

אבל אכלה שית שנין כולי –

However, if he consumed the produce for six years, etc.

OVERVIEW

The case at hand is as follows. The מפלניא זבינתה and I was there first claims מחזיק produces a שטר that he purchased it from the same מוכר four years ago. If the מערער can produce עדים that he lived there for the past seven years¹ the field remains by the מחזיק [since שני חזקה can imply more than three years]. If however the מחזיק can produce עדים only for the past six years, then even if he claims that he purchased the field before the מערער (even seven years ago, but since he cannot provide עדים), the field reverts to the מערער.

תוספות asks:

הקשה רבינו יצחק בר מרדכי אפילו לא אייתי סהדי אלא דאכלה שלש שנין –

The ריב"ם presented a difficulty; even if he did not bring עדים for all seven years, but rather he had עדים that he consumed the produce for only the past three years, nevertheless the מחזיק

יהא נאמן לומר לקחתיה קודם מינך² במיגו דאי בעי אמר מינך זבינתה³ –

should be believed to claim that I bought it from the original owner before you bought it, since the מחזיק has a מיגו, for the מחזיק could have said to the מערער, 'I bought it from you'. If the מחזיק would have claimed that he bought it from the מערער after the date on the שטר, the מחזיק would have been believed, since he has a valid חזקה and a טענה that מערער זבינתה. Therefore he should be believed if he claims that he bought it before the מערער bought it. Why is it necessary to produce עדים that his חזקה predates the מערער's שטר by three years?

תוספות answers:

ואומר רבינו יצחק דאין זה מיגו דמעיקרא לא יטעון כלל מינך זבינתה –

¹ It is self-understood that if the מחזיק can present עדים that he purchased the field from the מוכר (even one day) before the מערער, then the field remains by the מחזיק.

² See 'Thinking it over' # 1.

³ Seemingly this seems to be a מיגו למפרע (see ד"ה לאו). Originally the מחזיק claimed 'מפלניא זבינתה וכו'; to which the מערער responded that he has a שטר that he purchased it four years ago. The מחזיק now claims that he purchased it more than four years ago. However, now he does not have a מיגו of זבינתה, since he already stated מפלניא זבינתה. (See נח"מ.)

Perhaps, since in this ה"א we (seemingly) assume that the מחזיק is aware of the שטר מכירה, therefore it was certainly of the מחזיק that he needs this claim of more than three (four) years. In a case of אסיק אדעתיה we do say מפרש דבריו (minimally); רצ"ב. especially since he is only being (see [footnote # 15] תוספות ה"ל) מיגו למפרע

And the ר"י says that the מיגו of זבינתיה is not a valid מיגו; for originally when the מערער challenged him, the מחזיק would never claim that 'I bought it from you (the מערער)' -

דאין יודע אם יש לזה שטר⁴ שקנאה ממנו:

for he does not know whether the מערער possesses a שטר that he (the מערער) purchased the field from the original מוכר. A valid מיגו is when the claim is equally presentable as the actual claim. In this case, the מחזיק would never claim that he bought it from the מערער, since he has no knowledge that the מערער ever bought this property from the same מוכר who sold it to him. Therefore if the מחזיק would claim that he bought it from the מערער, he would be placing himself in jeopardy of losing the field to either the original מוכר or anyone else who may produce a שטר מכירה from this מוכר. They could come and challenge his ownership to the field, using his own statement that he bought it from the מערער, as proof that he never bought the field from the original מוכר

SUMMARY

A מיגו (of זבינתיה) is not applicable where the litigant may jeopardize his position if he were to claim this מיגו (of זבינתיה).

THINKING IT OVER

1. In question⁵ would there be a difference whether the מחזיק claims I bought it seven years ago or whether he claims I bought it before you (but less than seven years ago)?⁶

2. The reason why the שטר מכירה of the מערער constitutes a מחאה is because the שטר has a קול; people know about it, and the מחזיק should have kept his שטר. How can argue that the מחזיק may not know⁷ whether the מערער has a שטר from the מוכר?!⁸

3. Is question (only) according to the רשב"ם or even according to the יש⁹ (רשב"ם ל,ב ד"ה והני מילי) שמפרשים

⁴ See 'Thinking it over' # 2.

⁵ See footnote # 2.

⁶ See בל"י דף ל,ב אות קטז.

⁷ See footnote # 4.

⁸ See סוכ"ד אות ה'.

⁹ See בל"י הנ"ל.