What I will inherit from my father is sold to you; he said nothing – מה שאירש מאבא מכור לך לא אמר כלום

Overview

רבא explained the ruling of רב that when the גזלן buys the field from the נגזל it belongs to the (מגזלן) לוקח, because on account of the הנאה which the גזלן received from the לוקח that he trusted him, he was גמר ומקני the field to the לוקח. As תוספות previously explained[1] it is considered as if there was an implied stipulation by the גזלן, at the time when the לוקח bought it, that when the גזלן will buy it, it will belong to the לוקח. רב ששת challenged this explanation of רבא, for we find in a ברייתא that one cannot be מקנה (transfer ownership of) something which he presently does not own. תוספות explains why the גמרא did not offer an alternate solution to this question.[2]

תוספות asks:

ואם תאמר לימא דרב דאמר כרבי מאיר[3] ובריתא כרבנן –

And if you will say; let the גמרא **answer that רב** who maintains that the גנב can be מקנה the field (which is a דבר שלא בא לעולם) to the לוקח **agrees with ר"מ** who maintains אדם מקנה דשלב"ל, **while the ברייתא follows** the view of **the רבנן** who maintain אין אדם מקנה דשלב"ל.

תוספות answers:

ויש לומר דלדידן קפריך דאית לן כרב כדאיתא פרק איזהו נשך (לקמן דף עב,ב)[4] –

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[1] See previous תוספות ד"ה בההיא (footnote # 1.)

[2] s'רבא actual answer was that in the case of רב there is סמיכות דעת by the לוקח (since דלא נקריה גזלנא) and therefore the גזלן can be מקנה even if it is a דשלב"ל. Elsewhere, however where there is no סמיכות דעת we will maintain (as the ברייתא rules) that א"מקנה דשלב"ל.

[3] This question is strengthened because רבא on the ב' עמוד states clearly that רב follows the view of ר"מ (in the case where one says; שדה שאני לוקח לכשאקחנה קנוי לך מעכשיו, the rule is that he is קונה).

[4] The גמרא there (on א' עמוד) relates this story. ראובן (who borrowed money from שמעון) gave שמעון an orchard for a משכון. After it was in his possession for three years, שמעון told ראובן, 'either sell me this orchard, or I will hide the שטר which says that this orchard is my משכון, and I will claim that I bought this field from you and I lost my שטר.' [Since שמעון was in possession of this field for three years he has a חזקה and would be believed if he claimed he bought it from שמעון three years ago.] ראובן went ahead and gifted this field to his son in the presence of עדים (unbeknownst to שמעון). After he gifted the field, ראובן sold the field to שמעון. When שמעון claimed ownership to this field, ראובן bought the עדים who testified that at the time of the sale the field belonged to s'ראובן son and there is no sale. The issue is from where שמעון can collect the money he paid to ראובן for this bogus sale. Is this considered a מלוה בשטר (since there was a שטר written up) and שמעון can collect from the משעבדי of ראובן or (since it was a bogus שטר) it is merely a מכר and שמעון can collect only from the בני חורין? The גמרא attempted to resolve this from the ברייתא of נכסים משועבדים of the גזלן that if one buys a field from a גזלן he can collect the קרן from לשבח קרקעות כיצד

And one can say; that רב ששת is not asking a question on רב, but rather רב ששת **is asking his question on us, since we agree** with the ruling **of רב** regarding מה מכר ראשון לשני וכו', **as is mentioned in פרק איזהו נשך -**

דמייתי גמרא טעמא דלא ליקריה גזלנא וניחא ליה דליקו בהימנותיה –

Where the גמרא mentions the reasons of דלא לקריה גזלנא and ניחא ליה דליקו בהימנותיה (which substantiate and form the basis of the ruling of רב) -

וסבירא לן כרבנן דאין אדם מקנה דבר שלא בא לעולם –

And on the other hand **we agree with the רבנן that א"א מקנה דשלב"ל -**

דשמואל פסיק כרבי יוחנן הסנדלר[5] פרק אף על פי (כתובות דף נט,א) **–**

For שמואל rules like ר"י הסנדלר in פרק אע"פ that א"א מקנה דשלב"ל -

ורב נחמן סבר[6] בפירות דקל אף משבאו לעולם יכול לחזור בו –

And ר"נ maintains in the case where one sold **the fruits of a date palm** when they will grow, that **even when** the dates **appear,** either party **can retract** from the sale, since at the time of the sale it was a דשלב"ל. Therefore רב ששת asks how we can reconcile these two (seemingly) opposite positions (agreeing with רב that אדם מקנה דשלב"ל and agreeing with the רבנן that א"א מקנה דשלב"ל).

תוספות continues:

ורב האי פסק[7] דאין הלכה כרב בהא –

And רב האי ruled that in this case of the לוקח מגזלן **the ruling is not like רב;** the field is not acquired by the לוקח (it remains by the גזלן) -

משום דסבירא לן דאין אדם מקנה דבר שלא בא לעולם וכולי –

since we maintain that א"א מקנה דשלב"ל, etc.

תוספות disagrees with ר"ה גאון:

ולא נהירא מכח[8] דאיזהו נשך (לקמן דף עב,ב)**:**

And the ruling of ר"ה **is not clear** to תוספות**, on account** of the גמרא of פרק **איזהו נשך,** where it is indicated that we do follow the view of רב.

SUMMARY

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even though it was a bogus שטר. The same should seemingly apply by the משכון. The גמרא rejected the proof, because by the גזלן he intends to appease the נגזל and reinstate the original שטר either דלא נקרייה גזלנא or דליקו בהימנותיה therefore (even when the גזלן did not manage to purchase the property from the נגזל) it is considered a מלוה בשטר, however by the case of the משכון the owner is attempting to remove the property from שמעון, therefore there is no שטר; it is לא ניתן להכתב. The גמרא there cites the reasons of דלא נקריה גזלנא and ליקו בהימנותא which form the basis of s'רב ruling; indicating that we follow רב. See (however), 'Thinking it over' # 2.

[5] ר"י הסנדלר rules that if a person is מקדיש the מעשה ידי אשתו [מותר] it is not הקדש since it is a דשלב"ל.

[6] לקמן סו,ב. We follow ר"נ בדיני and similarly הלכתא כשמואל בממונא.

[7] ספר המקח וממכר שער כט.

[8] See 'Thinking it over' # 1.

The question of רב ששת is how can we maintain both the ruling of רב (which implies אדם מקנה דשלב"ל) and the ruling that א"א מקנה דשלב"ל.

THINKING IT OVER

1. תוספות rejects the ruling of רה"ג since the גמרא in א"נ indicates that we rule according to רב.[9] Seemingly תוספות could have asked that according to רה"ג that רב maintains אדם מקנה דשלב"ל then רב ששת has no question, for the ברייתא follows the view of the רבנן that א"א מקנה דשלב"ל?![10]

2. תוספות maintains, based on the גמרא in א"נ, that we follow the ruling of רב.[11] The גמרא in א"נ does not clearly state that if the גזלן purchased the field it reverts [automatically] to the original לוקח. Rather the גמרא attempts to differentiate between the case of משכון [where the שטר was not ניתן להכתב (since the owner is attempting to prevent the sale of the משכון), and therefore he cannot collect מנכסים משועבדם] and the case of גזלן [where the שטר is ניתן להכתב (for the גזלן will attempt to buy it [for the לוקח] from the נגזל) and therefore it can collect ממשעבדי]. How does תוספות derive from that גמרא that the הלכה is like רב?

[9] See footnote # 8.
[10] See אמ"ה # 119.
[11] See footnote # 4.