פעמים שבן בן גזלן אין לו חזקה כגון דקאתי בטענתא דאבא דאבוה –

Sometimes the grandson of a robber has no *Chazokoh*; for instance when he comes with the claim of his grandfather

Overview

רבא said (that even though ר' יוחנן taught that the grandson of a גזלן has a חזקה,[1] nevertheless) sometimes a grandson of a גזלן has no חזקה; that is in a case where the grandson claims that he inherited this item from his grandfather the גזלן.[2] Our תוספות discusses this issue.

תוספות asks:

תימה לרבינו יצחק דאמאי אין לו חזקה הא טוענין ליורש[3] -

The ר"י is astounded; why does the grandson **not have a חזקה, since we argue on behalf of an heir -**

והוה ליה למימר דלמא אי הוה אביו קיים דהיינו בן גזלן הוה טעין אנא הדר זבינתה מינך[4] -

So it should be said by בי"ד on behalf of the grandson (the יורש of the son) **that perhaps if his father (meaning the son of the גזלן) was alive,** the בן גזלן **would have claimed, 'I bought it from you later'** (after my father the גזלן had it), therefore the חזקה of the יורש is valid.

תוספות (because of the abovementioned difficulty) presents a different גירסא:

ונראה לרבינו יצחק דגרס פעמים שבן גזלן יש לו חזקה[5] –

And it appears to the ר"י that the text reads, 'sometimes the son of a גזלן has a חזקה (not פעמים שבן בן גזלן אין לו חזקה) -

כגון דקאתי בטענתא דאבא דאבוה[6] דהוא אבי הגזלן -

For instance where the בן גזלן **comes with the claim of his grandfather, meaning the father of the גזלן -**

וקא משמע לן דאף על גב שהיתה ביד מי שאין לו חזקה דהיינו אביו הגזלן -

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[1] This is in a case where the grandson claims he inherited it from his father, the son of the גזלן [see (however) footnote # 12].

[2] In this case we say that since the גזלן had no חזקה, therefore the חזקה of the grandson is meaningless.

[3] See previously כג,א and in רש"י there ד"ה טוענין. In a case where the מערער (who has proof the he was once the owner of the property) claims it is his field, and the מוחזק replies that he inherited it from his father. The בי"ד argues on behalf of the יורש that perhaps the father of the יורש bought it from the מערער, and therefore the חזקה of the יורש is valid (even though the יורש did not claim that his מוריש bought it from מערער).

[4] If the בן גזלן would claim that he bought it from the מערער, he would be believed, as the גמרא just stated.

[5] Even though ר' יוחנן taught the (generally) a בן גזלן אין לו חזקה, nevertheless פעמים that a בן גזלן יש לו חזקה.

[6] The בן גזלן claims that this field belonged to his grandfather (the אבי הגזלן) and he eventually inherited it from his father (the גזלן) who in turn inherited it from his father (the אבי הגזלן).

And רבא **is teaching us that even though this** property **was in the possession of someone who does not have a חזקה, meaning his father the גזלן** (from whom he actually inherited it) -

מכל מקום יש לו חזקה כיון שאמר שהיתה של אבי אביו[7] -

Nevertheless the בן גזלן **has a חזקה since he said it belonged to his grandfather –**

תוספות reconsiders the first גירסא:

ויש ליישב גירסא ראשונה פעמים דבן בן גזלן אין לו חזקה והכי פירושה -

And we can substantiate the first גירסא, which is **פעמים דבן בן גזלן אין לו חזקה, and this is the explanation;** the בן בן גזלן has no חזקה in a case where -

כגון דאתא בטענתא דאבא דאבוה -

For instance that the grandson **comes with a claim of his grandfather** the גזלן –

ואומר שאמר לו אביו דהיינו בן הגזלן שהניחה לו הגזלן אביו[8] -

And the grandson **claims that his father, meaning the son of the גזלן, said to him** (the grandson of the גזלן) **that his father the גזלן left him** this property -

דאם איתא דהדר זבנתה[9] מינך הוה אמר ליה אנא זבינא –

For if it is true that the בן הגזלן **went back and bought it from** the מערער, **he would have said to** his son (the grandson), **'I bought it** from the מערער', instead of merely saying, 'my father left it from me', this proves that the בן הגזלן never bought it from the מערער –

תוספות offers an alternate reason why here we are not טוען ליורש that his father bought it:

אי נמי[10] נראה לרבינו יצחק דלא טענינן ליורש כי האי גוונא דמילתא דלא שכיחא היא –

Additionally it appears to the ר"י that we are not טוען ליורש in such a case, for it is something uncommon that the בן גזלן who inherited the field from his father should buy it back from the מערער –

תוספות proves that we do not claim a מילתא דלא שכיחא (even) for יתומים:

כי היכי דאמר בסוף המוכר את הבית (לקמן דף ע,ב ושם דיבור המתחיל מאן) -

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[7] The claim is a valid claim since his grandfather was not a גזלן; anything in his possession is rightfully his. We believe the grandson that his grandfather had it, because the grandson has a מיגו, he could have claimed, 'I bought it from you'.

[8] תוספות will now answer the difficulty he had on this גירסא, namely why do we not argue on behalf of the grandson that his father (the בן הגזלן) bought it back from the מערער, since טוענין ליורש. The answer is that since the grandson claims that his father told him that he inherited it from his father (the גזלן), he negated any possibility that the son of the גזלן repurchased it from the מערער.

