# מחאה בפני שנים ואין צריך לומר כתובו – A מחאה is in the presence of two and it is not necessary to say, 'write it'

## Overview

רבא taught in the name of רב נחמן that a מחאה can be made in the presence of (only) two witnesses, and these witnesses may (formally) write down their testimony (that a מחאה was made),[1] even though the מערער did not order them to write it down. תוספות discusses what is the purpose and effectiveness of this document that the עדים write and attest to.

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תוספות asks:

**ואם תאמר ומה מועיל הכתיבה[2] –**

**And if you will say, but what will this writing help** (the מערער) -

**והא לא חשיב שטר אם לא נעשה מדעת מי שהוא חובתו[3] –**

**For** a written document **is not considered a** valid **שטר unless it is written with the consent of the one** for whom the שטר is **to his detriment -**

**כגון שטר מכר מדעת מוכר ושטר מתנה מדעת נותן ושטר מלוה מדעת לוה[4] –**

**For instance a bill of sale** must be written **with the consent of the seller and a note of a gift** must be written **with the consent of the giver, and a note of a loan** must be written **with the consent of the borrower;** however here the מחזיק (who stands to lose from this note) never consented that it be written. Therefore it is not considered a שטר.

תוספות rejects another purported purpose of this note

**ועדות נמי לא חשיב דמפיהם ולא מפי כתבם[5] –**

**And** this note **can also not be considered as testimony, because of 'from their mouths but not from their writing' -**

**ופירש ר"י בפירוש החומש[6] שלא יכתבו עדותן באיגרת וישלחו לבית דין –**

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[1] See רשב"ם ד"ה מחאה that the עדים will present this document to the מערער as a proof that he made a proper מחאה.

[2] תוספות question is on מודעה and קיום שטרות as well, as is evident in תוספות answer (see footnote # 10).

[3] One explanation why a שטר must be written מדעת המתחייב to be considered a valid שטר is (see נח"מ) because seemingly every שטר should be פסול because of מפיהם ולא מפי כתבם (see footnote # 5 & 7). However if it is written מדעת המתחייב it is not considered מפי כתבם (of the עדים) but rather מפי כתבו (of the מתחייב). See סוכ"ד (דף מ,א) אות ג' for an alternate explanation.

[4] In these three cases of a sale, a gift, and a loan the ones that stand to lose if the שטר is effective are the seller, the grantor, and the borrower respectively (the seller and grantor are transferring away their assets and the borrower becomes liable for the loan), therefore their respective consent is required to make those שטרות valid.

[5] The תורה writes (דברים [שופטים] יט,טו) that יקום דבר' וגו שנים עדים **פי** על. The גמרא in יבמות לא,ב interprets the word 'פי' to teach us that we require that the testimony of witnesses come from their mouth, but not from their writing.

[6] שם בד"ה על.

**And רש"י explained** this **in his commentary on the חומש** that ולא מפי כתבם means **that the** עדים **should not write their testimony in a letter and send it to בי"ד.** Therefore here too, the note with the signatures of the עדים cannot be used in בי"ד as a proof that a מחאה was made.[7] The question remains what is the purpose of the עדים writing that the מערער was מוחה when (seemingly) it is ineffective?!

תוספות answers:

**ויש לומר דתקנת חכמים היא שיהא חשוב עדות כדי לבטל החזקה בעדות כל דהו[8] –**

**And one can say that this is an enactment of the חכמים that it should be considered** a proper **testimony in order to nullify the חזקה** (even) **with minimal testimony,** for the ruling is –

**שבדבר מועט מבטלים החזקה –**

**That** even **with minimal evidence we nullify the חזקה –**

תוספות proves that a חזקה can be nullified even with a minimal cause:

**דהא אפילו יתברר לנו שלא שמע המחזיק מחאה מהני לבטל החזקה[9] –**

**For even if we will determine that the מחזיק did not hear the מחאה,** nevertheless if we can verify that a מחאה was made that **is sufficient to nullify the חזקה.**

תוספות explains the efficacy of writing a מודעה:

