

הלכך נוטל רביע בקרקע ורביע במעות –

Therefore he takes a fourth in land and a fourth in money

OVERVIEW

רביע בקרקע ורביע במעות maintains that the disinherited brother receives רביע בקרקע or רביע במעות (as the remaining brother wishes).¹ According to [the לשון אחרון of רש"י and] תוספות (his entire [half] loss).² The rule generally is that המוציא מחבירו עליו הראיה. The one who wishes to extract payment has the burden of proof; in this case the מוציא is the disinherited brother. Seemingly the rule should be that [according to the ל"ק, nothing should be paid, for perhaps and] according to the ל"א, he should only be required to pay him with money, for perhaps כלקוחות באחריות דמי and there is no מחלוקת. Our תוספות offers a terse answer to this question without any explanation.

תוספות states that the answer to the question is:

דלא שייך ביה המוציא מחבירו עליו הראיה:

For the rule of המוציא מחבירו עליו הראיה is not applicable in this case.³ One of the commentaries⁴ explains that our תוספות is offering this answer according to the ל"א, where there is no doubt whether the remaining brother owes the disinherited brother. The only doubt is whether בטלה מחלוקת and he is to be paid with קרקע or כלקוחות באחריות דמי and he could be paid with money. In this type of a ספק (where there is no doubt that a payment is required, but rather) where we do not know what type of payment to make, then the rule of המע"ה does not apply. The rule of המע"ה applies only when there is a doubt if payment is due.

SUMMARY

The rule of המע"ה, is not applicable to our case.

THINKING IT OVER

Here it is a ספיקא דדינא; how can one bring a ראייה?!

¹ The reason is because רב אסי is uncertain whether כיוורשים דמי and he receives his entire loss (half of the property confiscated), or כלקוחות (שלא באחריות) דמי and receives nothing. On account of this ספק we divide the loss and he receives a quarter of the confiscated property either בקרקע or במעות.]

² The reason is because there is a ספק is if כיוורשים דמי (and he receives half בקרקע) or כלקוחות באחריות דמי (and he receives half במעות). We therefore compromise and obligate the remaining brother to compensate him (at least) רביע בקרקע and a רביע במעות.

³ See אמ"ה for various explanations (and their refutations) of this תוספות.

⁴ See פנ"י (and ר"נ וכו' and פנ"י).