We derive from this that *Shmuel* is correct - שמע מינה איתא לדשמואל

Overview[1]

The גמרא derives from the fact that we return a שובר כתובה to the husband (when the woman is מודה) and we are not concerned שמא כתבה ליתן בניסן וכו',[2] that the הלכה is like s'שמואל ruling that המוכר שט"ח לחבירו וחזר ומחלו מחול.[3] Our תוספות explains why there are no other concerns.

תוספות asks:

ואם תאמר וניחוש שמא מכרה במעמד שלשתן[4] שאינה יכולה למחול[5] -

And if you will say; and let us be concerned that **perhaps** the wife **sold the כתובה through מעמד שלשתן, in which** case **she cannot forgive** the debt?!

תוספות proves that the debt which is sold במעמד שלשתן cannot be forgiven:

כדמוכח פרק האיש מקדש (קדושין דף מח,א ושם דיבור המתחיל כי) **-**

As is evident in פרק האיש מקדש -

גבי התקדשי לי בשטר חוב או במלוה שיש לי ביד אחרים[6] -

Regarding the case where a man said to a woman, '**become מקודשת to be with this note of debt** (that someone owes me), **or with** (an oral) **loan which someone owes me'**; there is a dispute there in both cases whether she is מקודשת or not.

דקאמר במלוה בשטר במאי פליגי בדשמואל -

Where the גמרא **states** that **regarding a documented loan, they argue** about s'**שמואל** ruling; the גמרא continues -

דאמר שמואל המוכר שטר חוב לחבירו וחזר ומחלו מחול -

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[1] See 'Overview' to the previous תוס' יט,ב ד"ה מצא.

[2] In this case (of כתבה בניסן וכו') if she sold her כתובה rights in אייר, the husband will later present the שובר which is dated ניסן and will fraudulently take away the כתובה rights from the purchaser.

[3] The כתובה rights is merely a debt which the husband owes his wife. She sold the right to the debt (in אייר). However when she gives the husband the שובר (in תשרי), she is now saying that she forgives him the obligation of repaying the debt, therefore the purchasers have no claim on the husband to deliver to them the כתובה rights, since there is no debt.

[4] מעמד שלשתן (literally in the presence of three) refers to a special קנין which the חכמים instituted. In a case where the מלוה wants to transfer his loan to another party, he can gather the לוה, and the intended recipient of the loan, and the מלוה states in the presence of the לוה and the recipient that he is transferring the loan to the recipient, so now the לוה owes the money to the recipient.

[5] In a case of מעמד שלשתן even if the מלוה (in our case the wife) forgives the debt of the לוה (in our case the husband), the debt remains. The לוה still owes the money to the purchaser (or the husband owes the כתובה to the purchaser). The question remains how can we return this שובר to the husband (based on s'שמואל ruling), since s'שמואל ruling does not apply if the sale was done במעמד שלשתן. [See נחלת משה בגמ' ד"ה ועיין בתוד"ה ש"מ, for his explanation of this rule.]

[6] He is saying to the woman that he is transferring the loan (either the documented or oral loan) to her as the קידושין payment. The lender will now owe the money to the woman.

For שמואל ruled, המוכר שט"ח לחבירו וחזר ומחלו מחול: the one who maintains she is not מקודשת agrees with שמואל, therefore the woman is not convinced she will get any money since the מקדש, may be מוחל the חוב; and the one who maintains מקודשת disagrees with שמואל and maintains that once the loan is sold, the מלוה cannot revoke it, therefore she is sure of receiving the payment. The גמרא there continues -

ואיבעית אימא כולא עלמא אית להו דשמואל ובאשה סמכה דעתה פליגי כולי[7] -

And if you want I can say, everyone (both the one who claims מקודשת and the one who claims אינה מקודשת) **agree with שמואל** (that המוכר שט"ח לחבירו וחזר ומחלו מחול), **and they argue whether the woman trusts** the מקדש, **etc**. This explains the מחלוקת by a מלוה בשטר. The גמרא continues -

ובמלוה על פה פליגי בדרב הונא דאמר במעמד שלשתן קנה[8] -

And regarding a מלוה ע"פ they argue in the ruling **of ר"ה who said that במעמד שלשתן he is קונה.** This concludes the גמרא cited in מס' קידושין. Now תוס' concludes the proof -

ולא מסיק כולא עלמא אית להו דרב הונא ובאשה סמכה דעתה פליגי כדאמר לעיל -

However, the גמרא **does not conclude** (in its explanation of the מחלוקת by a מלוה ע"פ), that we can also say that **everyone agrees with ר"ה,** however **they argue whether the woman trusts** the מקדש to be מוחל the חוב or not, **as** the גמרא **stated previously,** regarding a מלוה בשטר and the ruling of שמואל.

שמע מינה דאינו יכול למחול[9] -

We derive from this omission **that one cannot be מוחל** by מעמד שלשתן. The question remains why do we return the שובר, perhaps she sold the כתובה במעמד שלשתן (באייר) and she wrote the שובר בניסן ולא נתנה עד תשרי וכו', and the answer of מחילה is not applicable by מעמד שלשתן.

תוספות answers:

ויש לומר דליכא למיחש שמא מכרה במעמד שלשתן -

And one can say; that there is no concern that **perhaps she sold** the כתובה **במעמד שלשתן -**

דאי ליכא עדים שמכרה הבעל והאשה יכפרו המכירה[10] -

For if there are no witnesses that she sold the כתובה במעמ"ש, so **the husband and**

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[7] The one who says מקודשת maintains that the woman trusts the מקדש that he will not deceive her and be מוחל the חוב. However the מ"ד אינה מוקדשת maintains the woman does not trust the מקדש, thinking he may be מוחל the חוב, and she will receive nothing for the קידושין.

