possession)[11]. If however there would be no 'לפיכך'; if we could not assume that both built the wall, then there would be no יחלוקו in the case where it collapsed into one partner's רשות. Rather the דין would be המוציא מחברו עליו הראיה.

תוספות rejects this solution for -

אפילו נפל לרשותא דחד מינייהו – even if the wall **collapsed into the property of one** of the partners, the דין would still be יחלוקו; even if we are not certain that both built it. The fact that the stones are in the possession of one party does not make him a מוחזק. The other party is not a מוציא מחברו. In such a case also, the דין is יחלוקו. The question remains: why the 'לפיכך'?!

תוספות will go on to explain and to prove that even if נפל לרשותא דחד nevertheless we say יחלוקו without the 'לפיכך'.

כיון דליכא חזית לא לזה ולא לזה – since neither of the partners has a חזית[12] to prove that the wall is his[13]. Therefore we will say יחלוקו[14].

תוספות will prove that when there is no חזית we say יחלוקו without the 'לפיכך', even if נפל לרשות דחד:

כדפריך בגמרא גבי בקעה – as the גמרא asks[15] concerning a 'valley'. The משנה states that by a בקעה, if both parties consent to build a dividing wall they should make a חזית on both sides of the wall, to insure their equal ownership rights to the wall. The גמרא asks; why should they both make a חזית? –

לא יעשו חזית לא לזה ולא לזה – neither should make a חזית. There should be no חזית at all and everyone will realize that it belongs to both[16]. This concludes the quote from the גמרא. תוספות continues with his proof.

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[9] This type of מוחזק is not because the חזקה 'proves' that it is his. Rather the fact that the disputed object is in his actual possession, automatically makes the other claimant a מוציא מחבירו (under certain circumstances), and therefore the burden of proof is on the מוציא.

[10] See the גמרא ד,א the line beginning שניהם.

[11] There is good reason to assume that both built the wall; since either one can coerce his partner to participate, we assume that he did so.

[12] A חזית is a certain סימן made on the כותל to prove ownership.

[13] It seems evident from תוספות later, that the lack of a חזית is not proof that he did not build it. Rather the lack of a חזית is a lack of proof that he did build it. See footnotes # 21 & 35.

[14] In this case, without the 'לפיכך', the חלוקה will be מספק, as opposed to the case of 'לפיכך' that it is a חלוקה וודאית.

[15] דף ד,ב.

[16] The גמרא there answers that indeed a חזית is generally not needed at all. The משנה is discussing a particular situation where a double חזית is needed.

ואי הוי דהאיך דנפל לרשותו – and if the דין would be **that it belongs to the party, into whose property** the wall **fell**, then –

מאי פריך – how can the גמרא **ask** that there be no חזית at all –

הא צריך לעשות חזית – it is obviously necessary to make a double **חזית** in case

שלא יפול לרשות אחר – it should fall into the other property, that owner should **not** be able to claim -

ויאמר שלו הן – and say that it is his wall. If there will be a double חזית then no matter where the wall falls no one will be able to claim falsely that he alone built the wall. There is the double חזית to prove otherwise. If however there is no חזית at all, then if we were to consider the one in possession to be a מוחזק, the other will lose out without the חזית. The fact that the גמרא maintains that no חזית needs to be made, proves that even if the stones are in either party's possession he is not a מוחזק and the דין is יחלוקו, (even) if we do not know who built the wall.

תוספות has proven (from the דין of בקעה) that even if it fell into the רשות of either partner, he is not considered a מוחזק, even if we do not know who built the wall. The question, however, is why indeed is he not considered a מוחזק. תוספות will cite several cases, seemingly similar to our case, where the lone fact that the article in dispute is in someone's רשות, this alone confers upon him the status of a מוחזק.