**וגם במודעא[10] תקנת חכמים היא להציל הנאנס –**

**And similarly by מודעא it is a תקנת חכמים** that it should be a valid testimony **to protect the oppressed -**

**וקיום שטרות נמי משום דמעשה בית דין הוא וכל מעשה בית דין נכתב שלא מרצון החייב[11] –**

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[7] From תוספות elsewhere (see כתובות כ,א ד"ה ור"י) it is apparent that by a regular valid שטר we do not void it because of עדים החתומים על השטר נעשה כמי שנחקרה עדותן בבי"ד since מפיהם ולא מפי כתבם [or because it is written מדעת המתחייב (see footnote # 3)]. However since in our case here it is not a valid שטר since it was not written מדעת המתחייב, therefore it cannot be considered (even) as הגדת עדות, because of the פסול of מפיהם ולא מפי כתבם.

[8] This testimony is flawed מן התורה since it is in violation of ולא מפי כתבם, nevertheless the חכמים gave it minimal power to be מבטל a חזקה. See 'Thinking it over' # 1. We know that we can be מבטל a חזקה even with minimal support, as תוספות points out.

[9] Seemingly if the מחזיק did not hear the מחאה we cannot fault him for not keeping the שטר past the third year. Nevertheless since the מערער did what is necessary, the property reverts back to him, for the מחאה alone nullifies the חזקה, even without the ריעותא that the מחזיק should have kept his שטר.

[10] See footnote # 2. A מודעא is when the seller of a property gives notice beforehand that he is being forced to sell unwillingly and he declares the sale null and void (see רשב"ם ד"ה וכן on א,מ). The same question applies there, what is the purpose of writing it since it is not a שטר (for it is not written מדעת המתחייב [the buyer]) and it is מפי כתבם.

[11] מעשה בי"ד may not have a דין of a שטר (since it is written שלא מדעת המתחייב; the לוה has no say in the process of קיום), nevertheless what they write in the מעשה בי"ד (like קיום שטרות) is valid because the limitation of מפיהם ולא מפי כתבים applies to עדים but not to בי"ד.

**And also** regarding **קיום שטרות** it is a valid testimony **because it is an enactment of בי"ד and every מעשה בי"ד is written without the consent of the liable** party.

תוספות offers an alternate explanation of מפיהם ולא מפי כתבם:

**ועוד אומר רבינו יצחק ששמע מן רבינו תם שנוהגים לשלח העדים עדותם באיגרת לבית דין –**

**And in addition, the ר"י stated that he heard from ר"ת that the custom is for עדים to send their testimony to בי"ד in a letter -**

**וחשיב עדות[12] –**

**And it is considered a** valid **testimony –**

תוספות responds to the obvious question:

**והא דדרשינן בספרי מפיהם ולא מפי כתבם –**

**And that which the ספרי infers** that it must be only **מפיהם but not מפי כתבם**, so how can the עדים send in written testimony to בי"ד?! תוספות responds -

**לא אתא אלא למעוטי דוקא אלם שאינו בר הגדה אבל ראוי להגדה אין הגדה מעכבת בו[13] –**

**That is coming only to specifically exclude a mute who is one who cannot testify orally, however one who can speak, it is not necessary for him to speak,** but he can even send his testimony to בי"ד in writing.

תוספות anticipates a difficulty:

**והא דאמרינן בפרק ב' דכתובות (דף כ,א) כותב אדם עדותו על השטר –**

**And that which** the ברייתא מסכת **כתובות** in the **second פרק states, 'a person may write his testimony on a note -**

**ומעיד עליה אחר כמה שנים והוא שזוכר מעצמו[14] אבל אין זוכר מעצמו לא –**

**And testify** from **this** note even **after many years'** have passed from the time of the incident. רב הונא qualified that this rule is valid '**providing that he remembers**

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[12] It is apparent from that which תוספות shortly asks (see footnote # 15) and answers that according to the ר"ת when the עדים sent their עדות in an אגרת to בי"ד it has the strength of a שטר (and not merely the strength of הגדת עדות). This means that just as a שטר is valid even if the עדי השטר died (or do not remember the testimony) nevertheless the שטר is still valid. Similarly if the עדים sent their עדות to בי"ד in an אגרת. However if it is considered (merely) הגדת עדות, it will be valid only if the עדים (are alive and) remember the הגדת עדות as תוספות will mention shortly. It would also seem that according to the ר"ת there is no need that it be written מדעת המתחייב in order to be considered a שטר (see footnote # 3) since according to the ר"ת the פסול of מפי כתבם ולא comes only to exclude an אלם but not עדות בכתב [see בל"י אות שנג ד"ה ומכל זה].

