

**But now it would appear that - אלא מעתה מחאה שלא בפניו לא תהא מחאה -
a protest not in his presence should not be a protest**

OVERVIEW

asked that if we derive חזקת ג' שנים from שור המועד, then we should also derive that a מחאה שלא בפניו לא הויא מחאה. It would seem that his question is that if the מערער made his מחאה שלא בפניו, it should not be a valid מחאה, and therefore the חזקה should be a proper חזקה.¹ However תוספות is not satisfied with this explanation. One reason may be that if a מחאה שלא בפניו לא הויא מחאה, then if the מערער lives in a different city from the מחזיק, he would be required to travel to the city to make a מחאה. This, תוספות maintains, is unreasonable.² Another difficulty with this interpretation is (as תוספות later states³) that a העדאה is coming to establish a new חזקה, while a מחאה is coming to retain the present חזקה. We cannot derive one from the other. תוספות therefore chooses a different interpretation of רב עירא's question.

פירש רבינו יצחק כי היכי דילפת משור המועד דהוי חזקה בשלשה זימני –

The שור explained the גמרא's question as follows: **just as you derive from שור that a חזקה is established in three times –**

הכי נמי נילף מה שור⁴ צריך העדאה בפניו ולא אמר קלא אית ליה ותועיל –

let us also similarly derive from שור המועד an additional lesson; **just as by a שור [המועד] it is required that the warning take place in the presence of the owner; however a warning not in his presence is insufficient to render the ox a מועד and one does not say that the warning is adequately publicized and a העדאה should be adequate** because the owner of the ox will hear of the העדאה; we do not assume that, but rather we require a העדאה בפניו, because we assume that the owner will not hear the העדאה –

הכי נמי מחאה שלא בפניו אית לן למימר דלית ליה קלא ולא תהא חזקה –

Similarly by שנים if it is a מחאה שלא בפניו, if the מערער and מחזיק live far apart, **we should also assume that the מחאה does not have sufficient publicity and the מחזיק will not hear the מחאה, and therefore it should not be a חזקה -**

¹ This seems to be רש"י's understanding of the גמרא (see מחאה).

² See תוס' לקמן כט,א ד"ה אלא, 'דהא אינו צריך לבא בעיר אחרת לפני המחזיק ולמחות כדמוכח לקמן'.

³ See also footnote # 10

⁴ The שור המועד צריך; הגהות הב"ח amends this to read.

אף על פי ששמע החזקה כיון דאין קול למחאה⁵ –

Even in a case where the מערער **heard** about the חזקה; nevertheless it should still not be considered a חזקה. The reason it should not be a חזקה, is **since the objection will have no publicity**; the מחזיק will not hear it –

מה⁶ היה מועיל אם מוחה כיון שלא תגיע למחזיק מחאתו⁷ –

[for] what would it accomplish if the מערער [would] object, since his objection will not reach the ears of the מחזיק. Therefore since there is no purpose in the מחאה, there is no reason for the מערער to make a מחאה.⁸ If no מחאה needs to be made, there can be no חזקה. The validity of a חזקה is based on the fact that the מערער did not object.⁹ If there is no need (or purpose) to object, there can be no חזקה. The question that the גמרא asks, ב"ב כח,ב תוס' אלא מעתה מחאה שלא בפניו, is that if the חזקה is not בפני המערער, it should not be a חזקה (not that it should not be a מחאה and it should be a חזקה).

תוספות anticipates the following question:

ואף על גב שמחאה באה לבטל החזקה וההעדאה באה לקיים –

And even though that the intent of a מחאה is to nullify the חזקה; as opposed to **the warning** by a שור המועד; whose intent is **to substantiate** a new חזקה. How can we derive from שור המועד that just as to establish a חזקה it must only be בפניו, similarly to establish a מחאה it must also be בפניו? Perhaps the rules concerning establishing a חזקה differ from those of establishing a מחאה! When we wish to establish a new חזקה, to change from the previous status, it requires a greater effort (only בפניו); however to establish a מחאה (which will prevent a חזקה from taking effect, and maintaining the present status) that can be accomplished much easier (even שלא בפניו).¹⁰

⁵ מחאה שלא (מערער) has a greater chance of being heard (by the מערער) than a מחאה בפניו will point out later that a חזקה שלא בפניו (מחזיק) has a chance of being heard (by the).

