

**אי שתקת כולי ואי לא מהדרנא שטרא זיבורית למריה –**

**If you are silent, etc.; and if not I will return the שטרא זיבורית to its owner**

### **OVERVIEW**

The גמרא explains the ברייתא of מכרן כולן כאחד וכו' that the purchaser bought the field, the last. The reason they cannot all collect from עידית (even though it was purchased last), is because the purchaser can tell them if you collect according to your initial lien (i.e. מבינונית בע"ה אשה מזיבורית), fine; otherwise, I will return the שטרא זיבורית and you will all take from זיבורית. Our תוספות will clarify in which manner the purchaser can use the אי שתקת argument.

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כתובה begins that the אי שתקת claim can be used against the women collecting her תוספות. The owner can force her to collect זיבורית instead of עידית. תוספות anticipates a question:

**אף על גב דבלאו הכי אשה גביא מזיבורית -**

**Even though that (even) without actually enacting this threat of אי שתקת, the woman collects her כתובה from זיבורית.** He wants her to collect from זיבורית, as of now, without the 'returning'; so what threat can he present to her to persuade her not to take עידית. He is threatening her; if you do not take from זיבורית, I will return the זיבורית and you will be forced to collect from זיבורית. Seemingly this is not much of a threat. She could respond, I insist on collecting עידית; if and when you will return the זיבורית, then and only then will I collect from the זיבורית. The woman feels she is not at all jeopardizing herself since he is only offering her to collect from זיבורית.

תוספות replies that the אי שתקת is effective, and she can collect only from זיבורית:

**מכל מקום לא מציא למימר ליה לכי תהדר -**

**Nevertheless the אשה cannot counter his threat by saying to him; 'when you will return the זיבורית, I will be forced to collect from זיבורית';** however as long as the לוקח does not actualize his threat, the woman seemingly has nothing to lose and she may insist on receiving עידית. This is not so. The reason she cannot counter with the argument of לכי תהדר is –

**כיון שאין מפקיע כחה<sup>1</sup> -**

**since he is not diminishing her strength.** This claim of אי שתקת is not depriving her of her basic rights. She is initially entitled (only) to זיבורית and he is offering her זיבורית. Therefore even though in this situation she is seemingly entitled to עידית by the happenstance of

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<sup>1</sup> The power that he has to force her to collect זיבורית (by returning the זיבורית), coupled with the fact that her initial claim is basically on the זיבורית, gives the לוקח the right to force her to take זיבורית without having to actually return the זיבורית. See footnote # 3.

circumstances, he can prevent her from doing so through the claim of אי שתקת.

turns his attention to the בע"ה. It appears from the גמרא that the לוקח can force the בע"ה to collect from דינו בינונית. Why can the לוקח not force the בע"ה to collect from זיבורית, just as he can force the אשה to collect from זיבורית?! תוספות explains:

**אבל בעל חוב לא מצי למימר דלישקול בזיבורית מטעם דאי שתקת -**

**However the purchaser cannot tell the בע"ה to collect from זיבורית on account of the אי שתקת argument.** The purchaser can seemingly say to the בע"ה, not only will I not give you the עידית, but I insist that you take the זיבורית, and if you refuse to take the זיבורית, I will return the זיבורית back to the owner. The reason the owner cannot say that, but rather the בע"ה can collect from the בינונית is -

**דכיון דמפקיע כחו מצי אמר ליה לכי תהדר -**

**That since he is diminishing his strength** (by offering him זיבורית instead of בינונית which is his due), the בע"ה **can say to the purchaser 'when you will return it'** to the seller, only then will I be forced to collect from זיבורית, but now as long as you are in possession of all the fields, I collect from בינונית.<sup>2</sup> The בע"ה argues that you are not threatening me -

**דהא השתא נמי מזיבורית אתה רוצה ליתן לי -**

**For now you are also offering to me only זיבורית.**

In summation: The woman can be forced to collect from זיבורית כדינה (since he is not כחה); however the בעל חוב cannot be forced to collect from זיבורית (since he is כחו).<sup>3</sup>

**לכך לא פריך בסמוך אלא מנזקין ולא מבעל חוב כדפירש הקונטרס [ועי' תוספות יבמות לו. ד"ה דאמר]:**

**Therefore the גמרא later does not challenge the אי שתקת idea only from נזקין, but not from a בע"ה, as רש"י explained.**<sup>4</sup> The גמרא asks why do we say that the לוקח can force them to take (only) כדינם, seemingly he can even force the נזק to take בינונית, which is less than דינו; by employing the אי שתקת. However the גמרא does not also ask that he can force the בע"ה to collect less than דינו; from זיבורית. The explanation is that the לוקח cannot utilize the אי שתקת to have the בע"ה collect from זיבורית since he is כחו מפקיע from his due; the בינונית, therefore the בע"ה can argue לכי תהדר. However when there is no counterclaim of לכי תהדר (as it is when he

<sup>2</sup> The purchaser can restrain the בע"ה from collecting the עידית, and having him instead collect from the דינו בינונית כדינו for he has a valid threat against the בע"ה; he can force him to take זיבורית by 'returning'.

<sup>3</sup> The concept of אי שתקת (in a case where the creditor can respond לכי תהדר [without incurring a loss]) may be somewhat similar to the concept of מיגו (according to the interpretation that מיגו is a זכות הטענה [not a ברירה]). In both cases the claimant is treated as if his potential power (the מיגו or the מהדרגא וכו') has been actualized. However in both cases that power is limited; by מיגו it is only להחזיק and not להוציא, and by אי שתקת it is (similarly) only when he is not מפקיע כחו (which is similar to להחזיק) and not when he is מפקיע כחו (which is להוציא). However in a case where the creditor cannot claim לכי תהדר without incurring a loss, then the אי שתקת seems to take on an additional dimension; there is a viable 'threat' which the creditor cannot afford to ignore. See 'Thinking it over' # 1 (&2).

<sup>4</sup> דף ח, ב ד"ה נזקין.

threatens the נזק to collect from בינונית otherwise he will force him to collect (מזיבורית), then in such a case (only) can he force him to collect even less than דינו.

### **SUMMARY**

The לוקח can force the אשה to collect from זיבורית now, since he is not מפקיע כחה. The לוקח cannot force the בע"ה to take מזיבורית for the בע"ה can counter תהדר since he is מפקיע כחו.

### **THINKING IT OVER**

1. The לוקח can force the בע"ה to take בינונית now כדינו, since he has a viable threat that he will return the זיבורית and the בע"ה will suffer.<sup>5</sup>

The גמרא (soon) argues that he should be able to force the נזק to collect מבינונית (which is less than דינו) on account of the שתקת אי 'threat'. Where do find that אי אי?!<sup>6</sup> מעיקר הדין can deny someone his rightful due שתקת

2. Is שתקת אי a 'threat', or is it a 'right' that the לוקח has?

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<sup>5</sup> See footnote # 3.

<sup>6</sup> See פנ"י.