

**Until I said to him this - כולי - שהחזיקו מיצר רב יהודה מיצר רב יהודה מיצר כולי - which Rav Yehudoh said, 'a border<sup>1</sup> which was possessed, etc.'**

### Overview

The גמרא related that רב פפא had date palms on the border that he shared with רב הונא. רב פפא noticed that ר"ה was digging (in his own property) and cutting off the roots of the trees. ר"ה asked him why he is cutting of the roots, etc. so ר"ה answered him that he is digging a pit, and the משנה rules that he may chop down the roots and keep them. ר"ה recounted that he tried to bring all types of proofs against ר"ה to no avail until he told him the ruling of רב יהודה that a מיצר which the public took possession of, it is forbidden to ruin it. תוספות discusses the issues in this controversy.

תוספות asks:

**תימה מאי מייתי מרב יהודה דרבים שאני -**

**It is astounding! what proof does רב פפא bring from the ruling of ר"י, that a מיצר is different; since it is understood that by a רבים (the public) it is different;** we cannot derive a יחיד (the case of ר"פ) from a רבים (the ruling of ר"י). We are more concerned for the needs of a רבים than of a יחיד

תוספות proves this point that a יחיד ורבים are different -

**דאי לאו הכי קשיא מתניתין דקתני קוצץ ויורד -**

**For if it is not so (but rather a יחיד ורבים are the same), there will be a difficulty from our משנה which states, he may chop off the roots as he digs down –**

תוספות answers:

**ופירש רבינו חננאל ורבינו יצחק בן מאיר דרבים החזיקו במצריה דרב הונא<sup>3</sup> וברשותו -**

**And the ר"ה and the ריב"ם explained that here too it was many people who were מחזיק on the border of ר"ה, and they were מחזיק with his consent.** We must assume that it was with the consent of ר"ה -

**דאי לאו הכי אין חזקתו מועלת כדמשמע בהמניח (בבא קמא דף כח,א ושם) -**

<sup>1</sup> Alternately; a strip of land or a pathway.

<sup>2</sup> כב"ב. How can the well digger chop of the roots of the tree since the tree owner was החזיק (since we are now assuming that the ruling of ר"י applies to the situation with roots). The obvious answer is that this rule of ר"י regarding החזיק is only if it was a רבים, but not if it was a יחיד. The question remains how did ר"פ bring proof from the ruling of ר"י?!

<sup>3</sup> The border (on the side) of ר"ה was used as a pathway for the public. Underneath this pathway were the roots of ר"פ's trees. ר"פ challenged ר"ה that he cannot dig there since it is a רבים בו רבים.

<sup>4</sup> The רש"י amend this to חזקתו (instead of חזקתו).

**For otherwise** (if the חזקה was made without his consent) **their חזקה would not be effective, as it seems**<sup>5</sup> from the גמרא in פרק המניח –

תוספות continues with his explanation:

**ואתא רב הונא וקא חפר ברשות הרבים<sup>6</sup> וקצץ שרשים דרב פפא -**

**And ר"ה came and was digging in this public domain** (the pathway which he allowed for the public), **and was cutting the roots of ר"פ's trees** which extended into ר"ה's property underneath this public pathway -

**ומשום הכי פריך מדרב יהודה<sup>7</sup> דכיון שהחזיקו בו רבים אינו רשאי לחפור<sup>8</sup> -**

**So therefore ר"פ challenged ר"ה from the ruling of ר"י, that since the public took possession of this pathway, ר"ה is not permitted to dig there –**

תוספות anticipates a difficulty:

**והא דקאמר אמאי לא אמרי ליה כאן בתוך שש עשרה אמה וכולי<sup>9</sup> -**

**And regarding this which ר"ה stated, 'why did I not say to ר"פ, here it is within sixteen אמה, etc.'** How are we to understand this according<sup>10</sup> to the פר"ח וריב"ם?

תוספות responds:

**הכי פירושו כלומר כי קאמר רב יהודה מצר שהחזיקו בו רבים אסור לקלקלו -**

**This is its explanation; ר"ה meant to say, when did ר"י rule that a מצר שהחזיקו בו - רבים אסור לקלקלו**

**הני מילי תוך ט"ז אמה<sup>11</sup> אבל חוץ לט"ז אמה מותר לקלקלו -**

**That is only within sixteen אמות, however outside the sixteen אמות he is permitted to ruin it -**

**כיון שמניח ט"ז אמה כדין רשות הרבים<sup>12</sup> -**

<sup>5</sup> The גמרא there cites this ruling of ר"י that a מצר וכו' אסור לקלקלו בו רבים, regarding a case where there was a right of way in someone's field, עיי"ש. It appears that this rule applies only if the right of way was provided with the consent of the owner, otherwise he can chase them away.

<sup>6</sup> See footnote # 3.

