

According to whom; like- כמאן כרבי עקיבא דאמר קלוטה כמי שהונחה דמיא ר"ע, who maintains being captured is considered as if it is at rest

Overview

is establishing the ברייתא, which states that if one stole an animal and sold it on שבת that he is פטור (from ד' וה' שבת), in a case where the buyer of the animal told the thief, 'throw the animal which you stole (from the רשות הרבים) into my courtyard (רשות היחיד) and my courtyard will acquire it'. In this case the חיוב שבת (for הכנסה) and the חיוב גניבה (for ד' וה') happen simultaneously, therefore the thief is exempt from paying ד' וה' on account of מיניה. The גמרא comments that this can only be valid according to ר"ע who maintains כמי שהונחה דמי, therefore as soon as the animal entered the airspace of the חצר (it flew over the wall) there is both the חיוב שבת (since רה"י (according to ר"ע) it is considered as if it is resting in the חיוב שבת, for (קלוטה כמי שהונחה דמי), so there is the חיוב שבת, and simultaneously there is the חיוב גניבה since the buyer is קונה the animal.¹

asks: תוספות

ואם תאמר לרבי עקיבא נמי כיון דמטא לאויר חצירו חייב לענין שבת -

And if you will say, even according to ר"ע the חיוב שבת and חיוב גניבה are not simultaneous, for as soon as it enters the airspace of his חצר (higher and above the surrounding walls) the thief is חייב regarding the שבת -

דרשות היחיד עולה עד לרקיע² ולענין קנין לא קני באויר עד דמטי לתוך המחיצות³ -

Since the rule is that a רה"י extends upwards until the sky, however regarding acquisition of the item by the buyer, he does not acquire it until the item reaches within the airspace of the walls surrounding the חצר –

proves his point: תוספות

¹ However, according to the רבנן, the חיוב גניבה (which is effected by the קנין חצר) happens as soon as it is in the airspace of the חצר, however the חיוב שבת is only after it lands on the ground of the חצר. Therefore, - since they are not simultaneous there is no ruling of מ"מ קלב

² The entire airspace above a רה"י (even higher than the surrounding walls) is considered a רה"י. [If there is a narrow pole in a רה"י, which extends above the walls of the רה"י, and someone threw an item from the רה"י and it landed on top of the pole he is חייב (even according to the רבנן), since עד לרקיע, therefore according to ר"ע, who maintains קלוטה וכו', he will be liable for שבת, as soon as the item is in the airspace of the חצר.

³ חצר is effective only if the item is 'safe' within the חצר. That occurs only after the item is within the walls, however when it is higher than the walls it is not משתמר (safe). Therefore the חיוב שבת precedes the חיוב גניבה and they are not simultaneous, so there is no מ"מ קלב. [It is evident from תוספות question that even if the חיוב שבת precedes the חיוב גניבה (so there is already a מיתה), nevertheless there is no מ"מ קלב unless they are simultaneous.]

כדמוכח בגיטין בהזורק (דף עט,א ושם) גבי הוא מלמעלה והיא מלמטה -

As it is evident in מסכת גיטין in פרק הזורק regarding the case where the husband is standing higher than his wife, on a roof, and she is below on the ground in a courtyard, and the husband threw the גט downwards to his wife; the rule is that -

כיון שיצא מרשות הגג מגורשת⁴ ומוקי לה כגון שמחיצות התחתונות עודפות על העליונות⁵ -

As soon as it left the domain of the roof (it is no longer in the airspace of the roof, but rather it entered the airspace of the adjacent חצר), she is divorced, and ר' יהודה established that this ruling is valid only in a case where for instance the lower walls (of the חצר) extended above the higher walls of the roof.⁶

answers: תוספות

ויש לומר דהכא איירי שזרק לחצר דרך פתח או דרך חלון ולא מעל מחיצת החצר -

And one can say that here we are discussing a case where he threw the stolen animal into the חצר through the door or through a window, but he did not throw it above the walls of the חצר, therefore the חיוב שבת and חיוב גניבה are simultaneous⁷ (if we maintains 'קלוטה וכו' -

asks: תוספות

ואם תאמר ומאי שנא דבגיטין נקט רבי⁸ והכא נקט רבי עקיבא⁹ -

And if you will say; why is there this difference that in מסכת גיטין he mentions רבי, and here he mentions ר"ע -

answers: תוספות

ויש לומר דהכא נקט רבי עקיבא משום דאיירי בסתם חצר שאין מקורה -

And one can say that here in our גמרא he only mentions ר"ע, since we are discussing a 'regular' חצר, which is not covered, but open to the sky, therefore he cannot mention רבי -

⁴ She is divorced even if the גט is burnt or destroyed before it reaches her hand. The חצר acquired the גט on her behalf.

⁵ In this case as soon as it left that airspace of the roof, the גט was completely encircled by the walls of the חצר. However if this were not the case, she would not be considered divorced until the גט was within the walls of the חצר.

⁶ We see that the קנין is not effective until it is within the walls, so how can we apply קלב"מ in our case of גניבה, since חיוב שבת happens after the קנין.

⁷ As soon as it entered the חצר it was within the airspace of the walls of the חצר, therefore it a חצר המשתמרת and the buyer acquires it (which makes it a גניבה), and simultaneously there is the חיוב שבת if we maintains 'קלוטה וכו' like ר"ע.

