כגון זה כופין על מדת סדום – **In this for instance we constrain** him from acting in **the manner of סדום**[1]

Overview

A son bought property adjoining his father's property. רבה ruled that he can demand that his inherited share in the estate should be the field which adjoins his property. Not to give it to him would be a מדת סדום, since for the other heirs it makes no difference where their properties are located, and to this son it would be advantageous to have all his properties (the old and the new) adjoining each other. תוספות discusses the implication and application of כופין על מדת סדום.

תוספות asks:

תימה לרבינו יצחק לרבה אמאי איצטריך קרא[2] **בבכור דיהבינן ליה אחד מצרא**[3] –

The ר"י is astounded! According to רבה (that כופין על מדת סדום applies in this case), **why is a פסוק necessary** to teach us **that we give the בכור** his two portions (חלק פשוט וחלק בכורה) **on one boundary** (that it should be one contiguous property)?!

תוספות answers:

ואומר רבינו יצחק לפי שלא נתן לו[4] **כח הכתוב אלא כב' אחיו**[5] –

And the ר"י answers; since the פסוק only gave to the בכור **the rights of two brothers -**

ואילו היו שני אחיו רוצים להשתתף לא כפינן לשלישי לתת להם חלק ביחד[6] –

So if two brothers want to partner (and combine their inheritance) **we do not coerce the third** brother **to give them their shares together,**[7] but rather the third brother can insist on casting lots for their respective three parcels.[8]

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[1] מדת סדום is mentioned in (פ"ה מ"ו) אבות מס' that האומר שלי שלי ושלך שלך, etc. יש אומרים זוהי מדת סדום; meaning that I only take my needs in consideration, not of my fellow Jew.

[2] See previous חלק ד"ה תוס' that we derive from the פסוק פי שנים that a בכור receives both shares אחד מצרא.

[3] Just as in the case of זבין ארעא אמצרא דבי נשי we give him the adjoining property (for כופין על מדת סדום), the same should apply to a בכור that we give him both shares אחד מצרא for כופין על מדת סדום. The other sons have nothing to lose by giving him both shares together, and it is beneficial for the בכור.

[4] The הגהות הב"ח amends this to read; אלא לו **<u>הכתוב כח</u>**.

[5] This would be our understanding if the פסוק would not say פי שנים, but would rather say חלק נוסף or something similar.

[6] Let us assume that the estate consists of three equal adjoining parcels; where parcels 1 & 3 abut parcel 2 on either side. The partners cannot insist that that they receive parcel 2 and the lottery should be whether they receive either 1 or 3, and the third brother can receive either parcel 1 or 3 but not parcel 2. Rather the third brother has a right that there should be an equal lottery for all three parcels.

[7] Similarly I would have thought by בכור that the brothers can insist that he receive his two parcels separately by

תוספות offers an additional explanation why the פסוק of פי שנים is necessary:

ועוד דבכור מתנה קרייה רחמנא–

And in addition; that the תורה refers to the parcel **of the בכור as a gift -**

כדאמר ביש נוחלין (שם) **דכתיב לתת[9] לו פי שנים ואין לכוף את הנותן[10] –**

As the גמרא **states in** פרק **יש נוחלין, that it is written לתת לו פי שנים (to <u>give</u> him double); and we cannot force a grantor** of a gift as to where the location of the gift should be.

תוספות responds to an anticipated difficulty:[11]

ולאביי נמי אי לאו דקרייה רחמנא בכור –

And also according to אביי, if the תורה would not have called the יבם a **בכור -**

הוה אמינא יקום על שם אחיו כאילו הוא ואחיו קיימין –

We would have thought that the verse **יקום על שם אחיו (he should take the place of his brother)[12]** means that he should inherit his brother's share **as if he and his brother are alive.[13]**

תוספות offers an alternate solution to the original question (why a פסוק is necessary):

ורבינו יצחק בן אברהם מפרש דהא דאמר רבה כופין לא מדין תורה קאמר –

And the ריצב"א explained that when רבה ruled 'כופין', he did not mean that this is a תורה law -

דבדין היה יכול למחות[14] שכנגדו דאיכא קפידא ברוחות כדאמר בכמה דוכתין[15] –

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lottery; therefore we need the פסוק of פי שנים to teach us that he receives both parcels together.

[8] It will be necessary to distinguish between the case of זבן אמצרא דבי נשא where we do say כופין על מדת סדום, and the case of שני אחיו where there is no כופין עמ"ס. One explanation may be that by זבן אמצרא he already had a certain right in the adjoining property even before his father died (his father could not sell this property without giving him first refusal rights since he is a בר מצרא) therefore we say כופין עמ"ס (to retain his rights); however by the שני אחיו at the time the father died none of the brothers had any claim on any of the fields and the third brother had an equal right to the middle field, therefore we do not say כופין עמ"ס (to deny him his right). See סוכ"ד אות כב.

[9] The word לתת (to give) indicates that this extra portion is a gift.

[10] It seems that since the extra portion of the בכור is at the expense of the remaining brothers; it is considered as if they are gifting him this extra portion, and we cannot coerce a grantor how he should distribute his gift. The brothers can decide that the gift should not be adjoining. See נתיבות המשפט סי' רע"ח ס"ק ט and ברכת אברהם (לח,ב).