⁶ The היה מועיל אם היה מוחה; amends this to read; הגהות הב"ח.

⁷ This seems to indicate, that (even) according to the משור המועד, the purpose of the מחאה is to weaken the position of the מחזיק, by challenging him that since there was a מחאה, then where is the שטר. If the מחזיק will not hear the מחאה, the purpose of the מחאה is defeated.

⁸ See 'Thinking it over # 2.

⁹ In the confrontation between the מערער and the מחזיק, the מערער (generally) has proof that he was the original owner. The מחזיק has no שטר. The claim of the מחזיק that he bought the field from the מערער is substantiated (only) by the חזקה and the lack of a מחאה. If the מערער did not sell the field, why did he not protest? Had the מערער protested, that would have alerted the מחזיק to keep his שטר. If however the מחזיק would not have heard the מחאה anyway, what purpose is there in making it? Consequently the חזקה in such an instance is meaningless, for it does not substantiate the claim of the מחזיק.

¹⁰ It is readily understood that it is more difficult to change the status quo than to retain it. When there is either a העדאה or מחאה שלא בפניו we are not certain whether it is sufficiently publicized or not. Therefore by a העדאה שלא בפניו, since we cannot assume that it was heard by the owner, so the status quo remains; the שור is still a תם. By מחאה שלא בפניו, however, even though we are not certain whether the מחזיק heard the מחאה, nevertheless it is possible that he did hear it. Since it is in doubt we let the original status remain. The field should remain במחזקת המערער. (Alternately, since the מערער made a מחאה, therefore the basis of the חזקה is undermined. Even if this מחאה is questionable [since

תוספות responds:

מכל מקום פריך שפיר –

Nevertheless the question of מחאה is justified. explained previously that by arguing that מחאה שלא בפניו לא תהא מחאה, we really intend to say that מחאה שלא בפניו לא תהא מחאה. Therefore the שור המועד from לימוד is accurate; in both cases (by שור המועד and שנים ג' חזקה) we wish to invalidate מחאה שלא בפניו.¹¹

anticipates and addresses another question on his interpretation: If the intention of the גמרא is that we should derive from שור המועד מחאה חזקה –

והא דנקט מחאה ולא נקט חזקה –

So why did the גמרא mention the case of מחאה שלא בפניו and it did not mention the case of חזקה שלא בפניו; since we are interested to derive that מחאה שלא בפניו cannot take effect. The גמרא should have asked that חזקה instead of מחאה. The same logic that dictates that מחאה שלא בפניו לא תהא מחאה, since מחאה חזקה does not hear מחאה, will also dictate that חזקה should not be a חזקה since מערער does not know about the חזקה, so that he should be מוחה.

replies:

משום דחזקה נשמעת טפי מהעדאה –

Because a חזקה is more readily heard than the warning of שור המועד. The fact that the העדאה of שור המועד must be בפניו, would not lead us to conclude that מחאה שלא בפניו is not a חזקה. We could differentiate between them. The owner of the שור may not hear the העדאה of שור (therefore it is not a מועד); however מערער will more likely hear of the חזקה (therefore it should be a valid חזקה).¹² That is why the גמרא cannot ask initially that מחאה חזקה לא תהא מחאה.

אבל מחאה אינה נשמעת יותר¹³ –

However the objection of the מערער is not more readily heard than the העדאה of שור. Therefore we can compare the two, and argue that just as העדאה שלא בפניו is invalid (since the owner will not hear it) similarly מחאה שלא בפניו is invalid (for מחזיק will not hear it). Once, however, that we derive that מחאה שלא בפניו is not a מחאה, then it follows that מחאה חזקה שלא בפניו is not a חזקה. There can be no חזקה without the need and opportunity of a purposeful מחאה.

anticipates an additional question: The גמרא when it asks the question that מחאה שלא בפניו

(חזקה מערער retain his original חזקה), nevertheless, it should suffice that the

¹¹ If the intention of the question מחאה מעתה מחאה was that it should not be a מחאה, then there would be a difficulty as just mentioned; however since as תוספות explained, the intention is that there should be no חזקה, then it is similar to שור המועד, in both cases מחאה שלא בפניו cannot establish a חזקה.