[13] According to this view (that an עד may send his testimony to בי"ד in writing) it is understood that the writing of the מחאה (or מודעה) is a valid testimony [as a שטר] and not (merely) a תקנת חכמים as תוספות previously answered.

[14] See רש"י there who explains בלא ראיית השטר נזכר קצת מעדותו מאליו ד"ה שזוכרה מעצמו. Even ר' יוחנן who argues with ר"ה and maintains that it is a valid עדות even if it is אין זוכרה מעצמו, nevertheless he too maintains that it is עדות כשרה if after he sees the notes he reminds himself (partially) of the testimony. However if he does not remember even after consulting his notes, it is not a valid testimony. See (רש"י and) תוס' there ד"ה ור"י.

**on his own, however if he does not remember on his own** he may **not** testify from this note'. This concludes the citation from כתובות. Seemingly this contradicts what תוספות just ruled that a note is admissible testimony![15]

תוספות responds that the ruling there -

**היינו כשאינו מוציא כתב ידו בבית דין[16] –**

**Is in a case where he does not present his hand written** note **in בי"ד.** However if he would present his note to בי"ד in would be a valid עדות (even if אינו זוכרה מעצמו).[17]

תוספות offers an alternate distinction:

**ועוד שמא עד אחד בכתב אין חשוב עדות שאין שטר אלא בב' –**

**And in addition, perhaps the writing of one עד is not considered a testimony for there can be no שטר unless two** people sign it -

**להכי לא מהני בההיא דכתובות אפילו יוצא[18] כתב ידו אלא אם כן זוכר בראיית עדות[19] –**

**Therefore in that case in כתובות** מסכת the note **is not** an **effective** testimony **even if he would present his hand written note, unless he recalls seeing** the event **as a witness.**

תוספות comments:

**וצריך עיון בההיא דעד אחד בכתב בגט פשוט[20] (לקמן דף קסה,א ושם דיבור המתחיל אמר) –**

**And** some **contemplation is necessary regarding the case of 'one עד in a note',**

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[15] It is apparent from this question that when the ר"ת stated that עדים may send in their written testimony to בי"ד, he meant that it would be considered as a שטר and therefore valid even if the עדים do not remember the testimony. Therefore we have the contradiction from כתובות where the גמרא requires that he remember the testimony. However if the ר"ת would have meant that written testimony is valid (merely) as הגדת עדות but not as a שטר, then there is no contradiction from כתובות since the ר"ת also meant that the written testimony is valid (like all הגדת עדות) only if זוכרה מעצמו (see footnote # 12).

[16] The עד there does not remember the testimony (מעצמו); he reads over his note and then testifies personally in בי"ד without presenting the note. This is similar to עד מפי עד (which is פסול), since he is testifying on something which he does not recall on his own (see נח"מ).

[17] If he sends his written עדות to בי"ד however, it has the validity of a שטר (see footnote # 12).

[18] Others amend this to read יוציא (instead of יוצא).

[19] If however one does remember the testimony on his own he is permitted to present this testimony in writing to בי"ד without him being present, as תוספות ruled previously.

