

**This one made a חזקה in the trees, etc.**

**זה החזיק באילנות כולי –**

## **OVERVIEW**

The גמרא cites a מחלוקת between רב זביד and רב פפא regarding two people, one of whom made a חזקה in the trees and the other made a חזקה in the land. רב זביד maintains they each acquire that which they made a חזקה on, while ר"פ maintains that the מחזיק באילן acquires the trees and half the קרקע, while the other receives only half the קרקע. There is a dispute between the רשב"ם and תוספות as to what is meant here by החזיק.<sup>1</sup>

פירש הקונטרס<sup>2</sup> דלאו בחזקת ג' שנים איירי –

**The רשב"ם explained that the גמרא is not discussing the three year חזקה –**

**אלא שמכר לזה קרקע ולזה אילנות והחזיק כל אחד בשלו כגון דרפק בה פורתא –**

**But rather, the owner sold one the land and sold the other the trees (on this land) and each one (of the purchasers) made a חזקת קנין on his purchase, for instance the buyer of the land dug up some of the land (which is a valid חזקה) –**

**ובעל אילנות פשחינהו כדאמר לקמן<sup>3</sup> האי מאן דפשח דיקלא אדעתא דדיקלא<sup>4</sup> קני –**

**And the purchaser of the trees pruned the trees, which is also a valid חזקה, as rules later in the גמרא, 'this man who pruned the tree for the benefit of the tree, he acquires the tree'.**

The ר"י disagrees:

**וקשה לרבינו יצחק דלא הוה ליה למיקבעיה אמתניתין דהכא דאיירי בחזקת ג' שנים –**

**And the ר"י has a difficulty with this interpretation, for the גמרא should not have placed this discussion about חזקת קנין on our משנה here (of חזקת הבתים) which discusses חזקת ג' שנים –**

**אלא לקמן<sup>5</sup> גבי חזקות של קנין –**

**But rather he should have inserted this מחלוקת later in the גמרא where the**

<sup>1</sup> There are two types of חזקה; one is a חזקת קנין, it is one of the modes in which the ownership of property is transferred. When the recipient (or purchaser) of property makes a חזקה in the קרקע, either גזל ופרץ, etc. he becomes the owner of the property. The other חזקה, which we were discussing in this פרק (until now) is a חזקת ראיה; if a person harvests the produce of a land for three years without anyone protesting (and he claims that he bought it), this חזקה is sufficient proof that he is the owner.

<sup>2</sup> רשב"ם ד"ה זה.

<sup>3</sup> נדא.

<sup>4</sup> However, if he pruned the tree to use the pruned twigs to feed his animals, it is not a valid חזקת קנין (even though it would be [part of] a valid חזקת ראיה).

<sup>5</sup> נב, (and onwards).

discussion is **regarding חזקת of acquisition** (not חזקת ג' שנים which is a חזקת ראייה) –

שיטת הרשב"ם asks an additional question on תוספות

**ועוד דאמאי נקט חזקה טפי משטר וכסף וחליפין –**

**And furthermore, why does he mention חזקה קנין rather than the קנינים of either חזקה or חליפין, which are also קונה קרקע, instead of חזקה –**

**הוה ליה למינקט מכר סתם כדנקט מכר בכולה סוגיא דבסמוך –**

**He should have simply stated 'he sold' as the גמרא states 'he sold' in the entire סוגיא following without mentioning specifically how he was קונה (for it is irrelevant).**

תוספות offers his interpretation:

**ונראה לרבינו יצחק דאירי בחזקת ג' שנים<sup>6</sup> –**

**And it is the view of the ר"י that the גמרא is discussing חזקת ג' שנים –**

**דלרב זביד זה קנה אילנות וזה קנה קרקע ואין לבעל אילנות בקרקע כלום –**

**So that according to ר"ז this one acquired the trees and this one acquired the land, so that the tree owner has no rights in the קרקע at all –**

**ולכך כי יבשו לא יטע אחרים במקומן –**

**And therefore if the trees wither, he cannot plant other trees in their place, since he only owned the trees but not the land (not even the land upon which the trees stood) –**

