

What is Mechilah? How the Case of Mistaken Mechilah Answers that Question - Bava Batra 41a

The possibility of having a chazakah of three years over landed property corresponds to presumed *mechilah* (or waiving of rights) by the original owner? But what is *mechilah* actually? Is it a type of *kinyan*, or something else? The case of *mechilah b'taut*, mistaken *mechilah*, helps us probe that question.

Questions? Comments? Email dinanddaf@gmail.com

Mistakes on Both Sides

1. בבא בתרא מא.

רב ענן שקל בידקא בארעיה. אָזל הדר גודא בארעיה דחבריה. אָתא לקמיה דרב נחמן, אָמר ליה: זיל הדר. The Gemara tells of a related incident: A torrent [*bideka*] of water swept through Rav Anan's land, removing the wall which marked the boundary between his land and that of his neighbor. Rav Anan went back and rebuilt the wall, inadvertently placing it in his neighbor's land. Rav Anan came before Rav Nahman to ask him what he should do about it. Rav Nahman said to him: Go return the boundary to its prior position.

וְהָא אֲחִיזְקִי לִי! אָמַר לֵיהּ: כִּמָּאן – כְּרַבִּי יְהוּדָה וְרַבִּי יִשְׁמָעֵאל, דְּאָמְרִי: כּל בְּפִנְיוֹ – לֹא לִתְרֵי הֵוֵי חֲזָקָה? לִית הִלְכָתָא קוּוּתִיָּהּ.

Rav Anan replied: Why should I return the boundary? But didn't I already establish the presumption of ownership of this land? Rav Nahman said to him: In accordance with whose opinion are you claiming a right to the land? Is it in accordance with the opinion of Rabbi Yehuda and Rabbi Yishmael, who say: Any taking of possession that is done in the presence of the prior owner is sufficient to establish the presumption of ownership immediately? If so, your claim is not accepted since the *halakha* is not in accordance with their opinion.

אָמַר לֵיהּ: וְהָא אֲחִיל – דְּאָתָא וְסִייעַ בְּגוּדָא בְּהִדְאִי! אָמַר לֵיהּ: מְחִילָה בְּטַעוּת הִיא. אֵת גּוֹפֶךְ – אִי הָוֵה יָדַעַת לֹא עֲבַדְתָּ; כִּי הִכִּי דָאֵת לֹא הָוֵה יָדַעַת, הוּא נָמִי לֹא הָוֵה יָדַע.

Rav Anan said to Rav Nahman: But didn't the neighbor waive his ownership of this land, as he came and assisted in the building of the wall with me? Rav Nahman said to Rav Anan: It is an erroneous waiving, since you yourself would not have placed the wall there if you had known that it was the wrong location for it. Just as you did not know that you were building it in the wrong location, so too, he did not know. Therefore, it is reasonable to assume that he did not knowingly waive his ownership of his property.

“Mistake” in Lending, “Mistake” in Selling

2. משנה ב"מ ה:ג

...הלואה על שדהו, ואמר לו, אם אי אתה נותן לי מקאן ועד שלש שנים הרי היא שלי, הרי היא שלו. וכן היה בַּיתוֹס בן זונין עושה על פי חכמים:

...If one lent money to another on the basis of the borrower's field serving as a guarantee, and said to him: If you do not give me the money now and instead delay your payment from now until three years have passed, the field is mine, then after three years, the field is his. This is permitted even if the field is worth more than the amount of the loan. And this is what Baitos ben Zunin would do, with the consent of the Sages, when he lent money.

3. בבא מציעא סו:

אמר רב נחמן: השתא דאמור רבנן אסמכתא לא קניא, הדרא ארעא והדרי פירי. למימרא דסבר רב נחמן מחילה בטעות לא הויא מחילה.