והא דאמרינן בהשואל (בבא מציעא דף ק,א) – And that which the גמרא **says in** פרק **השואל**

גבי מחליף פרה בחמור – concerning the case in the משנה where one **exchanges a** (pregnant) **cow for a donkey**; The exchange was effected by the owner of the original cow making a קנין חליפין on the donkey and acquiring it for himself, thus automatically transferring the cow into the possession of the original owner of the donkey. The pregnant cow was not present at the transaction. After the transaction they became aware that the cow had given birth to a calf. We are not certain when the calf was born. If it was born before the transaction, then the calf belongs to the original בעל הפרה[17]; if it was born after the transaction it belongs to the new בעל הפרה (the original בעל החמור). The משנה there states that the דין is יחלוקו. The בעל הפרה and the בעל החמור divide the value of the calf. תוספות will shortly cite the comment of the גמרא on this ruling . -

וכן בריש הבית והעלייה (שם קטז,ב) – and similarly in the beginning of פרק **הבית והעלייה,** the גמרא makes the same comment. The משנה there states that if two people own a house and an attic as partners; one owns the house and the other owns the attic. If the entire edifice collapses they divide all the material equally. Neither can claim that the whole bricks are his and the broken bricks belong to the partner, since we cannot recognize to whom these unbroken bricks belonged to originally. In both these cases the גמרא challenges the משנה:

וליחזי ברשותא דמאן קיימא – let us see, in whose possession is the disputed article **found** –

וליהוי אידך המוציא מחבירו עליו הראיה – and the other party **will be considered** as **one who** attempts **to seize from his friend,** in which case the burden of

[17] The transaction was to exchange (only) the פרה for the חמור; not a פרה וולדה.

proof is on him. If the calf or the whole stones are in either of the parties' possession, that person is a מוחזק and he gets to keep the calf/stones[18]. The other party must prove that the calf /stones are his. If he cannot prove it, we leave it by the [19]מוחזק. We see from these גמרות that by a ספק the מוחזק retains the disputed article. We do not say יחלוקו in face of this [20]חזקת ממון. The same should seemingly hold true in our case. If the wall collapsed into one רשות, that person should retain the stones, since he is the [21]מוחזק. This would answer תוספות original question. Without the לפיכך, if we cannot assume that they both built the wall, then indeed if it fell לרשותא דחד, we would not say יחלוקו, but rather המוציא מחברו עליו הראיה (as we say in ב"מ by the calf/stones). However since we know for sure that they are partners (since they both must build the wall together, as previously explained) – therefore – 'לפיכך' the דין is חולקים![22]

תוספות rejects the comparison of our case of השותפין to the cases in ב"מ of the 'calf/stones'. The fact that there, in ב"מ, the דין is that whoever is in possession is the מוחזק, does not require that here in ב"ב, he is also a מוחזק. The cases are different; as תוספות goes on to explain. In ב"מ the reason why he is considered a מוחזק –

היינו משום דהתם – is because there in ב"מ by the 'calf/stones'

מתחילה מבורר היה הדבר – originally (before the transaction and before the house collapsed) **the situation was clear.** The (fetus of the) calf belonged to the original בעל הפרה. We know whose stones belong to the בעל הבית, and whose stones belonged to the בעל העלייה. There was no ספק originally.

וברשות אחד מהן נולד הספק – The ספק was created while **it was in someone's possession.** There was never a moment when there was a ספק that there was not a מוחזק. The ספק did not precede the חזקה. In fact the חזקה preceded the [23]ספק. Therefore, that type of חזקת ממון, where the ספק does not precede the חזקה, it is a valid חזקה.

אבל הכא – however here in השותפין where we are discussing what the דין should be without the 'לפיכך', namely if we are not certain who built the wall, then –

מעיקרא נולד הספק – the ספק to whom the wall belongs, **was created originally**, from the moment the wall was built, before there was any מוחזק. תוספות illustrates this point:

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[18] In the case of the calf he receives the entire calf. By the stones he can retain all the whole stones that are on his property, but must give an equal amount (by volume, weight, etc) of broken stones to the other party כמובן.

[19] The גמרא answers there, that the משנה is discussing a case where it is in neither רשות. However if it would be ברשותא דחד the דין is המוציא מחברו עליו הראיה.

