However, it should now be apparent **– אלא מעתה מחאה שלא בפניו כולי that a protest lodged not in his presence, etc.**

OVERVIEW

רבא maintained that the three years required for a חזקה is because a person (usually) does not keep his שטר for more than three years. The חכמים were concerned that an unscrupulous מערער may wait three years (from after the time he sold the field to the מחזיק), when he is reasonably certain that the מחזיק lost his שטר, and will claim that he never sold the field. We protect the מחזיק from such fraudulent claims made after three years of a purchase, by instituting the three year law of חזקה. The מערער is being put on notice that any מחאה must take place within three years of the חזקה.[1] Otherwise he loses his status as a מוחזק, and the מחזיק becomes the מוחזק. [If, however, the מערער has a valid reason why he did not make the מחאה, then it would not be a valid חזקה.][2]

אביי argues that if the purpose of חג"ש is to insure that the מחזיק does not lose his property through the deceit of the מערער, then the מערער should be required to make his מחאה (within the three years) in the presence of the מחזיק.[3] The מחזיק will then be aware of the מחאה and be able to safeguard his property, by holding on to the שטר. If however the מחאה is made שלא בפניו it should not be a valid מחאה; but rather the חזקה should be sustained. We are assuming now in the הו"א that a מחאה שלא בפניו will not necessarily be heard by the מחזיק.

אומר רבינו יצחק דליכא לאוקמי פירכא דאביי אלא כשהן[4] בעיר אחת –

The ר"י says that we cannot justify the challenge of אביי (namely, that a

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[1] This is one of many interpretations concerning חזקת ג' שנים. [It seems to complement the content of this תוספות.] According to this understanding we do not interpret the silence of the מערער as a tacit admission that it is not his field. Rather we maintain that if the מערער was not מוחה during the first three years (while the מחזיק still possesses the שטר [as the חכמים require]); any subsequent claims are not valid.

[2] One must bear in mind that in these cases, the מערער (usually) has proof that he was the original owner (the מרא קמא). The מחזיק is the מוציא. There must be sufficient cause to change the חזקה from the מערער to the מחזיק.

[3] If the explanation of חג"ש would be based on the fact that since the מערער was not מוחה for such a long time, that proves that it is not his field, then even a מחאה שלא בפניו would be sufficient. According to that explanation, since the מערער brings עדים that he was מוחה שלא בפניו then there is no proof. If however we are not attempting to prove anything from the s'מערער silence per se, but rather we require a מחאה within three years to protect the rights of the מחזיק (and) that he should retain his שטר, then the מחזיק must be aware of the מחאה; otherwise it is a useless מחאה. See 'Thinking it over' # 5.

[4] The הגהות הב"ח amends this to read בעיר **דרין** כשהן.

protest that is made not in the presence of the מחזיק should not be a valid מחאה, rather the חזקה should stand; this cannot be justified), in all situations, but rather **only when** the מערער and the מחזיק **are [living] in the same city.** אביי argues that the מחזיק can claim that had the מערער made the מחאה in my presence, I would have kept the שטר longer than the usual three years. However, since the מערער made the מחאה שלא בפני המחזיק (in order that the מחזיק should not be aware of the מחאה); therefore the מחזיק did not watch the שטר after the three years. The fact that the מערער was מוחה שלא בפני המחזיק supports the claim of the מחזיק that he indeed bought the field, and the מערער is being deceitful.[5] תוספות argues that this challenge of אביי is valid only when they live in the same city. The מערער should be required to come to the מחזיק personally and make the מחאה (within three years of the alleged purchase [חזקה]). Then it would be clear to all; if the מחזיק has the שטר he is the מוחזק, otherwise the מערער is the מוחזק. However if the מערער made the מחאה שלא בפניו, it should not be considered a מחאה. A מחאה שלא בפניו does not fulfill the intent of a מחאה; namely to warn the מחזיק to hold on to his שטר. This challenge of אביי is proper when they both live in the same city; where we can reasonably (without undue hardship) demand of the מערער to make a מחאה בפניו.