Rav Naḥman said: Now that the Sages have said that an *asmakhta* does not effect acquisition, in a case such as that in the mishna, when one promised another land for the repayment of a debt, if the lender in fact took it, the land must be returned and the value of any produce the creditor consumed from this land must also be returned. The Gemara poses a question: Is this to say that Rav Naḥman maintains that mistaken forgiveness of payment is not valid forgiveness, meaning that if one forgoes repayment of a loan of a certain amount of money in error, he can change his mind? In this case, the borrower had thought that the lender had acquired the land, and he therefore allowed him to consume the produce.

והאיתמר: המוכר פירות דקל לחבירו. אמר רב הונא: עד שלא באו לעולם – יכול לחזור בו. משבאו לעולם – אין יכול לחזור בו. ורב נחמן אמר: אף משבאו לעולם יכול לחזור בו.

But it was stated that *amora'im* disputed this very issue: If one sells the fruit of a palm tree to another (before the fruit ripens), Rav Huna says: He can retract and cancel the sale until the fruits have come into the world, as the fruit is not yet in existence. But once they have come into the world, even if they are still unripe, he cannot retract, as once the fruits that are being acquired exist, the sale has gone into effect. And Rav Naḥman says: He can retract even once they have come into the world (, as one cannot transfer ownership of an entity that has not yet come into the world, and the actual transaction was performed before the fruits existed).

ואמר רב נחמן: מודינא דאי שמיט ואכיל – לא מפקין מיניה! התם זביני, הכא הלואה.

And Rav Naḥman said: I concede that if the buyer seized the fruit and consumed it, we do not take its value from him. (The reason is that since the seller initially accepted the transaction, although it involved a legal error, it can be assumed that he decided to waive his rights to the fruit and allowed the other to take it. Consequently, it can be demonstrated that Rav Naḥman holds that mistaken forgiveness is forgiveness.) The Gemara rejects this proof: There, the discussion involves a sale, with regard to which it can be said that the seller waived his rights to the fruit. Here, it is referring to a loan, and not requiring the lender to reimburse the borrower for the produce consumed is considered a form of interest.

4. תוספות ב"מ סו: ד"ה התם זביני

ומפ"ת הכא הלואה דהלואה לא הקנה אלא בתורת מכר והמכר אינו כלום דאסמכתא לא קניא נמצא דהוי מחילה בטעות ולא הוי מחילה ולכך הדרי פירי אבל אם היה נותנו בתורת רבית לא הוי הדרי דאבק רבית הוא אבל התם גבי פירות דקל זביני ולא מחילה בטעות היא דנהי דיכול לחזור מ"מ אין לו לחזור כי היכי דליקו בהימנותיה ולכך

אית לן למימר דאפילו היה יודע שיכול לחזור לא היה חוזר ורבא דהוה בעי לאותביה מאונאה היה סבור דטעמא דרב נחמן דלא מפקינן באי שמיט ואכיל משום דמחילה בטעות הוא מחילה ולפי סברת רבא היה משיבו ומביא ראייה מאיילונית:

5. רש"י בבא מציעא סו:

הכא הלואה היא - ומיחזי כרבית שמתחילה בהלואה בא לו...

Here it is a loan - And it looks like taking interest because it originally came to him through a loan. And it is similar to

6. הגהות אשרי בבא מציעא ה:לב

...נראה לי דודאי גם רב נחמן סבר דמחילה בטעות הוא מחילה אע"ג דקנין טעות חוזר בדין שיכול לחזור בו כיון שהממון עדיין הוא בידו יש כח בידו לחזור כיון דבטעות הקנהו והקדש נמי לא חייל בטעות כיון דבעינן שיגמור בלבו ואין זה גמר כיון דטעה וכן ההיא דחזקת הבתים דהדר גודא בארעא דלאו דיליה דלא הוי מחילה לא דמיין כלל דהא לא מחל ולא מידי ולא הפקיר מידי אלא דסבור שאין שלו ונמצא שלו א"כ +אבל+ אדם שיש לו ממון ומוכר אותו לחבירו ומוחל לו אע"פ שהוא בטעות זכה חבירו מידי דהוה אהפקירא בעלמא דחשוב הפקר א"כ שכנגדו קנאו ביאוש בעלים...