[20] תוספות cited these two cases as proof that we say הממע"ה, because they have similarities to our case of השותפין. In all these cases the חזקה does not prove anything at all. There is a serious doubt as to the ownership of the disputed item even after the חזקה. In addition in these cases the חזקה was not there originally. The person was not always מוחזק in the object; it occurred eventually. There was a time that we know that he was not the מוחזק.

[21] See footnote # 13.

[22] Were we to accept this answer, there would in turn be a difficulty by בקעה; how can we say לא יעשו חזית?! It may fall לרשותא דחד.

[23] When we became aware of the ספק (the birth of the calf, the collapse of the house) the disputed article was already in someone's רשות.

ואם היו באין לחלוק – for if they would come to בי"ד and argue how **to divide** the wall.

בעוד שהכותל קיים – while the wall was still **standing** before it collapsed. If each one would claim that he built the (standing) wall, the דין would be –

היו חולקין בשוה מספק – they would divide the wall **equally, since** there is a **ספק** as to who built the wall. תוספות will soon conclude his thought; that since originally there is a ספק before there is a חזקה, and as a result of this ספק we say יחלוקו, therefore the חזקה that follows this יחלוקו does not have the power to deprive either of them of their rights in half the כותל.

However תוספות anticipates a certain difficulty in this assumption that if they would come to בי"ד to dispute the standing wall, בי"ד would rule יחלוקו. Generally there is an ongoing מחלוקת between סומכוס and the חכמים by ממון המוטל בספק. סומכוס maintains that when in doubt, we say יחלוקו. The חכמים on the other hand disagree and argue that we do not say יחלוקו but rather המוציא מחברו עליו הראיה. Why is תוספות presuming that if they would come while the wall was still standing that בי"ד would say יחלוקו?! This is only the opinion of סומכוס; the חכמים disagree. תוספות presently addresses this issue. The דין will be יחלוקו –

אפילו לרבנן דסומכוס – even according to the רבנן who argue **with סומכוס**

דלית להו ממון המוטל בספק חולקין – and they do not maintain that you divide monies that are in doubt to whom they belong, but rather we say המוציא מחברו עליו הראיה, nevertheless -

הכא מודו - they will agree here in this case of dividing the wall that we do say יחלוקו

כיון דליכא חזקה הכא לזה יותר מלזה – for here (when the wall is standing), **neither party has a greater חזקה.** There is no מוחזק while the wall is standing. We cannot say המוציא מחברו עליו הראיה; there is no מוציא and there is no מוחזק. Therefore the חכמים agree that we say יחלוקו. We have established that the דין is יחלוקו when the wall is standing even according to the חכמים.

תוספות returns now to conclude the previous thought; that since in our case the ספק preceded the חזקה, and in fact בי"ד would have awarded each partner half of the standing wall.

הלכך – therefore it is understood why the חזקה after the wall collapsed is not valid. For –

אפילו נפל לרשותא דחד מינייהו – even if it eventually **fell into the רשות of either of** the partners

לא יפסיד האחר כחו – the other should not lose his right. He would have been awarded half by בי"ד; nothing really changed with the collapse of the wall. The same ספק that there was before the wall fell, exists now as well[24]. The fact that the wall fell in

[24] This is in contrast to the two cases in ב"מ. By מחליף פרה בחמור there is a new ingredient; the calf was born during the חליפין process. We are not certain whether immediately before or immediately after. No one can claim the calf based on the previous situation. Everything changed with the חליפין process and the birth of the calf. Therefore the חזקה resolves the ספק in favor of the מוחזק. Similarly by הבית והעלייה; there is no prior claim. It should be borne in mind that they both agree that half the stones belong to each; they are only disputing which stones. It is not recognizable to whom the (whole) stones belong to. The situation has

someone's רשות certainly does not change anything. This חזקה does not give him any additional rights than what he had before, namely that they each receive half the wall.

