

This beam of a (temporary) hut**האי כשורא דמטללתא -****OVERVIEW**

אומר רבינו teaches us that if one places a beam [to support the roof of a temporary hut] on his neighbor's wall; if it stood there for less than thirty days it is not considered a חזקה;¹ if it remained there more than thirty days, without the owner of the wall protesting, it is considered a חזקה for the owner of that beam.

The question arises; in reference to what, are we discussing whether or not it is a חזקה. Presumably it would seem that it is in reference to whether or not the owner of the beam may keep the beam on the other person's wall indefinitely.² This type of a חזקה is called חזקת תשמישין; the right to use another person's property.

However this presents a difficulty according to some opinions. There is a dispute among the ראשונים as to how חזקת תשמישין is established. According to certain opinions (the 'תוס' mentioned in אהזיק להורדי and others) this חזקה is established immediately; as soon as the owner is aware that someone is using his property and he does not protest, the user acquires the right to continue using his neighbor's property (in this manner) forever.³ Other ראשונים, however maintain that this חזקת תשמישין can be acquired only if it was utilized for three years, without any protest from the owner, and the user claims that the owner sold him or gifted him the right of usage.⁴

אומר רבינו תם דאמתניתין קאי דעד שלשים יום לא הוי חזקה והוי בחזקת שלא נתן –

The ר"ת says; that this rule concerning the כשורא דמטללתא, is referencing back to our משנה.⁵ The ר"ת says that our גמרא is discussing a case where he placed

¹ Even if the owner of the wall did not protest during the entire thirty day period, it is not a חזקה.

² See רש"י ד"ה לא הויא חזקה.

³ There is a further dispute in this opinion itself. Some maintain (רש"י 'תוס') that the מחזיק must have a claim, that he either bought this right or it was gifted to him. However others maintain that he needs no טענה, the mere fact that the owner did not protest indicates that the owner gave up his exclusive right to the property and is מוהל it to the user.

⁴ The question arises; why are thirty days required by a כשורא דמטללתא? It should either be immediately or after three years. Those that maintain that חזקת תשמישין is immediately; they will answer that since it was a beam which supported a temporary hut, the owner would not mind, for up to thirty days. However more than thirty days indicates that it is not temporary anymore, therefore if he does not protest after thirty days the user acquires the חזקת תשמישין for this כשורא. However according to the ר"ת who maintains that even חזקת תשמישין requires a three year חזקה, why is there a חזקה by a כשורא דמטללתא in only thirty days; it should require three years. תוספות addresses this issue

⁵ The משנה stated that if the neighbor built an adjacent wall next to the dividing wall (which belonged to the other party), he is liable for the expense of the party wall, even if he did not place a roof over both walls. The משנה continues there, that he is assumed not to have paid for the dividing wall unless he can substantiate his payment. The inference from the משנה may be that if he put a roof over both walls and claims that he paid for his share in the

(merely) a כשורא דמטללתא over both walls. רבינא says that the דין is that **until thirty days** have passed since he placed the כשורא דמטללתא on the dividing wall, **it is not considered yet that he has a חזקה**, for since it is a temporary structure the owner may not mind his using the wall **and therefore it is still presumed that he did not pay** for the dividing wall unless he brings proof to substantiate his claim. However -

מכאן ואילך הוי בחזקת שנתן⁶ –

From thirty days onward; once thirty days have passed since he placed the כשורא דמטללתא on the dividing wall and his neighbor did not protest **it is presumed that he paid** for his share in the dividing wall, and if he claims that indeed he paid it, he is not required to substantiate his claim.

חזקת תשמישין (as opposed to משנה, (as opposed to תוספות adds that by interpreting this case as referencing our חזקת תשמישין there is an (additional) advantage.

ואתי שפיר דנקטיה הכא ולא בחזקת הבתים :

And it properly understood that he mentions this ruling here and not in פרק חזקת תשמישין. If we are discussing a חזקה of ownership and rights; then that belongs in פרק חזקת תשמישין. **חזקת הבתים**. If we are discussing a חזקה of ownership and rights; then that belongs in פרק חזקת תשמישין. **חזקת הבתים**, not here in this פרק, where we are discussing the rules of division of property.⁷

SUMMARY

In a case of סמך לו כותל and then he placed a כשורא דמטללתא over the party wall; if it remained there for (over) thirty days he is בחזקת שנתן.

THINKING IT OVER

The ר"ת maintains that if we were discussing חזקת תשמישין, this case of כשורא דמטללתא should have been mentioned in חזקת הבתים. Why then does the גמרא mention here the laws of אהזיק לכשורי אהזיק להורדי וכו'; they are certainly laws of חזקת תשמישין?⁸

dividing wall he will be believed. The reason is, because the original owner would not permit him to place a roof over the party wall unless he paid up for his half of the wall.

⁶ The ר"ת explains that we are not discussing here חזקת תשמישין, for that would require a three year חזקה. Rather the second party who built the adjacent wall becomes obligated to pay for the party wall. Our גמרא is discussing at what point he is considered בחזקת שנתן and when he is considered בחזקת שנתן. It is obvious that if he built a finished roof over both walls without the owner protesting, that he is בחזקת שנתן immediately; otherwise why did the original owner of the dividing wall allow him to place a permanent roof over the dividing wall. It must be because he paid him already for his half of the wall. By a כשורא דמטללתא, however, which is a temporary roof; thirty days are required for him to be considered בחזקת שנתן.

⁷ See 'Thinking it over'.

⁸ See footnote # 7. See ס' יד beginning of ר"א ש"ש.