**ומודה רבי יהושע באומר שדה כולי דנאמן –admits in** a case  **ר"י And**

**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.[[1]](#footnote-1) 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 וכו', 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[[2]](#footnote-2) דדוקא כשאין הלה תובעו -**

**From the context of sרש"י' 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** מוחזקis 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[[3]](#footnote-3) -**

**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 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.

תוספות disagrees with רש"י:

**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 לקחתיה הימנו (without a שטר or חזקה).

**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 מרא קמא, a שטר or חזקת ג' 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 מרא קמא, then the מוחזק is always believed **even though the** son is **demanding of him**,that he vacate the premises, nevertheless theמוחזק **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 הלה 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 (without עדים), the מוחזק is not believed.[[4]](#footnote-4)

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

**ובגמרא נמי פריך[[5]](#footnote-5) 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 שדה זו של אביך היתה (which is somewhat more complicated), the משנה could have taught the same דין in a case of שדה זו שלך היתה ולקחתיה ממך (which is a simpler case). This concludes the citation from the גמרא.

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

**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.

תוספות expounds; If we assume that the case of שלך היתה is discussing a situation of הלה 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.[[6]](#footnote-6)** 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 לקחתיה ממך. The words שדה זו 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 הלה תובעו, it is self understood that the מיגו of להד"ם is sufficiently strong that the מוחזק retain the field.

תוספות therefore maintains that the ruling of ר"י is valid even if הלה תובעו. The מוחזק is believed since he has a מיגו of לא היתה של אביך מעולם.[[7]](#footnote-7)

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 responds that he bought it from the father.[[8]](#footnote-8) 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 אין הלה תובעו with עדים?[[9]](#footnote-9)

1. 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 חזקת ג' שנים. [↑](#footnote-ref-1)
2. See רש"י טז,א ד"ה שהפה, where רש"י clearly states זה אינו יודע שהיתה של אביו אלא על פיו של זה. See also, רש"י ד"ה הכא where רש"י states אם שתק זה לא היה לו עוררים. [↑](#footnote-ref-2)
3. If the מוחזק would have responded that it never belonged to your father; the מוחזק would retain the field. However now that he admits של אביך היתה, he is not believed that לקחתיה הימנו with the מיגו of לא היתה של אביך מעולם. It would seem that רש"י maintains that only a מיגו דאי בעי שתיק is sufficiently strong to allow the current מוחזק to retain the field. However, the מיגו of להד"ם, is not sufficient. Once the מוחזק admits that the father was the מרא קמא, a regular מיגו cannot be מוציא from a מרא קמא; only a מיגו דאי בעי שתיק, which the משנה refers to as הפה שאסר הוא הפה שהתיר, can be מוציא from the מ"ק. [↑](#footnote-ref-3)
4. תוספות assumes that it is a greater חידוש that the מוחזק is not believed בהלה 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 אינו נאמן, then the משנה should have taught us the greater חידוש of הלה תובעו. See ‘Thinking it over’ # 2. [↑](#footnote-ref-4)
5. דף יז,ב. [↑](#footnote-ref-5)
6. תוספות could not have proven this from the case in the משנה of שדה זו של אביך היתה; for there the phrase שדה זו של אביך היתה is appropriate even if אין הלה תובעו. He is informing the son, who may not be aware, that this field once belonged to your father. However in the sגמרא' question where he is stating שלך היתה, that statement is only appropriate if it is הלה תובעו. [↑](#footnote-ref-6)
7. 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 של 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. [↑](#footnote-ref-7)
8. There are no other witnesses, documents or חזקה. [↑](#footnote-ref-8)
9. See footnote # 4. [↑](#footnote-ref-9)