

**But now it would appear that a protest not in his presence should not be a protest.**

### Overview

asked that if we derive שנים ג' חזקת from שור המועד, then we should also derive that a מחאה שלא בפניו לא תהא 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<sup>1</sup>. 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 מחזיק's city to make a מחאה. This, תוספות maintains, is unreasonable<sup>2</sup>. Another difficulty with this interpretation is (as תוספות later states<sup>3</sup>) 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 ש"ת's question.

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**The ר"י explained** the ש"ת's question as follows:  
**- שור המועד just as you derive from משור המועד - כי היכי דילפת משור המועד -**  
**- that a חזקה is established in three times - דהוי חזקה בשלשה זימני -**  
**- let us also derive from שור המועד an additional lesson - הכי נמי נילף -**  
**- 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 - מה שור [המועד]<sup>4</sup> צריך העדאה לפניו -**  
**- and one does not say that the warning is adequately publicized - ולא אמר קלא אית ליה -**  
**- and a העדאה שלא בפניו 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 - ותועיל -**  
**- here too by שנים ג' חזקת if it is a מחאה בפניו - הכי נמי מחאה שלא בפניו, if the מערער and מחזיק live far apart -**  
**- we should similarly assume - אית לך למימר -**  
**- that the מחאה does not have sufficient publicity and the מחזיק will not hear the מחאה - דלית ליה קלא -**  
**- and therefore it should not be a חזקה. In a case where the מערער lives in a different place, far from the מקום החזקה, it should not be a חזקה - ולא תהא חזקה -**

<sup>1</sup> This seems to be ש"ת's understanding of the גמרא.

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

<sup>3</sup> See also footnote # 10.

<sup>4</sup> See הגהות הב"ח.

**heard** about the **מערער** – **even** in a case where the **אף על פי ששמע החזקה**; 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**<sup>5</sup>; the **מחזיק** will not hear it –

**what would it accomplish if he objects –** **מה היה מועיל אם [היה] מוחה** – **since his objection will not reach the ears of the מחזיק**<sup>7</sup>. Therefore since there is no purpose in the **מחאה**, there is no reason for the **מערער** to make a **מחאה**<sup>8</sup>. 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<sup>9</sup>. If there is no need (or purpose) to object, there can be no **חזקה**. The question of the **גמרא** that **בפניו** **שלא** **מחאה** 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**).

anticipates the following question:

**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**)<sup>10</sup>.

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

<sup>6</sup> See הגהות הב"ח אות ז.

<sup>7</sup> This seems to indicate, that Tosfos maintains that (even) according to the **שור 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 your **שטר**. If the **מחזיק** will not hear the **מחאה**, the purpose of the **מחאה** is defeated.

<sup>8</sup> See 'Thinking it over # 2.

<sup>9</sup> 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**.

<sup>10</sup> It is readily understood that it is more difficult to change the status quo than to retain it. When there is either a **מחאה** **שלא בפניו** or the **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 **בפני המערער**. (Alternately, since the **מערער** made a **מחאה**, therefore the basis of the **חזקה** is undermined. Even if this **מחאה** is questionable [since **אין לה קול**], nevertheless, it should suffice that the **מערער** retain his original **חזקה**.)

responds:

**is** אלא מעתה מחאה **nevertheless the question** of מחאה **is** **justified**. מחאה שלא בפניו לא תהא מחאה explained previously that by arguing that מחאה, we really intend to say that חזקה שלא בפניו לא תהא חזקה. Therefore the לימוד from שור המועד is accurate; in both cases we wish to invalidate a חזקה שלא בפניו.<sup>11</sup>

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

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

answers:

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

– **However the objection** of the מערער **is not more readily heard** than the העדאה of the שור<sup>13</sup>. Therefore we can compare the two, and argue that just as a העדאה שלא בפניו is invalid (since the owner will not hear it) similarly a מחאה שלא בפניו is invalid (for the מחזיק will not hear it). Once, however, that we derive that a מחאה שלא בפניו is not a מחאה, then it follows that a 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 a מחאה should not be a מחאה, just as by a שור המועד a העדאה שלא 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 –

– **the same question can be asked without** any reference to שור המועד. The גמרא could have simply asked that a מחאה שלא בפניו –

<sup>11</sup> 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 חזקה שלא בפניו cannot establish a חזקה.

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

<sup>13</sup> In both cases neither the owner of the שור or the purchaser of the field anticipates any difficulties or changes of the present status.

**מחאה**; since it cannot be heard by the תוספות. מחזיק – שור המועד will prove that the question of מחאה, does not require any support from שור המועד –

**as the גמרא will later<sup>14</sup> ask according to the רבנן**, who do not derive חזקת ג' שנים from שור המועד, but rather from סברא. 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' שנים from שור המועד, in regards to this question?!

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

**שור from חזקת ג' שנים however since we derive חזקת ג' שנים from שור מועד**

**מחאה to challenge the status of** – **it is easier** for the **מקשן** **ליה למיפרך מינה** **from** שור המועד; for from שור המועד we have proof that **שלא בפניו** has no קול, since העדאה של בפניו is invalid.

ר' עזרא answer to the question of גמרא's continues with תוספות

**and the גמרא answers: 'Your friend has another friend, etc.** In truth –

**there is adequate publicity both by a מחאה and העדאה**; which explains why a מחאה בפניו הויא מחאה

**however concerning העדאה itself – אבל בהעדאה גרידה**

**– תורה it is a decree of the – גזירת הכתוב הוא**

**– מועד that the ox does not become a מועד – דאין נעשה מועד**

**unless the witnesses testify in the presence of the owner. However –**

**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 מחוייב 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

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

### Thinking it over

<sup>14</sup> לקמן כט,א, ועיי' ש תוס' ד"ה אלא

1. In the previous תוספות there were two ways how to understand the לימוד from שור המועד: A. Three years makes the מחזיק a מוחזק in the field and the מערער is a מוציא<sup>15</sup>. B. If the מערער did not protest for three years, then he is presumed to give up his rights<sup>16</sup>. When the גמרא asks 'וכו' אלא מעתה מחאה וכו', which of these two interpretation 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<sup>17</sup>. 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<sup>18</sup>.

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

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<sup>15</sup> See תוס' כח,א ד"ה עד.

<sup>16</sup> See תוס' כח,ב ד"ה אלא וכו' חזקה.

<sup>17</sup> See footnote # 8.

<sup>18</sup> See סוכ"ד אות מג.