⁸ רבי maintains that if one throws an object from one רה"ר to another and in between it passes a רה"י he is חייב (for both קלוטה כמי שהונחה דמי and ר"ע). This is similar to the ruling of ר"ע and is based on the same principle of (הוצאה and הכנסה).

⁹ The גמרא in גיטין asked that the answer of העליונות עודפות על העליונות (see footnote # 5) is seemingly valid only according to רבי who maintains קלוטה (see footnote # 8), but does not mention ר"ע; while in our גמרא when we discuss קלוטה we only mention ר"ע, but not רבי; why is there this discrepancy, since seemingly they both maintain 'קלוטה וכו'.

דרכי לא אמר קלוטה כמי שהונחה דמיא אלא ברשות היחיד מקורה¹⁰ -

- רה"י only by a covered קלוטה כמי שהונחה דמיא rules רבי Since

כדאמרין בריש שבת (דף ה,א ושם) דאמר ביתא כמאן דמליא דמיא -

As the גמרא states in the beginning of שבת, מסכת רבי maintains the house (which is covered by a roof) is considered as if it is full of substance, so it is considered as if the item passing through is landing on this 'substance'. Therefore our case which is not a חצר - (ר"ע) only according to רבי, there will be no קלוטה according to מקורה,

אבל רבי עקיבא אית ליה אפילו ברשות הרבים¹¹ שאין מקורה¹² -

However ר"ע maintains קלוטה even by a ר"ר, which is not covered, therefore in our גמרא where we are discussing an open air חצר he mentions ר"ע, but not רבי -

ובגיטין נקט רבי משום דאוקמא כשמחיצות התחתונות עודפות¹³ -

However in גמרא he mentions רבי, since the established that case where the lower מחיצות of the חצר extended above the מחיצות of the roof -

דלרבי עקיבא לא מצי למינקט דלדידיה אפילו בלא מחיצות כלל כמו ברשות הרבים -

So the גמרא could not mention ר"ע, since according to ר"ע, even if there are no מחיצות at all, like a ר"ר -

אית ליה כמי שהונחה דמיא בריש שבת¹⁴ -

מסכת גמרא states in the beginning of קלוטה כמי שהונחה דמי will maintains ר"ע - שבת

¹⁵ responds to an anticipated difficulty: תוספות

וסלקא דעתין דלרבי אפילו במחיצות בלא קרוי¹⁶ אמרין כמאן דמליא דמיא -

And the גמרא initially assumed that we say דמי even if it is not covered, as long as there are מחיצות -

¹⁰ The ruling of רבי was where one threw an object from a רה"ר to a רה"י by way of a רה"י (see שבת ד,ב). The גמרא therefore interpreted this to mean that according to רבי we consider the item at rest in the רה"י, only if it is covered.

¹¹ ר"ע made his ruling of קלוטה where it was thrown from a רה"י to a רה"י by way of a רה"ר. See שבת ד,א.

¹² A covered רה"ר is not considered a רה"ר. See שבת צה,א.

¹³ See (text by) footnote # 5.

¹⁴ See footnote # 11. Why is there a need to mention (according to ר"ע) that the מחיצות התחתונות are מחיצות על המחיצות, when according to ר"ע all that we need (to say קלוטה) is the airspace above; no מחיצות are necessary. See 'Thinking it over'.

¹⁵ How can the גמרא there (in גיטין) state that this ruling is only valid according to רבי, who maintains קלוטה, but רבי maintains קלוטה only by a covered רה"י (see footnote # 10), so how can his ruling apply to the case of גיטין where it was an open air חצר?!

¹⁶ The reason רבי stated his ruling in a case where he threw רה"ר לרה"ר דרך רה"י was not because a רה"י is covered, but rather because a רה"י has מחיצות (as opposed to a רה"ר). And if the object is within the מחיצות we also consider it כמאן דמליא דמי. This is all only in the גמרא of the הוה אמינא there, according to the מסקנא, the ruling of רבי is only by a רה"י מקורה.

תוספות offers an alternate explanation:

אי נמי למאי דבעי לאוקמי כרבי איירי בחצר מקורה:

Or you may also say that according to this, when the גמרא attempted to establish the ruling in גיטין like רבי (of קלוטה) we will need to say that we are discussing a covered חצר.

Summary

The case here is where he threw it into the חצר through the door, otherwise (if he threw it over the wall) the חיוב גניבה would come before the חיוב שבת. According to רה"י we say קלוטה only by a covered רבי.

Thinking it over

תוספות writes the reason the גמרא does not mention ר"ע in גיטין is because since the גמרא established the case there where העליונות עודפות על העליונות, and מחיצות התחתונות עודפות על העליונות, and according to ר"ע we say קלוטה even without מחיצות.¹⁷ However תוספות stated previously¹⁸ that regarding a קנין, even ר"ע agrees that it is only קונה if the item is within the מחיצות (it is only regarding שבת that we say קלוטה even above the מחיצות), so how can תוספות write regarding גיטין where we are discussing the קנין הגט that according to ר"ע we would say קלוטה even without מחיצות?!¹⁹

¹⁷ See footnote # 13.

¹⁸ See footnote # 3.

¹⁹ See מהרש"א (הארוך) and מהר"ם.