תוספות refers back to his original statement that if the שותפין would go to בי"ד while the wall was standing, בי"ד would rule יחלוקו even according to the רבנן, since there is no מוחזק and no מוציא. תוספות again questions this assumption:

והא דלא אמר הכא – And the reason **we do not say here** in the case of השותפין where we do not know who built the wall, and they came to בי"ד when the wall was standing, we do not rule that –

כל דאלים גבר – whoever is stronger overpowers the other and retains the disputed article

כמו בזה אומר של אבותי – just as we say concerning the case where **one says** this **belonged to my parents** (לקמן לד,ב) and the other claimed that it belonged to his parents. The case in question is where two people are arguing over a ship (or a parcel of land), each claiming that it is his, for he inherited it from his parents. Neither has any proof at all that it belongs to them, or that it belonged to their parents. The rule is כל דאלים גבר. Whoever is stronger may overpower his opponent and take possession of the ship/field. We do not say יחלוקו. תוספות asks that perhaps here by the שותפין with the standing wall, we should also say כל דאלים גבר and not יחלוקו.[25]

תוספות answers that we cannot compare the case of השותפין to the case of זה אומר של אבותי.

התם הוא - over there, by the case of זה אומר של אבותי we say כל דאלים גבר and not יחלוקו, because –

דליכא דררא דממונא – there is no monetary attachment[26] between either of the litigants with the article in dispute. We have no reason to suspect that either of them have an interest in the disputed article. In fact it may not belong to either of them. Or it may belong to one of them.

אבל הכא איכא דררא דממונא – however here by השותפין **there is a דררא דממונא.** When we notice a wall between two adjoining properties we automatically assume that both (or either) of the adjoining property owners has an interest in this wall. When there is no דררא דממונא there is no reason to say יחלוקו. When בי"ד rules יחלוקו we are awarding each individual, part of the object. There is no compelling reason to award them anything. It could be they both do not own anything in this article. בי"ד tells them we have no way of verifying the veracity of your statements, therefore you are on your own, so to speak. However when there is a דררא דממונא there is compelling reason to award each of them half. It is evident that each party has (at least a possibility of) an interest in this article by

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changed. There was no doubt before the collapse of the house. After the collapse there is a new ספק. This is resolved by the חזקה.

[25] Were we indeed to say כל דאלים גבר by השותפין, then the previous line of reasoning which differentiated between the case of השותפין and the cases in ב"מ would be refuted. The fact that the ספק preceded the חזקה would be irrelevant. When the ספק existed the rule would have been כל דאלים גבר, meaning that possession determines ownership. This continues to be the rule after the wall collapses. If it fell in one's רשות, he is the אלים גבר.

[26] See תוספות ב"מ ב,ב ד"ה היכא (and ב"ב לה,ב ד"ה דררא) who interprets דררא דממונא to mean that בלא טענותיהם יש ספק לבי"ד – without their claims בי"ד is in doubt as to whom the object belongs to. It is a self generated doubt. In the case of זה אמר של אבותי there is no self generated doubt. The ספק is created by the litigants only.

virtue of the circumstances itself. בי"ד needs to protect that interest. It does so by ruling יחלוקו. Therefore in the case of השותפין as well as in the cases of מחליף פרה בחמור and הבית והעלייה, we say יחלוקו.

In conclusion: תוספות proved that if the wall between two adjoining properties, fell לרשותא דחד, that person is not a מוחזק, even if we are not sure who built the wall. The דין in such a case will be חולקים. The question remains; why does the משנה say 'לפיכך'?! The 'לפיכך' indicates that the דין is חולקים only because we are assuming that they both built it. This is not true. The דין will be חולקים even if we are not sure at all who built it; and even if נפל לרשות דחד. תוספות will now answer the original question:

ומתרץ רבינו יצחק דהיינו הך דפריך בגמרא – And the ר"י answers that indeed the גמרא actually asks this question[27] -

פשיטא – It is obvious that the דין is חולקים! The גמרא questions: why does the משנה say 'לפיכך וכו' חולקים', it is obvious. The literal way of understanding the question is; once the משנה taught us that they must build the wall it is obvious, that when the wall collapses it belongs to both of them, since they both built it. תוספות, however maintains this is not the intention of the גמרא. Rather the question of the גמרא is -