**ורב פפא סבר דזה קנה אילנות וחצי קרקע –**

**And ר"פ maintains that the tree owner acquires the trees and half the land –**

**פירוש לא שיקנה בגוף הקרקע כלום שהרי זה החזיק בכל הקרקע<sup>7</sup> –**

**Meaning; not that the בעל אילנות acquires the land proper, for the בעל קרקע, made a חזקה in the entire קרקע –**

**אלא לענין שאם יתייבשו יטע אחרים במקומן –**

**But rather he is קונה קרקע to the extent that if his trees will wither, he may plant other trees in their place –**

תוספות responds to an anticipated difficulty:<sup>8</sup>

<sup>6</sup> The case according to תוספות is that ראובן and שמעון claim that they bought this field and the trees from לוי, the (מערער) original owner. ראובן bought the trees (and had חזקת ג' שנים) and שמעון bought the קרקע (and had חזקת ג' שנים in the entire קרקע [even under the trees]). The issue is whether ראובן has the right to replant his trees after they wither and die. ר"ז say no and ר"פ says yes. See (בד"ה והנה נ"ל) for an alternate interpretation that each of ראובן and שמעון claim that they own the entire property the trees and the land יגיד אות יגיד. עייש ובסוכ"ד אות יגיד.

<sup>7</sup> Both ר"ז and ר"פ agree that in this case of חזקת ג"ש the reason the בעל אילנות has no ownership in the קרקע, is because the בעל הקרקע made a חזקה בכל הקרקע. [See footnote # 6 and footnote # 9.] They only argue as to whether his חזקה in the אילנות allows him to replant them. See רצ"ל, why ר"פ calls it חצי קרקע.

<sup>8</sup> On the עמוד ב' the גמרא differentiates and states that when ר"ז and ר"פ maintain their respective opinions, only by שני (מכר קרקע ושייר אילנות) [the גמרא is discussing]. It seems obvious that the גמרא (but not in the other case) is discussing לקוחות.

**ומינה שמעינן בסמוך דמכר לזה אילנות ולזה קרקע –**

**And from this we shortly derive that when he sold the trees to one and the land to another -**

**דלרב זביד אין לבעל אילנות בקרקע כלום ליטע אחרים במקומן לכשיבשו ולרב פפא יש לו –**  
**That according to ר"ז, the בעל אילנות has no rights at all in the קרקע, not even to plant other trees in their place when the current trees will wither; however according to ר"פ the בעל אילנות has this right to replant other trees -**

**דסברא הוא דאם מכר לזה אילנות ולזה קרקע בסתם –**

**For it is logical, that if he sells trees to one and land to another without specifying (what rights they have) , the rule is according to ר"פ that -**

**קנה בעל אילנות הקרקע ליטע אחרים במקומן לכשיתיבשו –**

**The בעל אילנות acquires the קרקע to plant other in their place when they will wither;<sup>9</sup> it follows -**

**גם<sup>10</sup> חזקתו יש לו להועיל לענין זה:**

**That also his חזקה in the trees should be effective for this purpose of having the right to replant the trees.**

## **SUMMARY**

According to the רשב"ם the term החזיק means קנין חזקה and according to תוספות it refers to חזקת ג"ש.

## **THINKING IT OVER**

מכר לב' explains the assumption of the גמרא that ר"ז ור"פ are arguing about 'מכר לב' חזקת ג"ש.<sup>11</sup> However if we assume that they both admit that קנה אילנות וזה קנה קרקע,<sup>12</sup> then the case of חזקת ג"ש is identical to מכר לזה אילנות ולזה קרקע; so what is תוספות question?!<sup>13</sup>

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חזקת ג"ש assumes that the מחלוקת between ר"ז ור"פ is in a case of מכר לב' לזה אילנות ולזה קרקע, but not in a case of חזקת ג"ש (where the מערער may claim that it is all גזולה). See "Thinking it over"

<sup>9</sup> In this case of מכר, the reason the בעל האילנות has no ownership rights in the קרקע (לכו"ע) is because it is assumed that when the owner sold one of them the קרקע it is as if he explicitly denied the בעל האילנות an ownership in the קרקע. See footnote # 7. The comparison of תוספות from חזקה to מכר is not regarding the lack of the בעל האילנות ownership in the קרקע (for it is for different reasons), rather the comparison is (only) whether he has the rights of replanting, as תוספות states זה חזקתו יועיל לענין זה.

<sup>10</sup> Seemingly תוספות should have phrased this in the reverse, since by חזקה he retains the right to replant, therefore by buying he also has this right (since according to תוספות the מחלוקת between ר"ז ור"פ was by חזקת ג"ש and not by מכר). The answer is that מכר is where the rights originate, not the reverse; חזקה merely substantiates a מכר.

<sup>11</sup> See footnote # 8.

<sup>12</sup> See footnote # 6.

<sup>13</sup> See סוכ"ד אות יב ויה נח"מ and נח"מ.