[11] אביי ruled that a יבם receives his and his deceased brother's inheritance אחד מצרא, since the תורה refers to the יבם as the בכור. The same question arises here as well; why is a פסוק necessary; we should give the יבם both parcels אחד מצרא for כופין על מדת סדום. We cannot answer here that מתנה קרייה for by יבום there is no mention of מתנה.

[12] This פסוק teaches that the יבם receives the inheritance of the deceased brother (in addition to his own).

[13] If both he and his [deceased] brother were alive they could not manipulate the other heirs that their properties (of the יבם and the מת) should adjoin, as תוספות just stated (in the first answer to the previous question. See footnote # 6). Similarly without the פסוק of בכור the יבם could not coerce his brothers to give him both parcels אחד מצרא.

[14] Therefore there is no question why a פסוק is necessary; for רבה is giving (merely) a rabbinic ruling while the פסוק makes it a תורה ruling. See footnote # 21.

[15] See קידושין מב,ב that יכולים למחות ברוחות. The minor heirs can protest at maturity that they prefer their parcel in a

For according to תורה **law the other** heir **can protest** and not allow him to take the adjoining property **for there is 'preference in location' as is mentioned in many places** in the גמרא. Therefore מה"ת we cannot be כופה**,** since they can always be מוחה ברוחות –

תוספות offers an additional explanation why כופין על מדת סדום here is only מדרבנן:

ועוד הא דכופין על מדת סדום בזה נהנה וזה לא חסר[16] –

And additionally this that we are כופין על מדת סדום in a case where one benefits and the other does not lose -

היינו בשכבר דר בחצר חבירו שאינו מעלה לו שכר –

That is only if he lived in his friend's חצר, that he does need to pay rent -

אבל הא פשיטא שיכול למחות בו שלא יכנס לדור בביתו[17] –

However this is obvious that the owner of the property **can protest** and prevent him **that he should not enter to live in his house -**

אפילו בחצר דלא קיימא לאגרא וגברא דלא עביד למיגר דהוה זה[18] **נהנה וזה לא חסר –**

Even in a case **where the חצר is not intended to be rented and the** other **person does not usually rent, which** makes it a case of **זה [לא] נהנה וזה לא חסר,** and the owner can prevent him from using his property -

אלא[19] **מתקנת חכמים קאמר הכא דכופין**[20] –

Rather it is because of a rabbinic enactment that רבה rules here that כופין -

והשתא אין להקשות כלל[21] **אמאי איצטריך קרא בבכור:**

So now there is no question at all why we require the פסוק of בכור.

SUMMARY

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different location (not the one that was chosen for them by their אפוטרופוס).

[16] The גמרא in ב"ק כ,א-ב discusses a case where a person lived in someone's property without permission. The גמרא concludes that if the owner has no intention of renting out this place (he is לא חסר, not losing anything by the squatter living there) then even if the squatter (usually) rents (so he is a נהנה), nevertheless he need not pay the rent (and certainly if he never rents [where he is a לא נהנה]), since we are כופין עמ"ס, for the owner suffered no loss.

[17] Even if we were to assume that כופין עמ"ס is a דאורייתא that is only בדיעבד not to pay, but to initially force one to give up his rights (to his house, or to a lottery), there is no כופין עמ"ס מדאורייתא.

[18] The רש"ש amends this to read, נהנה **לא** זה.

[19] Here too (by בכור or by זבין אמצרא דבי נשא), the other brothers have a right to a גורל; therefore initially they can say we do not wish to relinquish this right. The only reason we are כופין עמ"ס is because of a תק"ח.

[20] The reason the חכמים were כופה עמ"ס by ירושה and not by שכירות (where one may refuse to let anyone live in his חצר) may be that by שכירות he is the actual owner of the חצר, and there is not ample reason to deny him the right of ownership on his property. However by ירושה the other brothers have no actual right to any particular parcel, but rather they merely have a potential right through a גורל. The חכמים enacted that this potential right for גורל must be relinquished to accommodate the brother who may suffer a loss if there is a גורל.

[21] See footnote # 14. If it is derived from a פסוק, then the adjoining parcel legally belongs to the בכור; if it is כופין עמ"ס we require the consent (even through כפיה) of the other brother(s) to transfer it to the בכור.

There is no כופין עמ"ס by a בכור (and a יבם) since (תי' ר"י) it is like two brothers who want to deny the third brother his rights to a lottery, or because בכורה is a מתנה where there is no כופין. Alternately (תי' ריצב"א) the rule of כופין עמ"ס (in these cases of לכתחלה) is only מדרבנן and a בכור receives his two portions אחד מצרא מדאורייתא.

THINKING IT OVER

1. תוספות finds it necessary to explain why according to אביי we require a פסוק for a יבם that he receives both parcels אחד מצרא, and the concept of כופין על מדת סדום is insufficient. אביי shortly maintains that even in a case of תרתי ארעתא אחד נגרא we do not say כופין על מדת סדום; what is תוספות difficulty with אביי?![22]

2. According to the ריצב"א are the two brothers able to coerce (מדרבנן) the third brother to give them adjoining parcels?

3. Is כופין עמ"ס a תורה law or a דרבנן law?

[22] See נח"מ and סוכ"ד אות כו.