

וצריך למחות בסוף כל ג' –

And it is necessary to protest at the end of each three years

OVERVIEW

ruled (in the name of קפרא בר) that there must be a מחאה within each three year cycle. A מחאה cannot be effective for more than three years. תוספות discusses the reasons for this ruling, and the validity of this ruling.

אין לפרש דטעמא שלא יאמר לקחתי אחר המחאה¹ –

It cannot be explained that the reason why צריך למחות בסוף כל ג' is in order that the מחזיק should not claim, 'I bought it from you after the מחאה'; this cannot be the reason -

כדפירש הקונטרס² כיון דעל כרחו מודה דמעיקרא קודם מחאה לא בתורת מכירה נחת בהם³ –
As the מחזיק admits that since perforce he entered the field without buying it -

אין נאמן לומר אחרי כן קניתי⁴ –

He is not believed to claim I bought it afterwards.

offers another reason to negate this interpretation:

ועוד דאם כן שפיר קרי ליה גזול⁵ –

And in addition if indeed this is the concern, so it is proper for him to be called a גזול!

¹ If the מערער made a מחאה and four years later he comes again, the מחזיק can claim that he bought the field sometime after the מחאה and was החזיק for three years and lost the שטר. The מערער would then (seemingly) lose the field; therefore it is incumbent on the מערער to be מערער within three years of his last מחאה, so that the מחזיק should never have a חזקה. This ruling would then be more like an עצה טובה to the מערער.

² See רשב"ם ד"ה אמר ר"ל (בסופו).

³ We are concerned that if the מערער was not מוחה for three years after his first מחאה, the מחזיק may claim that I bought it after the (first) מחאה and made a חזקה for three years after the (first) מחאה. This should be of no concern. We know that the מחזיק was in the field the first year, for the מערער made a מחאה based on the מחזיק's occupation of his field in the presence of עדים. If the מחזיק will subsequently claim that he bought it in year two (for instance), it will be understood that in year one he was in the field illegally. Once it is established that he was there illegally, a חזקה will not be sufficient to establish the field in his possession. See 'Thinking it over'.

⁴ Once someone is established as a גזול in a field he cannot rely on a חזקה, but must have a שטר. See לקמן מז,א.

⁵ ruled that the מחאה must be made within three years, for otherwise (according to this explanation) the מחזיק will be זוכה by claiming, 'I bought it from you after the מחאה'. The גמרא cites that יוחנן ר' disagreed with this ruling (that the מחזיק will have a חזקה if there is no מחאה within three years) and said, 'but can a גזול have a חזקה'. Seemingly ר"י was referring to this מחזיק as a גזול. The גמרא asked why does ר"י refer to this מחזיק as a גזול just because there was an ערער; nothing was proven yet. However according to this explanation that the מחזיק admits that he was in the field illegally the first year (he bought the field after the מחאה), then ר"י is right by calling the מחזיק a גזול. What was the שאלה?

continues to give the correct interpretation:

אלא טעמא כדפירש הקונטרס משום דתלת שנים מזדהר איניש בשטריה אחר המחאה ותו לא –
But rather the reason why a מחאה is required every three years is as the רשב"ם explained it,⁶ because a person is careful to watch his שטר for three years after the מחאה, but no longer than three years. Therefore if the מערער will wait longer than three years between מחאות, the מחזיק will claim that (he bought the field initially before the first מחאה, but) since three years passed without a מחאה (he assumed it to be frivolous) and he lost the שטר.

notes a contradiction from another ruling:

ולהאי טעמא⁷ הא דאמר לעיל (דף לא,א) אבל אכלה שית שנים אין לך מחאה גדולה מזו⁸ –
And according to this reason (that a מחאה must be made every three years for otherwise the מחזיק does not keep his שטר), that which the גמרא stated previously, 'but if he consumed the פירות for (only) six years, there is no מחאה greater than this', that גמרא -

פליגא⁹ אהך דהכא דקאמר דצריך למחות כל ג'¹⁰ –
Argues with that which is stated here, namely that he is required to be מוחה every three years.

concludes:

ונראה דכההיא הלכתא דסתמא דגמרא קאמר לה –
And it is the view of תוספות that the הלכה is like that previous גמרא, for the גמרא there stated it anonymously -

⁶ See footnote # 2.

⁷ See footnote # 10.

⁸ The (details of the) case there (which are relevant to us) is that the מערער brought a שטר that he bought this field four years ago from the same מוכר from which the מחזיק (who has no שטר) claims he bought the field. The ruling is that if the מחזיק can bring עדים that he made a חזקה beginning three years prior to the שטר of the מערער, which is seven years prior to the current date (so that by the time the מערער allegedly bought the field the מחזיק already had his שנים ג' חזקה and need not keep his שטר), the field remains by the מחזיק. However if the מחזיק can only bring proof that he was מחזיק for two years prior to the alleged sale to the מערער (six years before the current date), the field is given to the מערער. We consider this שטר which is dated four years ago (at which point the מחזיק was there for only two years and did not have a חזקה and presumably still had his שטר) as a proper מחאה (on part of the מוכר), which should have caused the מחזיק to keep his שטר, until now. Even though the מחזיק made an additional חזקה for four years after the alleged sale to the מערער, nevertheless (it seems from that גמרא) that once the מחאה was made (with this שטר from four years ago) the מחזיק must keep his שטר (indefinitely or until he settles with the מערער). This contradicts our גמרא which requires the מערער to make a מחאה every three years, and in that case since four years passed since the מחאה (with his מכירה הב"ח) the field should have remained by the מחזיק.

⁹ See רשב"ם ל,ב ד"ה וה"מ who cites the ש"ח who offers another explanation why there is no contradiction (see נח"מ).

¹⁰ See מהרש"א that according to the לפרש אין there will be no difficulty, because since in the case of שית אכלה the מחזיק never claimed המחאה אחר לקחתי, therefore he loses the field, however generally we are concerned that he may claim המחאה אחר לקחתי, therefore he should be מוחה every three years.

ולא כמו שפסק רבינו חננאל דהלכה כבר קפרא:

And not like the ר"ה who ruled that the הלכה is like בר קפרא that a מחאה must be every three years, but rather one מחאה is sufficient.

SUMMARY

A מחאה must be made every three years for otherwise that מחזיק will not keep the שטר. The הלכה however (according to תוספות) is that it is not necessary.

THINKING IT OVER

תוספות explained that we are not concerned that the מחזיק will claim that I bought it from you after the מחאה, because then he will have entered the field initially illegally and he cannot have a חזקה (because he is a גזולן) and the field will revert to the מערער. Seemingly the מחזיק can reply that in truth I bought it before the מחאה, but after you made the מחאה I decided to buy it from you again so there will be no complaints. We find¹¹ this to be a valid argument previously!¹²

¹¹ See עב"ד איניש דזבין דיניה, where רבא states, ל,ב.

¹² See נח"מ.