כדפירש בקונטרס – as רש"י explains it.[28] רש"י explains the question as follows: why does the משנה connect the דין of חולקים with the previous ruling that both have to build the wall;

דאפילו לא פסיק לן תנא דמתניתין – for even if the תנא of our משנה would not have ruled –

שמתחילה בין שניהם עשאוה בעל כרחם – that originally they both (were **required to) build it together**, nevertheless the דין would have been –

היו חולקין בשוה – they would be required to **divide** everything **equally,**

ואפילו דנפל לרשותא דחד מינייהו – and even if it fell into the property of either **one,** they would still have to divide[29].

כדמוכח גבי בקעה – as is evidenced concerning the case of **בקעה,** which תוספות mentioned previously[30]. תוספות maintains that his question and the question of the גמרא when it asks 'פשיטא!', are identical[31]. What indeed does the גמרא answer on this question? תוספות continues to cite the גמרא:

ומשני לא צריכא דנפל לרשותא דחד מינייהו – and the גמרא **answers; 'it was not necessary** to utilize the 'לפיכך', except in a case **where it fell into one** person's **property'.** This concludes the quote from the גמרא. However this answer is seemingly not sufficient. תוספות has already made it clear that even without the 'לפיכך' the דין would be יחלוקו even if נפל לרשותא דחד. What is the answer?! תוספות continues:

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[27] דף ד,א .

[28] See רש"י ד,ב ד"ה פשיטא. See following footnote # 29.

[29] רש"י does not state this at all. When תוספות says כדפירש בקונטרס, he is referring to the general thrust of the question 'פשיטא'. It is not to be understood literally, but rather the way רש"י and תוספות interpret it.

[30] See the main text by footnote # 15 & 16.

[31] It may be appropriate to summarize the question as follows: Since even without the 'לפיכך', the דין is יחלוקו, then certainly with the 'לפיכך' the דין is surely יחלוקו; it is פשיטא! See פני שלמה.

פירוש – The explanation of נפל לרשותא דחד מינייהו is that the material that fell into that person's property -

ושהו ברשותו הרבה – remained in his property for an **extensive** period of time[32]. The other partner did not come to claim the stones until a much later date from when they originally fell; therefore –

מהו דתימא – one may have thought –

כיון דשהו ברשותו הרבה – since they were in his possession for so much time

ניהמניה שעשאוה כולה – we should believe the מוחזק if he claims **that he built the entire** wall himself. How can we believe him [if we assume that they are both obligated to build the wall] (alternately, תוספות has already taught us that he is not a מוחזק since the חזקה followed the ספק)? תוספות explains that we should believe him that he built the wall by himself, since he has a –

מיגו – מיגו דאיבעי אמר ממך לקחתיה, for he could have claimed I bought the stones **from you** after the wall collapsed. Had he actually claimed that he bought the stones from him, the דין would be that –

והיה נאמן – he would have been believed[33]. Therefore now that he is claiming that he built it himself, I may have thought that he should be believed with this 'מיגו', that he could have said, 'I bought the stones from you'. This מיגו is valid only because it was שהו ברשותו הרבה, if however the other partner came immediately to claim the stones, there is no מיגו of לקחתיה ממך. Even if he would argue that לקחתיה ממך he would not be believed if לא שהו ברשות הרבה, since it is normal that when the wall falls it may fall in anyone's רשות. He cannot claim that he bought it, if the neighbor comes to claim it within a reasonable time.

תוספות anticipates a challenge to this assumption that if שהו הרבה ברשותו, the מוחזק is believed to say ממך לקחתיה.