[9] The הגהות הב"ח amends this to read הוה **זבנה מיניה** דהדר (instead of הוה **זבנתה מינך** דהדר).

[10] According to the א"נ, there is no need to say that the grandson stated that his father inherited it from his father the גזלן (which negates the claim of הדר זבנה), but even if no mention was made that his father inherited it from his grandfather, nevertheless בי"ד will not be טוען that perhaps his father bought it from the מערער.

Just as the גמרא **states**[11] **in the end of** פרק **המוכר את הבית -**

דלא טענינן ליתמי נאנסו משום דמילתא דלא שכיחא היא -

That we do not claim נאנסו on behalf of the יתומים since אונס **is an uncommon occurrence –**

תוספות responds to an anticipated difficulty:

והא דקאמר לעיל [בן] בן גזלן בן אומן יש לו חזקה[12] **-**

And this which ר' יוחנן **ruled previously** that **the grandson of a גזלן and the son of an אומן** (both) **have a חזקה –**

תוספות responds:

היינו דוקא משום דאמר בפנינו הודה[13] **-**

That ruling **is only because he claimed that** the מערער **admitted in our presence** that he sold it (to my grandfather [the גזלן]) -

ואדרבה משם יש להוכיח דמשמע הא לאו הכי אין לו חזקה -

And on the contrary; from there we can prove what תוספות claimed, **for it seems** that **were it not for this** (that he claimed בפנינו הודה לו) **he has no חזקה -**

כיון דמעיקרא בתורת אומנות ואריסות וגזלנות אתא לידיה:

Since initially it came into his possession through either **אומנות, אריסות וגזלנות.**

Summary

[11] The case there is where the father of the יתומים received money (בשטר) from an investor, for the purpose of investing, where the profits would be divided between the investor and the father. The father then died and the investor (מלוה) is coming to collect from the יתומים with this שטר כיס. The חכמים ruled that in this type of investment/loan, we look at it is if half is a loan (for which the לוה is responsible to pay it back, no matter what happens) and half is considered to be a פקדון for which he can be exempt from returning it if there was an אונס. Therefore if the father would have lost all the money, on account of an אונס, he would be required to pay back the half, which is a loan, but could swear that it was lost באונס, and be פטור from paying the second half. In this case however the father died and the investor/מלוה wants to collect from the יתומים with this שטר כיס. The rule, according to one מ"ד, is that he collects everything (from their father's estate). He certainly collects the מלוה half, for we cannot claim פרעתי, since he has a שטר, but he even collect the half of the פקדון, and we do not claim (on behalf of the יורשים) perhaps it was an אונס, so they should be פטור, since אונס לא שכיח. [This does not say there explicitly in the גמרא, but that it how תוספות explains it.]

[12] תוספות understands the case of בן בן גזלן יש לו חזקה (which ר' יוחנן stated together with בן אומן יש לו חזקה), to mean that the grandson claims that his grandfather the גזלן owned it (and he inherited from him). [This is not like the רשב"ם בד"ה לא that the grandson of the גזלן claims that he inherited it from his father (for that is פשיטא).] The question is how the grandson has a חזקה, since his grandfather the גזלן has no חזקה. We could therefore (mistakenly) conclude that we are טוען ליורש (to the grandson) that his father (the בן גזלן) bought it from the מערער. This contradicts this which תוספות just said that this claim is a מלתא דלא שכיחא and בי"ד will not claim it for the יורש.

[13] Normally if the grandson would claim he inherited it from his grandfather (the גזלן), he would not be believed, but the גמרא previously explained that the ruling of בן בנו של גזלן יש לו חזקה, is when he claims בפנינו הודה, that the מערער admitted to the grandfather that the מערער sold it to him, therefore he is believed with a מיגו of מינך זבנתה. However if he merely claims, 'I inherited from my grandfather' he is not believed, since he was a גזלן. See 'Thinking it over' # 1.

We can be גורס that בן של גזלן יש לו חזקה, or we can be גורס that בן בנו של גזלן אין לו חזקה, and we are not טוען ליורש, either because he negated that option in his claim, or the claim of הדר זבנה is a מלתא דלא שכיחא which we are not טוען ליתומים (unless he claims בפנינו הודה).

THINKING IT OVER

1. It appears from תוספות that by a בן בנו של גזלן, he has a חזקה in a case of בפנינו הודה even if he claims that he inherited it from his grandfather (the גזלן).[14] The question here is why the בן גזלן is not believed (even in a case of בפנינו הודה), because we say the הודאה is meaningless, and the בן בנו של גזלן is believed; here too we should say that the הודאה is meaningless. Why is there this difference between בן גזלן (where אין לו חזקה) and בן בנו של גזלן (where יש לו חזקה)?![15]

2. תוספות writes בן בן גזלן ובן אומן יש לו חזקה, and similarly in the end תוספות writes כיון דמעיקרא בתורת אומנות ואריסות וגזלנות אתא לידיה. Is תוספות question (and subsequent answer) based only on בן בן גזלן or also on אומן ואריס?[16]

[14] See footnote # 13.

[15] See מהר"ם.

[16] See פני יהושע ונחלת משה.