

**And ר"י admits in a case – where one says this field, etc.; that he is believed.**

### OVERVIEW

ר"י agrees (to ר"ג ור"א) that in a case where the current occupant of a field asserts; 'This field once belonged to your father and I bought it from him', the rule is that the מוחזק is believed.<sup>1</sup> It is not clear from the משנה whether the son initially demanded that the מוחזק vacate the premises (and the מוחזק responded that 'שדה זו כו' or whether the מוחזק initially informed the son that 'שדה זו כו', and subsequently the son demands the field be returned to him (based on the admission of the מוחזק).

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**מתוך פירוש הקונטרס משמע<sup>2</sup> דדוקא כשאין הלה תובעו -**

**From the context of רש"י's explanation, it seems that the ruling of ר"י that we accept the claim of the current occupant that לקחתיה הימנו, is only when this son of the original owner is not presenting a claim against him.** The current מוחזק approached the son of the original owner and informed him that he, the מוחזק, bought the field from his father. The son was not aware that it once belonged to his father.

**ונאמן במגו דאי בעי שתיק -**

**And the מוחזק is believed that he bought it, for he has a מגו for he could have been silent.** There was no need to tell the son anything. If he were silent he would have kept the field. Therefore, even though he admits that the field once belonged to the father, and he has no proof, nor a חזקה that it is his, nevertheless he gets to keep the field since he has the מגו דאי בעי שתיק -

**אבל אם תובעו אינו נאמן<sup>3</sup> -**

**However, if the son presented a claim against him; the מוחזק is not believed;** the son initially demanded that the מוחזק leave the field, since the son

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<sup>1</sup> The משנה is discussing a case where there is no proof that it ever belonged to the father, and the מוחזק has neither a שטר nor a שנים ג' חזקה.

<sup>2</sup> See רש"י, where רש"י טז, א ד"ה שהפה clearly states זה אינו יודע שהיתה של אביו אלא על פיו של זה. See also, רש"י, אם שתק זה לא היה לו עוררים where רש"י states that the מוחזק would retain the field.

<sup>3</sup> If the מוחזק would have responded that it never belonged to your father; the מוחזק would retain the field. However now that he admits לקחתיה הימנו, he is not believed with the מגו of לא היה של אביו. It would seem that רש"י maintains that only a מגו דאי בעי שתיק is sufficiently strong to allow the current מוחזק to retain the field. However, the מגו of להד"ם, is not sufficient. Once the מוחזק admits that the father was the קמא, a regular מגו cannot be מוציא from a קמא; only a מגו דאי בעי שתיק, which the משנה refers to as מהתיר, can be מוציא from the קמא.

inherited it from his father, and subsequently the מוחזק responded that I bought it from your father, the מוחזק is not believed, and the field reverts back to the son.

רש"י disagrees with תוספות

**ואינו נראה דהא קתני סיפא ואם יש עדים כולי -**

**And this interpretation does not seem to be correct, for the משנה teaches us in the סיפא 'and if there are witnesses, etc'.** The משנה states that if there are witnesses that the field once belonged to the father, then the מוחזק is not believed that (חזקה or שטר without a לקחתיה הימנו).

**משמע דדוקא אם יש עדים שהיתה של אביו אינו נאמן -**

**it seems from this סיפא that only if there are witnesses that it once belonged to his father;** only in such a case is the מוחזק **not believed**; for since there are עדים that it originally belonged to the father, then in order to be מוציא a field from a קמא, a שטר or שנים is required.

**אבל אם אין עדים אף על גב דהלה תובעו נאמן במגו -**

**However if there are no witnesses** that the father was the קמא, then the מוחזק is always believed **even though the son is demanding of him**, that he vacate the premises, nevertheless the מוחזק **is believed**, for he has a מיגו –

**דאי בעי אמר לא היתה של אביך מעולם -**

**For the מוחזק could have claimed it was never your father's;** the son has no witnesses that it was his father's (in the רישא of the משנה). It is only in the סיפא that the משנה states that there are עדים. תוספות concludes his proof that the רישא is discussing even a case of תובעו –