[20] The גמרא there cites a מחלוקת between אביי and אמימר in a case of פה בעל בשטר וע"א ע"א; meaning there was a שטר (מלוה) where only one עד signed, and another עד testified orally that there was a loan. אביי maintains that it is invalid, while אמימר maintains that it is a valid שטר and can collect from נכסים משועבדים. It appears (see the תוספות there) that if it would be a case where the two עדים would sign on two separate documents even אביי would agree that it is a valid שטר. This contradicts that which תוספות just ruled that an ע"א בשטר is not a valid שטר. [An ע"א בכתב is a valid עדות (so the מלוה would collect from נכסים בני חורין), but since it is not a שטר, the מלוה cannot collect from נכסים משועבדין (according to שיטת תוס') which seems to be contradicted from the גמרא there, which maintains that it is a valid שטר.]

which is discussed **in פרק גט פשוט,** to reconcile it with that which תוספות stated here.[21]

In summation: according to the first explanation (of the ר"ת), an עד can send in his written testimony and it is valid even though he may not remember his testimony. The עד may use his notes as an aid if he remembers (somewhat). According to the second explanation even if he presents his note in בי"ד it is not considered a שטר, but merely עדות and is valid only if he remembers.

תוספות asks:

**ואם תאמר מאי קא משמע לן דאין צריך לומר כתובו פשיטא כיון דזכותו הוא[22] –**

**And if you will say; what is** רבא אמר ר"נ **teaching us that it is not necessary** (for the מערער) **to say** to the עדים**, 'write'; it is obvious** that they can record what he told them **since it is for his benefit –**

תוספות offers a partial answer:

**ובמחאה איכא למימר דנקיט ביה ואין צריך לומר כתובו אגב אחריני –**

**And regarding מחאה it is possible to answer that he mentions ואצ"ל כתובו, because of the other cases** where it was necessary to mention ואצ"ל כתובו like by קנין[23] -

**ולא אתא לאשמועינן במחאה אלא שהיא בפני ב' –**

**And by מחאה all** that רבא אמר ר"נ **wanted to teach us is that it requires the presence of** only **two** and not three as ר' אבהו אמר ר"י ruled -

**אבל במודעא קשה למאי איצטריך –**

**However by מודעא it is difficult why is it necessary to** mention it at all. It obviously needs only two[24] (and not three) and certainly אצ"ל כתובו since it is לזכותו.

תוספות answers:

**ויש לומר דאתא לאשמועינן דאף על פי שלא צוה להם לכתוב והם כתבו שצוה כשרה –**

**And one can say that** רבא אמר ר"נ **comes to teach us that even though that he did not tell them to write, but they wrote that he commanded** them to write, nevertheless **it is כשר -**

**ולא מיחזי כשקרא דמסתמא לפיכך מחה או מסר מודעא בפניהם כדי שיכתבו:**[25]

**And it does not appear like a false statement, for presumably the reason he was מוחה or gave over the מודעה in their presence was in order that they**

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[21] See סוכ"ד אות כא for a possible explanation.

[22] See 'Thinking it over' # 2.

[23] Regarding קנין it is a חוב for the מוכר and nevertheless the ruling is that אצ"ל כתובו.

[24] Their role is merely to be עדים that he was מוסר מודעה; there is no reason we should require more than two.

[25] See thinking it over # 3.

**should write** it.

## Summary

The written מחאה is effective either because it is a תק"ח or because עדים may submit their testimony בכתב. The חידוש of אצ"ל כתובו is that it is not מיחזי כשקרא.

## Thinking it over

1. תוספות writes in his initial answer that writing a מחאה is effective (even though it is not considered a שטר or הגדת עדות), because it is a תק"ח to be מבטל the חזקה even with a דבר מועט.[26] Does the תק"ח make this written מחאה into a valid שטר, or does it (merely) accept their writing as הגדת עדות?[27]

2. תוספות asks what is the חידוש that כתובו לומר א"צ.[28] Is this a general question or only a question on פי' ר"ת?[29]

3. תוספות explains that the חידוש of אצ"ל כתובו is that it is not מחזי כשקרא.[30] Why however was it necessary to repeat it by מודעה once it was already stated by מחאה?[31]

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[26] See footnote # 8.
[27] See בל"י אות שנב (what the difference would be if it is a שטר or הגדת עדות).
[28] See footnote # 22.
[29] See סוכ"ד אות כב.
[30] See footnote # 25.
[31] See נח"מ.