דאי בעיר אחרת היכי פריך דלא תהא מחאה ותהא חזקה –

However if the מערער lived **in a different city** than the מחזיק **how can** אביי **challenge** רבא **that it should not be** considered **a** valid **מחאה,** but rather **it should be** considered **a** valid **חזקה**,[6] since the מערער did not make the מחאה in the presence of the מחזיק; This cannot be -

אדרבה כיון דלא הויא מחאה לא הויא חזקה –

On the contrary! Since it is not a valid **מחאה;** for it is שלא בפניו and the מחזיק is not aware of it (to keep the שטר), then the ruling should be that **it is not a** valid **חזקה.** The basis of all חזקות is that if the מערער is truthful, then he should have made a מחאה (within the three years). If, however, we assume that the מחאה שלא בפניו will not reach the מחזיק, then there is no purpose in the מחאה.[7] If there is no purpose or reason to make a מחאה, there can be no חזקה. The מערער will argue that he did not make a מחאה since it is useless; the מחזיק will not hear it anyway. It cannot be argued that the מערער should make it his business to appear before the מחזיק and deliver the מחאה personally -

דהא אינו צריך לבא בעיר[8] אחרת לפני המחזיק ולמחות כדמוכח[9] לקמן:[10]

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[5] A מחאה שלא בפניו is similar to a מחאה after three years; in both case the מחזיק will not watch the שטר.

[6] It is evident from the way אביי phrased the argument of the מחזיק, saying אי מחית בא[נ]פאי הוה מיזדהרנא בשטראי, that the intent of the challenge is that the מחזיק is in the right, and it should be a חזקה. See תוספות כח,ב ד"ה אלא, where the question אלא מעתה מחאה is explained differently. See 'Thinking it over # 1.

[7] This is especially true since the (whole) purpose of the מחאה is to warn the מחזיק that he should safeguard his שטר. See footnote # 3.

[8] The הגהות הב"ח amends this from בעיר to לַעיר.

[9] See מהרש"א who states that when תוספות writes that it is 'evident later', תוספות is referring to what he said

For the מערער **is not required to travel to another city to lodge his מחאה in the presence of the מחזיק, as is evident later** in the גמרא. In conclusion; אביי did not ask his question in a case where the מחזיק and the מערער live in separate cities. In such a case אביי maintains that it should not be a חזקה; i.e. a חזקה שלא בפניו לא הוי חזקה.[11]

Summary

The question מחאה שלא בפניו לא תהא מחאה is only in a case where the מערער and מחזיק lived in the same city. In a case where they lived in different cities, the ruling will be (in this הו"א) that there is no חזקה; for there is no obligation on the מערער to travel in order to be מוחה בפניו.

Thinking it over

1. Why does תוספות interpret the previous question of אלא מעתה מחאה וכו' (on כח,ב דף) to mean that since it is not a מחאה it should not be a חזקה;[12] however here תוספות interprets this (same) question to mean that it should be a חזקה?

2. Why does תוספות assume that the מערער need not travel to the city of the מחזיק to make the מחאה בפניו?[13]

3. Could have אביי challenged רבא in a case where the מערער and מחזיק live in two different cities?[14]

4. It seems that אביי was certain that a מחאה שלא בפניו הוי מחאה. From where did he derive it?

5. Why does אביי ask this question of אלא מעתה מחאה וכו' only on the last answer of רבא; not on any of the previous answers?[15]

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previously that when there is no (possibility of) מחאה there is no חזקה, this is what is evident from the גמרא later (see following footnote # 10). [However concerning what תוספות states immediately prior, that the מערער need not go to another city to be מוחה בפני המחזיק, that is self-evident, and needs no proof to support it. See 'Thinking it over # 2.]

[10] See the גמרא on ל,א concerning בשוקי בראי and the משנה on לח,א.

[11] See 'Thinking it over' # 3.

[12] See footnote # 6

[13] See מהרש"א. See footnote # 9.

[14] See footnote # 11.

[15] See footnote # 3.