**מדלא נקט אם תובעו אינו נאמן -**

**Since the משנה did not state 'if he demands of him, he is not believed'.**

According to רש"י the משנה should not have (merely) said if there are עדים, he is not believed; rather the משנה should have said that even if the son accuses him (עדים without), the מוחזק is not believed.<sup>4</sup>

תוספות offers an additional proof to his contention that רש"י is mistaken:

**ובגמרא נמי פריך<sup>5</sup> וליתני שדה זו שלך היתה -**

**And the גמרא also challenges the משנה and asks, 'and the משנה should rather have taught us a case where the מחזיק says this field was once yours, etc.'** The גמרא asks that instead of teaching us the דין of היתה של אביך היתה (which is

<sup>4</sup> תוספות assumes that it is a greater חידוש that the מוחזק is not believed תובעו without עדים, than that the מוחזק is not believed if there are עדים that the father owned the field. Therefore if רש"י is correct, that בהלה תובעו, then the משנה should have taught us the greater חידוש of הלה תובעו. See 'Thinking it over' # 2.

<sup>5</sup> דף יז,ב.

somewhat more complicated), the משנה could have taught the same דין in a case of שדה זו (which is a simpler case). This concludes the citation from the גמרא.

– גמרא continues with his proof. This question of the תוספות

**משמע דבהלה תובעו איירי -**

**indicates that** the משנה **is discussing** a case **where** the son **is accusing** the מוחזק of occupying his field, which prompted the response of שדה זו שלך היתה ולקחתיה ממך.

הלה expounds; If we assume that the case of שלך היתה is discussing a situation of תובעו –

**ולכך משיב ודאי שלך היתה ולקחתיה ממך -**

**Therefore** the מוחזק **responds to him**; ‘**certainly it was yours, however I subsequently bought it from you**’. This conversation is understandable -

**אבל אם לא תובעו אין שייך לומר שלך היתה כי מסתמא הוא יודע בעצמו דבר זה:**

**However, if** we are discussing a case **where** the מחזיק **is not being accused**; rather the מחזיק is approaching the former owner (as רש"י would have us understand), then **it is not appropriate** for the מחזיק **to state** to the original owner ‘**it was yours**’, **for it is assumable that he himself** (the former owner) **knows of this**.<sup>6</sup> The owner knows that he is an owner; what does the מוחזק accomplish by saying ‘this was once your field’. He merely should have said שדה זו. The words שלך היתה, make sense only if the מוחזק is acknowledging a claim made against him; not if he is merely informing the former owner of his own status as a buyer. Once we assume that the question of שלך היתה is discussing תובעו הלה, it is self understood that the מיגו of להד"ם is sufficiently strong that the מוחזק retain the field.

הלה תובעו. The מוחזק is therefore maintains that the ruling of רש"י is valid even if תובעו הלה. The מוחזק is believed since he has a מיגו of מעולם אביך.<sup>7</sup>

## SUMMARY

There is a dispute between רש"י and תוספות in a case where a מערער claims that the מוחזק is occupying his (deceased) father's field; and the מחזיק

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<sup>6</sup> שדה זו של אביך היתה of משנה in the case could not have proven this from the case in the תוספות. for there the phrase שדה זו של אביך היתה is appropriate even if תובעו הלה. He is informing the son, who may not be aware, that this field once belonged to your father. However in the גמרא's question where he is stating שלך היתה, that statement is only appropriate if it is תובעו הלה.

<sup>7</sup> See previous footnote # 3. תוספות will assume that since the son has no proof that it ever belonged to his father. His only claim is based on the admission of the מוחזק, that אביך היתה; therefore the מיגו of להד"ם is sufficiently effective for the מוחזק to retain the field. According to תוספות this type of מיגו is also considered הפה שאסר הוא הפה שהתיר.

responds that he bought it from the father.<sup>8</sup> According to רש"י the מערער receives the field; according to תוספות the מוחזק retains the field.

### **THINKING IT OVER**

1. What would be the respective views of רש"י ותוספות in a similar case where there is no mention of a father; rather the מחזיק claims he bought it from the מערער?
2. Where is there a greater חידוש that the מוחזק is נאמן; in a case of הלה תובעו without עדים, or הלה תובעו with עדים?<sup>9</sup>

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<sup>8</sup> There are no other witnesses, documents or חזקה.

<sup>9</sup> See footnote # 4.