

אין להם דרך זה על זה – They have no right of way, one on another

OVERVIEW

ruled that after the brothers divided their father's estate they have no easement rights on each other. If for instance one brother received a house and the other received a field,¹ the בעל הבית cannot walk through the field unless his brother (the בעל השדה) chooses to grant him this easement right (even though in the past they would walk through this field to enter the house). תוספות explains and clarifies this rule.

טעמא משום דפסיק שמואל בפרק המוכר את הבית (לקמן דף סד,א.) כרבי עקיבא –

פרק ר"ע in שמואל rules like ר"ע because (the same) אין להם דרך זה"ז The reason why
- המוכר את הבית

דאמר מוכר בעין יפה² מוכר –

Who (ר"ע) says that a seller sells with a 'benevolent eye' -

ולפיכך אין להם דרך זה על זה שלא שייר לעצמו כלום כל אחד חלק³ בחלק חבירו –

And therefore (since מוכר בעין יפה) the brothers have no claim of 'right of way' against each other since each brother did not retain any rights in the portion which he granted to his friend (brother) -

והוה לו כמוכר –

And the division is considered as if each brother is selling to the other brothers all of his rights in the portions which are assigned to them.

anticipates a difficulty:

ואף על גב דאמרין המוכר בית ושייר חצר מוכר לו עם הדרך למאן דאמר מוכר בעין יפה מוכר מוכר בעין יפה who maintains מוכר בעין יפה And even though we rule, according to the one who maintains מוכר, one who sells a house and retains the courtyard for himself, he sold him the house together with right of way through the חצר to enter the house; the buyer has the right of way to use the path in the חצר which belongs to the seller. Similarly here too, in this division, if one brother received a house and the other the courtyard, why do we not consider that the בעל החצר sold (his rights to) the בית and retained the חצר, in which case the בעל הבית should have an easement in the חצר. Why do we say that אין להם דרך זה"ז?!

¹ Initially both brothers are equal owners of the בית וחצר. When they divide it is considered as if the בעל החצר is selling (and relinquishing) to the בעל הבית his rights in the בית, in lieu of the בעל הבית selling (and relinquishing) his rights in the חצר, to the בעל החצר.

² The seller wishes to satisfy the buyer and gives him whatever is necessary [and more] so that the buyer is satisfied with his purchase.

³ The הגהות הב"ח omits this word חלק and it reads, כל אחד בחלק חבירו.

responds: תוספות

לא דמי דהכא כולם מוכרין וכל אחד מכר ולא שייר לעצמו כלום בחלק חבירו –

The cases are **not comparable**, for here by האחין שחלקו, **all the brothers are selling, and each one sold his share and did not retain in his brother's share anything at all**, therefore the בעל הבית (who sold his interest of the חצר to the בעל החצר) has no easement rights in the חצר -

והוא ליה כמוכר חצר ושייר בית⁴ דצריך ליקח לו דרך מבעל החצר:

And the בעל הבית is considered as if he sold the חצר and retained the בית, in which case **he would be required to buy his easement from the בעל החצר** since כל המוכר בעין יפה מוכר.

SUMMARY

The ruling of זע"ז is based on the ruling of יפה מוכר. By כל המוכר בעין יפה מוכר. By all the brothers are considered sellers and relinquish any rights in the portions that now belong to their brothers.

THINKING IT OVER

Why does not the בעל הבית have a דרך in the חצר?⁵ Granted that when the בעל הבית sold his share of the חצר to the בעל החצר he relinquished all rights to the חצר, but when the בעל החצר sold his share in the בית to the בעל הבית he was יפה מוכר and give him a דרך in the חצר (just as if the בעל החצר would have sold the בית to a stranger)?!⁶

⁴ In the case of מכר בית ושייר חצר there is only one seller; the (new) בעל החצר and he was מוכר to the (new) בעל הבית, thereby granting him an easement in the חצר. However here the בעל הבית and the בעל החצר (who were originally equal owners of the בית וחצר) are selling and relinquishing their rights in the חצר and בית (respectively), therefore the בעל הבית has no rights in the חצר (because even if we were to assume that the בעל החצר is giving him a דרך in the חצר, nevertheless the בעל הבית as a מוכר [to the בעל החצר] is relinquishing his rights to the חצר), and vice versa. See 'Thinking it over'.

⁵ See footnote # 4.

⁶ See סוכ"ד אות כב ואילך.