ואף על גב דאמר בריש הבית והעלייה – and even though the גמרא **states in the beginning of הבית והעלייה** פרק

דשותפין לא קפדי אהדדי – that partners are not particular towards each other. Generally people are particular and insistent that their belongings be in their possession. Therefore if an article is in someone's possession we assume that it is his. Any other person, who claims it, must prove ownership. If it is indeed his, how come someone else possesses it? This rule does not apply by partners. If people own a business in partnership, neither can claim that any article associated with the business belongs solely to him, even if it is in his private possession; for שותפין לא קפדי אהדדי, they are not particular whether their business items are in either partner's possession. In our case, we consider the wall a partnership. They were both obligated to build the wall together[34]. They are considered partners in this wall. It would seem to follow that even if the collapsed wall remained an extended time ברשותא דחד, he still cannot claim ממך לקחתיה, since שותפין לא קפדי אהדדי.

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[32] See 'Thinking it over # 1.

[33] This is true even after the 'לפיכך'; even if we know that they both built the wall he is believed to say לקחתיה ממך if it was שהו הרבה. See 'Thinking it over # 2.

[34] See מהר"ם on our 'בא"ד והא דאמרינן' בסוף ד"ה תוספות. Alternately, since he is claiming לקחתיה ממך, there is a tacit admission that originally they were partners in the wall. He should therefore not be considered a מוחזק.

תוספות responds:

הכא מיירי דשהו יותר מכדי רגילות – here by השותפין, **it is a situation where it remained more than it is customary.** It was in the possession of the מוחזק an inordinate amount of time. Can we assume –

דאטו משום דשותפין נינהו – that just **because they are partners –**

לא יקפידו עד עולם – they will never mind if an article that one has in interest in, should remain in the possession of his partner for ever?! Obviously it is not so! The rule of אהדדי קפדי לא שותפין also has time limits. Our case of השותפין is in a situation where this time limit was exceeded. Therefore if the מוחזק would claim ממך לקחתיה he would be believed. That is why if he claims that he built it, he would be נאמן במיגו of ממך לקחתיה; if we were not certain that they both built it together.

תוספות anticipates an additional question on his assumption that the מוחזק is נאמן to claim ממך לקחתיה since it was שהו ברשותו הרבה.

ולא דמו לגודרות – and we cannot compare our case of השותפין **to** the case of **'herds'** of sheep; concerning which the דין is –

דאין להם חזקה (לקמן דף לו,א) – there is no חזקה for herds of sheep. If it was known that a particular flock of גודרות belonged to 'A'. A while later these גודרות were in the possession of 'B' who claims that he bought them from 'A', who, in turn, denies the sale. The דין is that the גודרות revert back to 'A', since 'B' has no proof that he bought them. The fact that they are in his possession is no proof of ownership, since גודרות move on their own. It is very possible that the גודרות left 'A', by themselves and wandered over to 'B'. Therefore 'B' never has a חזקה, no matter how long the גודרות are in his possession. This seems to contradict what תוספות said that if שהו הרבה, there is a חזקה; why by גודרות is there no חזקה, no matter how long they are in his רשות?!

תוספות answers that there is a distinction between השותפין and גודרות. By גודרות there is no חזקה ever –

לפי שאין ידוע ביד מי הם – for it is not known in whose possession they are! 'A' does not know where his גודרות went! He is looking all over for them! We cannot fault him for not going to 'B' and claim the גודרות. 'A' had no idea that they were by 'B'!

אבל הכא – however here by השותפין we can fault the מוציא. If they were indeed his, and he did not sell them to the מוחזק, then –

לא היה להשהותו כך כך ברשותו – he should not have let them remain so long in the possession of the מוחזק. The מוציא knew that they are by the מוחזק! The fact that he did leave them by the מוחזק for such a long time gives credence to the claim of the מוחזק that ממך לקחתיה, and he is believed.