¹² An absentee owner is continually inquiring as to the status of his fields; therefore he will be aware of any חזקה in his field.

¹³ In both cases neither the owner of the שור or the purchaser of the field anticipates any difficulties or changes of the present status

should not be a מחאה, just as by a שור המועד a שור בפניו is not a העדאה, the גמרא is assuming that the reason why a העדאה שלא בפניו is invalid, is because the owner will not hear of it. Similarly the מחאה which has the same publicity as a העדאה (as just mentioned) will also not be heard. If the גמרא assumes that the מחאה שלא בפניו will not be heard, then –

ובלא שור המועד הוי מצי למיפרך דלא תהא מחאה כדפריך¹⁴ אליבא דרבנן –

The same question can be asked without any reference to שור המועד. The גמרא could have simply asked **that** a מחאה שלא בפניו **should not be a valid מחאה**; since it cannot be heard by the מחזיק. Our תוספות proves that the question of מחאה שלא בפניו as the גמרא will later ask **according to the רבנן**, who do not derive שנים ג' from שור המועד, but rather from a סברה. Nevertheless the גמרא asks there that a מחאה שלא בפניו לא תהא מחאה, since it cannot be heard. Why did our גמרא have to resort to compare שנים ג' from שור המועד, in regards to this question?!

– שור המועד to depend on answers: In truth it was not necessary to depend on תוספות

אלא כיון דיליף משור המועד ניחא ליה למפרך מיניה –

however since we derive שנים ג' from שור המועד it is easier for the מקשן to challenge the status of מחאה שלא בפניו; for from שור המועד we have proof that מחאה שלא בפניו has no קול, since העדאה שלא בפניו is invalid.

¹⁵:ר' עזירא answer to the question of the גמרא's continues with the תוספות

ומשני חברך חברא אית ליה ויש קול בין למחאה בין להעדאה –

And the גמרא answers: 'Your friend has another friend, etc. so there is adequate publicity both by a מחאה and העדאה; which explains why a מחאה בפניו הויא מחאה –

אבל בהעדאה גרידא גזירת הכתוב הוא דאין נעשה מועד אלא אם כן מעידים בפניו –

However, concerning העדאה only, it is a decree of the תורה that the ox does not become a מועד unless the witnesses testify in the presence of the owner –

אפילו יתברר לו באלף עדים שהעידו על שורו בבית דין:

Even if the owner will become aware through the testimony of a thousand witnesses, who will come to the owner and testify that witnesses testified in בי"ד concerning your ox; that he gored three times, nevertheless since he was not warned personally (in בי"ד) to guard his ox he will not be מועד בתשלומי מועד. The reason why העדאה must be בפניו is not because the owner is not aware; but rather it is a special requirement that he be warned personally by the עדים (in בי"ד).

SUMMARY

¹⁴ לקמן כט,א, ועיי"ש תוס' ד"ה אלא

¹⁵ See 'Thinking it over' # 3.

The question 'וכו' אלא מעתה מחאה is that since a העדאה שלא בפניו is not a העדאה therefore a מחאה שלא בפניו should not be a מחאה and consequently the חזקה שלא בפניו should not be a חזקה.

THINKING IT OVER

1. In the previous תוספות there were two ways how to understand the שור from לימוד: A. Three years makes the מחזיק a מוחזק in the field and the מערער is a מוציא.¹⁶ B. If the מערער did not protest for three years, then he is presumed to give up his rights.¹⁷ When the גמרא asks 'וכו' אלא מעתה מחאה, which of these two interpretations is the גמרא following?

2. תוספות states that since a מחאה שלא בפניו will not be heard by the מחזיק, there is no point in the מחאה.¹⁸ Seemingly there is a point to the מחאה even if the מחזיק does not hear it. It invalidates the proof of the חזקה. We cannot say that if it is the מערער's field, why did he not protest. The מערער did protest.¹⁹

3. Why is it necessary for תוספות to explain²⁰ the תירוץ of the גמרא?

¹⁶ See תוס' כח,א ד"ה עד.

¹⁷ See תוס' כח,ב ד"ה אלא וכו' חזקה.

¹⁸ See footnote # 8.

¹⁹ See סוכ"ד אות מג.

²⁰ See footnote # 15.