

– ואי סלקא דעתך לוקח אית ליה קלא אין לך מחאה גדולה מזו –

And if it enters your mind that there is publicity by a purchaser, there is no greater protest than this

OVERVIEW

The *Brayta* taught if a three year *hazaka* was made against a *qama*; first the father lived there for a year, then the son inherited the father and lived there for a year, then the son sold it to a buyer who lived there for a year, it is a valid *hazaka* if the *me'arer* did not make a *machah* during the three years. The *me'arer* cannot claim that he was not *me'arer* the third year because the person who was *me'azik* then is a different person than the previous occupants (father and son),¹ for we say that the sale is publicized and the *me'arer* knew that the buyer's *hazaka* is a continuation of the *hazaka* started by the father and son.

The *Gemara* asks that this presumption that a sale has a *qol* is contradicted by the *Si'fa* of this² *Brayta* which states that if a person makes a three year *hazaka*; the first year during the lifetime of the *qama*, the second year during the lifetime of his son, and the third year after the son sold it to a buyer (and no one made a *machah* during these three years) it is a valid *hazaka*. However if there is publicity by a sale so when the son sold it to the *loqach* this was a valid *machah* against the *me'azik*, which the son is making, so the *me'azik* should have kept his *sheter*. The *Gemara* replies that this latter *Brayta* is where the son sold all his properties (not the disputed property specifically) and the argument is whether the disputed property is included in the sale. *Tosfos* offers an alternate resolution to this contradiction.

אומר רבינו יצחק דהוי מצי לשנויי כאן בשטר כאן בלא שטר –

The *R' sates* that the *Gemara* could have answered and distinguished between the two *Braytots* saying that **here (in the first *Brayta* where *loqach* has a *qol*) we are discussing a case where sale was **with a *sheter***, therefore the *sheter* *edi* are *mu'zia* a *qol* and the *hazaka* is valid) and **here** (in the second *Brayta* where *loqach* has no *qol*) **it is without a *sheter*** (and therefore there is no *qol*) –**

Tosfos proves that there is a distinction whether the sale was with or without a *sheter*:

דאין מצטרפין אלא בשטר כדאמרין לעיל –

¹ They are not *me'azik* *me'azik* אינשי אינשי; one year this one, the next year another one.

² See *Tosfos* פ"ב ה"ג that these two *Braytots* are written in sequence. See footnote # 4.

For לקוחות cannot combine to make a חזקה unless they sold to each other the property with a שטר as רב ruled previously³ –

תוספות offers a tentative reason why the גמרא did not use this distinction:

אלא שמא דעדיפא מיניה⁴ קא משני:

But perhaps the גמרא gave a better answer.

SUMMARY

There is a קול by לקוחות (regarding ומחאה), [only] if the sale was made with a שטר.

THINKING IT OVER

תוספות answers that if the sale is not בשטר (only with עדים) it is not a מחאה. Seemingly a מחאה does not require a שטר only עדים that he is מוחה, and since אין לך why does this sale not invalidate the חזקה?⁵

**תם ולא נשלם פירושי התוספות
לפרק חזקת הבתים והבורות
בעזרת אדון הנפלאות
נשוב לסיים פרקין עד גמירא
בברכת נורא על כל תהילה**

³ מא, ב. If three people made a חזקה in three consecutive years, one year per person where the property was sold from one to the other, it is a חזקה if the sale was with a שטר, for then the מערער is aware of the sale and cannot claim that each one made only a חזקה for a year.

⁴ The advantage of the גמרא's answer may be that it is applicable even if we maintain that עדים without a שטר also has a קול. See מהרש"א מהוד"ב for an alternate explanation; if we assume that both ברייתות are connected (see footnote # 2) then it is difficult to say that one is בשטר and the other שלא בשטר (for the ברייתא could have mentioned one case and differentiated whether or not it was בשטר), however we can say (according to the גמרא's answer) that indeed both are where he sold סתם [in the first ברייתא it is a חזקה because the לוקח was utilizing the field (so the מערער should have been מוחה), and in the latter ברייתא it is a חזקה because there is no proof that he sold the disputed field]. See נח"מ.

⁵ See בל"י אות תח and מהרש"א, נח"מ.