...It appears to me that Rav Nahman also thought that mistaken *mechilah* is considered valid *mechilah* even though a mistaken acquisition is returned; it is logical that one can renege so long as the money is still in their possession because the owner accidentally gave acquisition over it. And *hekdesh* is not effectuated when there is a mistake because we need the person to have intention, and there can be no intention given the mistake. And likewise in the case of *Chezkat Habatim* (3rd perek of Bava Batra) where the wall that is in another person's property was returned, because that is not *mechilah*, is not similar to this because the person did not waive their rights and did not make anything *hefker*, but rather he thought that it wasn't his, and it turns out that it was. On the other hand, a person who has property and sells it to another person, and waives their right to it, even if it was based on a mistake, the other person acquires it, similar to the case of *hefker*. In that case, the other person acquires it through the *yeush* of the original owners...

7. קצות החושן קמב:א

וביאור דבריו משום דיאוש אפי' בטעות מהני דיאוש דאבידה נמי בטעות הוא דאלו הוי ידע היכן האבידה לא היה מייאש וכיון דטעמא דמחילה בטעות לרב נחמן מהני היינו משום יאוש בעלים א"כ הכא שפיר קאמר ר"נ כי היכא דאת לא ידעת הוא נמי לא ידע וא"כ ה"ל מחיל" בטעות דהא מצד יאוש והפקר לא זכה רב ענן כיון דלא ידע הזוכה ובהפקר היכא דסבר שהוא שלו לא קנה ומצד דעת אחרת מקנה ל"מ דה"ל מחילה בטעות והוא קנין בטעות דל"מ:

And the explanation of his words is that *yeush*, even mistakenly, works since *yeush* in the case of a lost item is also based on a mistake - that if the person knew where the lost item was, that person would not despair. And because mistaken *mechilah* works for Rav Nachman based on *yeush* by the owners, it makes sense that Rav Nachman said: Just as you didn't know, neither did he. And therefore, it is mistaken *mechilah*, and based on *yeush* and *hefker* Rav Anan did not acquire the land because he did not know about it either. And in a case of *hefker*, when someone believes that an item is already theirs, they do not acquire it from *hefker*. And likewise, another person does not cause acquisition because it was mistaken *mechilah* which cannot effect a *kinyan*.

8. ירושלמי בבא קמא ד:ח

שור שהוא יוצא לִיִּסְקָל כולו. תני. שור שהיה יוצא לִיִּסְקָל ונמצאו עֵדָיו זוממין. רבי יוחנן אָמַר. כִּלְהִקּוּדָם בו זָכָה. רִישׁ לְקִישׁ אָמַר. יֵאוּשׁ טְעוֹת הוּא. וְכֵן עֲבָד הֵיוּצֵא לִיהָרֵג ונמצאו עֵדָיו זוממין. רבי יוחנן אָמַר. זָכָה עֲצָמוּ. רִישׁ לְקִישׁ אָמַר. יֵאוּשׁ טְעוֹת הוּא.

“A bull which is led out to be stoned,” etc. It was stated: If a bull was led out to be stoned when its witnesses were found to be false, Rabbi Johanan said, the first to come acquires it; Rabbi Simeon ben Laqish said, it was false despair. Similarly, if a slave was led out to be killed when his witnesses were found to be false, Rabbi Johanan said, he acquired himself; Rabbi Simeon ben Laqish said, it was false despair.

9. בבלי כריתות כד.

אָמַר רַבִּי כְרוּסְפָדַי אָמַר רַבִּי יוֹחָנָן: שׁוֹר הַנִּסְקָל שֶׁהוּזְמַן עֵדָיו – כָּל הַמַּחְזִיק בו זָכָה בו.

Rabbi Keruspedai says that Rabbi Yohanan says: With regard to an ox that is stoned whose witnesses were rendered conspiring, anyone who takes possession of the ox acquires it, as the owner of the ox relinquished his possession upon hearing that the animal is sentenced to die.