<sup>7</sup> Presumably when the גמרא stated initially that ר"פ אמרי ליה כולהו ולא יכילי ליה, he was trying to convince ר"ה that he has no right to cut his roots; however, since ר"ה לא יכילי ליה, so he took another tact based on the fact that it was a מצר שהחזיקו בו רבים.

<sup>8</sup> ר"ה was not permitted to dig (not because he was cutting the roots of ר"פ, but rather) because it was a public road.

<sup>9</sup> See פרש"י ד"ה בתוך that ר"ה could have claimed that your חזקה on the tree (and its roots) extends only sixteen אמות and I am digging past the sixteen אמות. This גמרא is understood if we assume that the claim of ר"פ was based on his חזקה of the tree (not like פר"ח וריב"ם).

<sup>10</sup> What connection is there between the rule of sixteen אמות for the nourishment of the tree, since the basis of ר"פ's claim was that it was a מצר שהחזיקו בו רבים?!

<sup>11</sup> A מצר שהחזיקו בו רבים requires a pathway that is sixteen אמות wide. ר"ה dug outside those sixteen אמות (which may have also been used as a pathway, but he was not obligated to give them such a wide pathway; only up to sixteen אמות).

<sup>12</sup> A ר"ה is considered a valid ר"ה (regarding הוצאה בשבת) if it is sixteen אמות wide.

**Since he leaves a pathway of sixteen אמות as is required for a רה"ר.**

anticipates a difficulty on פר"ה וריב"ם that one may be מקלקל a רבים as long as there remains אמה ט"ז:

**ובסוף חזקת הבתים<sup>13</sup> (לקמן דף ס,ב) דאסר רבי יוחנן לאדם שכנס תוך שלו להחזיר כתלים במקומן - And in the end of פרק חזקת הבתים where ר"י prohibited a person, who receded into his own property and built a wall there, to return the walls to their place at the border of his property -**

**אף על גב דאיכא רווחא כדמשמע<sup>14</sup> התם אליבא דריש לקיש<sup>15</sup> הכא איכא רווחא - Even though there is space as (it appears) [the גמרא answers] there according to ר"י; 'here there is space' –**

responds:

**רווחא דקאמר התם<sup>16</sup> שאינו סותם כל רשות הרבים אבל ליכא רווחא ט"ז אמה<sup>17</sup> - The רווחא, which ר"ל stated there, means that by returning the wall he will not close up the entire רה"ר, there will still be place to walk, however there is no space of אמה ט"ז -**

**אבל אי איכא רווחא ט"ז אמה -**

**However if there is a width of sixteen אמה in the רה"ר -**

**מודה רבי יוחנן דמותר לקלקלו ומחזיר כתלים למקומן כדאמר הכא - מודה ר"י would admit that we can ruin the excess of אמה ט"ז and he can return the walls to their place on the border of the רה"ר as ר"ה stated here.**

In summation; according to the ר"ה וריב"ם, the claim ר"פ had against ר"ה was not based on his rights of his tree, but rather the place where ר"ה was digging was used by the public as a pathway, and so he had no right to ruin their pathway. ר"ה could have responded that even after his digging there still remained a pathway of sixteen אמות, which is sufficient for a public pathway.

<sup>13</sup> The case there is where a person (who had the right to build up to the property line with the רה"ר) decided to build his wall not on the property line (which he had the right to), but he recessed the wall and built it on his property some distance away from the רה"ר. Now he wishes to return this wall and rebuild it on the property line with the רה"ר. According to ר"י it is forbidden (since the empty space became a רבים; מיצר שהחזיקו בו רבים); people used the space on his property between the wall and the רה"ר, while ר"ל maintains it is permitted since there is רווחא (enough space).

<sup>14</sup> The רש"ש amends this to כדמשני התם (instead of כדמשמע התם).

<sup>15</sup> The גמרא there explained that ר"ל is not concerned for the ruling of ר"י (see footnote # 13), since ר' יהודה is discussing about destroying the pathway which is prohibited, however here even if he puts back the walls there is still the entire רה"ר (of sixteen אמות), which the people can use. It is apparent from the גמרא that ר"י prohibits returning the walls even though there is רווחא. The question why is this different from our גמרא where ר"ה claimed that he can dig and ruin the pathway as long as they have אמה ט"ז remaining.

<sup>16</sup> The הגהות הב"ה amends this to read התם היינו שאינו (instead of התם שאינו).

<sup>17</sup> The רה"ר there was not wide אמה ט"ז (for whatever reason).

asks (a general question, not related the פר"ה וריב"ם).