תוספות has established that in the case where [we are not sure who built the wall and] the wall collapsed לרשותא דחד and it was שהו ברשותו הרבה, the דין is that the מוחזק is; a) believed to claim ממך לקחתיה; and b) is therefore believed to claim that he built it, since he has the מיגו of ממך לקחתיה. We return to the original question of תוספות and the גמרא. Why is the דין of חולקים dependent on the חיוב to build a כותל? Seemingly the דין of יחלוקו will always apply even without the חיוב to build. The answer is that in a case where שהו ברשותו הרבה, the מוחזק has a מיגו of ממך לקחתיה and is therefore believed if he claims that he built it (if

there would not be a חיוב לבנות). We might have thought that even when there is a חיוב לבנות, he should still be believed that he built it himself since he has the מיגו of ממך לקחתיה. The חיוב לבנות does not contradict the טענה of ממך לקחתיה, and seemingly does not contradict the argument that בניתי כולה. It is possible that he built it himself and has ceded his right to coerce his neighbor. The מיגו should support this contention. That is the answer to the פשיטא. It is not obvious that we divide the wall; we may have thought that the מיגו is sufficiently strong to award the מוחזק the entire כותל –

קא משמע לן – the משנה teaches us with the phrase לפיכך וכו' של שניהם', that -

כיון דמעיקרא על שניהם היה לעשות – since initially they were both required to build the wall

לא מהימן לומר שהוא עשה הכל – he (the מוחזק) **is not believed to claim that he built it all** by himself, even though he has a מיגו. Had he said ממך לקחתיה he would have been believed (even if we know that they both built it together), nevertheless now that he is not claiming ממך לקחתיה, but rather that he built it, the מיגו is not sufficient to support his argument –

דמיגו במקום עדים הוא – for it is a מיגו which contradicts witnesses. If there were witnesses that they both built the wall together, and the מוחזק would claim that he built it himself, even if he has a מיגו of ממך לקחתיה, he would not be believed. The proof of עדים is much greater that the 'proof' of the מיגו. In the case of our משנה even though there are no actual עדים to testify that they both built it, however it is considered as if there are עדים that they both built it –

דאנן סהדי שלא עשאה לבדו – for we (בי"ד) **are the witnesses that he did not build** the wall **himself.** This does not mean that we actually know that they both built the wall, but rather we are certain in our minds that neither built the wall by themselves –

כיון שהיה יכול לדחוק את חבירו בדין – since he was able to pressure his friend legally

שהיה עושה עמו – that the friend **should built it** together **with him.** No person would forfeit this right to have the partner share in the expense of the wall, and rather do it on his own. This then is the חידוש of the משנה when it says לפיכך, that even though he may have a מיגו, nevertheless he is not believed and we say חולקים, because there is the אנן סהדי which is stronger than the מיגו.

All of the above apply only when there is the אנן סהדי, and the resultant לפיכך. In a case where there is no אנן סהדי, either according to the מ"ד that היזק ראיה לא שמיה היזק, in a case where we do not know that they agreed to build a כותל, or in a בקעה according to everyone, the דין will be different, as תוספות concludes:

אבל בבקעה – however in a בקעה, where there is no חיוב to build a wall, the דין is different. If a כותל was built in a בקעה, without a חזית, and the wall collapsed דחד ברשותא –

אם שהו הרבה – if it remained in his רשות for an **extended time**

היה נאמן לומר שעשאה – the מוחזק **would be believed to claim that he built it** by himself, even though there was no חזית to substantiate his claim. The reason he is believed is because he has -

במיגו דאי בעי אמר לקחתיה מיגו, for he could have claimed I bought it from you; in which case he would have been believed since it was שהו ברשות הרבה, as

תוספות explained previously. The מיגו is sufficiently powerful that it overrides the lack of a חזית.[35]

והאי שינויא - The abovementioned **answer**
אינו אלא מאבנים – explains **only** the חידוש that they divide **the stones** in spite of the מיגו that the מוחזק has.
אבל מקום הכותל – however concerning **the place of the wall,** which the משנה teaches that they divide that as well –
לעולם פשיטא דחולקין אותו – it was always obvious that the place **is divided** among the two parties. We do not need the משנה to teach it to us. Concerning the מקום there is no מוחזק, and therefore no מיגו. Even if we are not aware at all who built the wall (in a בקעה for instance, without a חזית), we would still divide the place of the wall.[36]
Why then does the משנה teach us that we divide the מקום הכותל as well, since it is obvious and unrelated to the דין of מחייבין אותו? תוספות replies:
ואיידי דנקט אבנים נקט המקום – however since the משנה **mentioned** that they divide **the stones, he** also **mentions** that they divide **the place**[37] since in fact it is true, and did not require any major elaboration on part of the משנה.