ומיהו קשה מאי קאמר רב פפא אמרי ליה מכולהי מאי כולהי -

**However there is a difficulty; what did ר"פ mean when he said, I asked him from 'all of these'; what are 'all of these'? What proof did ר"פ bring against ר"ה?**

answers:

ומפרש הרב רבינו מנחם דמכולהי היינו מכל הני דתנן<sup>18</sup> אם האילן קדם לא יקוצץ<sup>19</sup> ספק כולי -  
And משנה ה"ר מנהם explained that 'מכולהי' means from all these which the taught; i.e., 'if the tree was first, he should not chop it down, and if it is in doubt, etc. he should not chop it down -

ולא יכלי ליה שהיה דוחה אותו דמיירי באילן עצמו אבל השרשים יקוצץ -

**However, I could not overcome him, for ר"ה deflected those proofs saying that the משנה which prevents the chopping is discussing the actual tree, however one may chop off the roots.**

offers an alternate explanation for the entire סוגיא:

ורבינו תם מפרש דרב הונא היה קוצץ ולוקח השרשים לעצמו -

**And the ר"ה explains that ר"ה was cutting the roots and taking them for himself -**

ואמר ליה רב פפא מאי האי כלומר למה אתה לוקח השרשים לעצמך -

**So ר"פ said to ר"ה, 'what is this'; meaning, why are you taking the roots for yourself?**

אמר ליה דתנן<sup>20</sup> קוצץ ויורד וכיון שבדין אני קוצץ כמו כן יהו העצים שלי -

ר"ה replied to ר"פ, the משנה taught, 'he may cut and dig downwards', so since I may legally cut the roots, similarly the wood of the roots should be mine -

ואמרי ליה מכולהי היינו הנהו דמייתי הכא<sup>21</sup> -

**So I (ר"פ) said to ר"ה all of these, meaning these that he mentions here -**

וההיא דמייתי לקמן<sup>22</sup> שרשי אילן הדיוט הבאים כולי<sup>23</sup> -

**And those proofs, which the גמרא cites later, from a משנה i.e. the roots of commoner's tree which entered, etc. into הקדש property -**

דמינה מוכח לקמן דהעצים שלו דקתני במתניתין היינו של בעל האילן<sup>24</sup> -

<sup>18</sup> כה,ב.

<sup>19</sup> See 'Thinking it over'.

<sup>20</sup> כו,א.

<sup>21</sup> See רש"י who asks, what are these הכא דמייתי?

<sup>22</sup> On this עמוד.

<sup>23</sup> The rule is that one may not derive benefit from them, however there is no מעילה מה"ת if one benefited from them; indicating that the שרשים are not הקדש since they belong to the בעל האילן.

<sup>24</sup> See previous footnote # 23.

**Which** from that משנה we prove later that when our משנה stated, ‘and the wood of the roots **belong to him**’, the משנה meant it belongs to the tree owner -

ולא יכלי ליה שדחה לו כדדחי ליה לקמן<sup>25</sup> עד דאמרי ליה מרב יהודה כולי -

**But** nevertheless, I could not convince him, for he deflected this proof as the גמרא **deflects it later, until I told him of the ruling of ר"י, etc. –**

<sup>26</sup>ר"י explains what proof is there from the ruling of ר"י תוספות

דנהי שלא תועיל חזקתי כחזקת רבים לענין שלא תהא רשאי לקוצו -

**For granted that the חזקה of ר"פ is not effective as the חזקה of the many, regarding that ר"ה should not be permitted to chop off the roots -**

לענין זה מיהא תועיל שיהו העצים שלי -

**Nevertheless, regarding the ownership of the roots, the חזקה of ר"פ should be effective that the wood of the roots should belong to ר"פ -**

ומסיק אמאי לא אמרי ליה חוץ לשש עשרה יש להיות העצים שלי -

**And** the גמרא **concluded** that ר"ה said, **why did I not tell him (ר"פ) that past sixteen אמות the wood should belong to me -**

כדאמר רבינא לקמן<sup>27</sup> כאן תוך שש עשרה כולי :

**As** אמא **differentiated later, ‘here it is within sixteen אמה, etc.**

## **Summary**

The claim of ר"פ was based on the fact that it was a מצר שהחזיקו בו רבים (the view of ר"ה וריב"ם) and the sixteen אמות refers to the width of ר"ה, or (according to the ר"ת) the dispute was regarding the ownership of the roots.

## **Thinking it over**

אם האילן קדם לא regarding כה,ב on משנה 'דמכולהו' explained that ר"ה מנחם לא יקוץ<sup>28</sup>. However this is seemingly no proof, for perforce we must say that ר"ה refers to the tree but not to the roots (as ר"ה actually responded according to ר"ה), for regarding the roots our משנה (on כו,א) states clearly ויורד ויקוצץ<sup>29</sup>!

<sup>25</sup> The גמרא later rejected the original proof (in footnote # 23) from the סיפא of that משנה.

<sup>26</sup> According to the ר"ת the argument between ר"פ ור"ה was regarding the ownership of the roots; how is the ruling of ר"י concerning ר"ה relevant to their argument?

<sup>27</sup> רבינא reconciled that the רישא of that משנה in מעילה (where it seems that the roots belong to the בעל האילן) is when the roots were within sixteen אמות, and the סיפא (where the roots belong to the בעל הקרקע) is where the roots are אמא.

<sup>28</sup> See footnote # 19.

<sup>29</sup> See מהרש"א and נחלת משה.