<u>Summary</u>
When there is a wall between two properties (in a בקעה) and there is no indication at all who built it, the דין is that if the wall collapsed they divide the place and the stones between both neighbors, even if the wall fell into one person's property. We know this is true, because the גמרא contends that when two people jointly build a כותל בבקעה, there is really no need to build a חזית at all. For even if it will fall לרשותא דחד the דין will still be חולקים.
There is no מוחזק in this case as opposed to the cases of מחליף פרה בחמור and הבית ועלייה, for there the חזקה precedes the ספק, while here the ספק precedes the חזקה.[38]
The ספק originated with the building of the wall. While the wall was standing, if each of the neighbors claimed it as his, the דין would be יחלוקו, since there is neither מוציא nor a מוחזק. We would not say כל דאלים גבר since there is a דררא דממונא. This דין carries over to the collapsed wall, regardless where it fell.
However in a situation where the wall remained ברשותא דחד for an unusual extended period of time, then in the above situation, where there is no hint as to who built the wall, the one in possession would be believed to claim that it

[35] The lack of a חזית is not a proof that he did not build it himself; rather it is merely a lack of proof. The מיגו therefore is the proof that he did indeed build it. See footnote # 13. See 'Thinking it over # 3.
[36] In a כותל בקעה without a חזית, if it was נפל לרשותא דחד and it was שהו ברשותו הרבה, the דין would be as follows: The מוחזק would retain the אבנים, since he has a מיגו of לקחתיה. However the מקום הכותל is divided equally. (The same would obviously also apply if he actually claimed לקחתיה.)
[37] One may have wondered, since the משנה mentions only the אבנים and not the מקום, perhaps the מקום has a different דין. To remove any such misconception the משנה states both.
[38] This is commonly referred to as תפיסא לאחר שנולד הספק.

is his, for he has a מיגו of ממך לקחתיה. Had he claimed ממך לקחתיה he certainly would be believed. Therefore he is also believed to claim אני בניתי כולה.
If, in the above case of שהו ברשותו הרבה, we are aware that they were required to build it jointly, then if he claims ממך לקחתיה, he would be still be believed. The requirement of building it together does not preclude the possibility of a subsequent purchase by the מוחזק. He is considered a מוחזק, if שהו ברשותו הרבה, despite the fact that שותפין לא קפדי אהדדי, since it is such a long time, even שותפין would not allow this to happen.
If however in the above case the מוחזק claims בניתי כולה he is not believed, even though he has a מיגו of ממך לקחתיה. It is considered a מיגו במקום עדים. Common sense testifies that no one will willingly forfeit his right to coerce his neighbor to build a wall jointly, and instead build it himself.
It is this case that the משנה is referring to when it states that (only) לפיכך וכו' חולקים. Without the לפיכך the מוחזק will be נאמן במיגו דממך לקחתיה, however the לפיכך tells us that it is a מיגו במקום עדים, when there is a חיוב לבנות jointly.

<u>Thinking it over</u>

1. Why does the גמרא answer 'דנפל לרשותא דחד'? According to תוספות that was assumed in the question! The גמרא should have answered that it was שהו ברשותו הרבה. It seems that the עיקר חסר מן הספר!

2. Why is ממך לקחתיה believed (even) if שהו ברשותו הרבה,[39] why don't we say it is a תפיסא לאחר שנולד הספק?

3. In the case of a בקעה, and שהו ברשותו הרבה, where the מוחזק claims בניתי כולה; does he need a מיגו of ממך לקחתיה to be believed or can he be believed directly because of his טענה בניתי כולה, since it was שהו ברשותו הרבה?[40]

4. In a בקעה where both agree to build the wall together, seemingly a חזית is not really required. Should we not require a חזית in order to protect the מוציא in case it was שהו ברשותו הרבה by the מוחזק?

[39] See footnote # 33.
[40] See footnote # 35.