[8] The מקדש told the כלה in the presence of the לוה, that I am giving over this loan to you as קידושין payment. If we agree with ר"ה, she is מקודשת, however if we disagree with ר"ה (there is no קנין מעמד שלשתן) she is not מקודשת.

[9] This explains why the גמרא could not have said that all agree with ר"ה, but they argue whether she is סמכה דעתה or not (for he can be מוחל the חוב), since indeed he cannot be מוחל, so if we agree with ר"ה, it will be a valid קידושין, since he cannot forgive this loan.

[10] We do not cause any loss to the buyer by returning the שובר to the husband, for if the husband and wife want to defraud the buyer from the כתובה, they can merely deny that any מעמד שלשתן sale took place, so the buyer will lose in any case (since the woman, by giving her husband the שובר, is מוחל the כתובה payment).

the wife will deny the sale; they will say there was no כתובה sale (במעמ"ש)[11] at all -

ואי איכא עדים נשיילינהו היכי הוה אם אומרים שנתרצה הבעל או שתק -

And if there are witnesses that she sold the כתובה במעמ"ש, **we will ask** the witnesses **what occurred; if the say that the husband agreed or he was quiet** during the מעמ"ש sale -

אם כן מודה שהשובר שקר[12] -

So therefore he is implicitly **admitting that the שובר is false -**

ואם מוחה שאמר כבר פרעתי לה אם כן השובר נעשה קודם המכירה -

And if during this מעמ"ש sale, the husband **protested, for he claims, 'I already paid her' so therefore** it is true that **the receipt** and the payment **was made before the** מעמ"ש **sale -**

ואינהו דאפסידו אנפשייהו[13] -

And it is they (the buyers), **who caused a loss to themselves.**

תוספות offers another answer why we are not concerned that she sold the כתובה במעמ"ש:

ועוד יש לומר דלא תקנו מעמד שלשתן אלא בדבר שראוי לגבות מיד[14] -

And one can say furthermore; that the חכמים **did not institute** the קנין of מעמ"ש in all instances, but rather **only in a situation where** the item being transferred **is ready to be claimed immediately -**

אבל בכתובה דאינו חייב עתה עד אחר גרושין וגם שמא לא תתגרש[15] לא תקנו מעמד שלשתן -

However by a כתובה, where the husband **is not obligated now** to give her the כתובה, **until after the divorce, and also perhaps she will not be divorced** ever, in this situation, the חכמים **did not institute** the קנין of **מעמ"ש.**

תוספות seeks to bolster his view that if it is not ראוי לגבות מיד, there is no מעמ"ש:

וכן צריך לומר בפרק החובל (בבא קמא דף פט,א ושם) -

And indeed it is necessary to assume this in פרק החובל -

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[11] [They cannot deny the sale, for presumably the buyer is holding the כתובה, however they can deny that it was sold במעמד שלשתן and therefore מחילה is applicable.]

[12] The עדים testify that in אייר the wife sold the rights to her כתובה במעמ"ש and the husband agreed; how can he produce a שובר, which states that in (the preceding) ניסן he paid his wife her כתובה; if she received her כתובה in ניסן why was the husband silent by the מעמ"ש sale in אייר. This will obligate him to pay the כתובה a second time (if he indeed paid in ניסן).

[13] The sale was done במעמ"ש, the husband and the buyer were both there; when the buyer heard the husband protest (as the עדים testify) they should have backed off from the sale. Therefore the claim of the husband is valid (that he paid the woman in ניסן before the מעמ"ש sale took place) and the buyer can only blame himself.

[14] In a case (for instance) where the מפקיד (the depositor) (or a מלוה) tells the נפקד (the custodian) (or לוה) to transfer the item (loan) to a new owner. This can be carried out immediately. The קנין of מעמד שלשתן (which is a הילכתא בלא טעמא) was instituted in order to facilitate transaction verbally without the burden of making an actual קנין. This was necessary for transactions that needed to be carried out immediately; however for transactions which cannot be carried out immediately, we can utilize the regular modes of קנין. See 'Thinking it over' # 1.

[15] This ספק strengthens the concept that a כתובה is not [מיד] ראוי לגבות.

גבי האשה שחבלה (בבעלה[16]) לא הפסידה כתובתה[17] -

Regarding a woman who injured someone, **she does not lose her כתובה** in order to pay for the damage she inflicted; she is as of now exempt from paying -

ואמאי תזבין במעמד שלשתן אלא משום דלא תקנו בכתובה כדפרישית -

But why is she exempt, **she should sell** her כתובה **במעמ"ש,** where there is no מחילה; **rather** we must say the reason is **because** the חכמים **did not institute** מעמ"ש **by a כתובה as I explained.** Therefore she cannot sell her כתובה במעמ"ש.

תוספות addresses another concern:

וזה אין לחוש שמא מכרה אחר גרושין במעמד שלשתן[18] -

However we are not concerned for this possibility, that **perhaps she sold** the כתובה **after the divorce במעמ"ש;** the reason we are not concerned is -

כי אחר גרושין מסתמא מכרה בדמים יקרים וכשיוציא הבעל שוברו שקדם היא צריכה לשלם -

For after the גירושין she presumably sold the כתובה for a high price,[19] and when the husband will present his receipt which preceded her sale, **she will be required to pay** back to the buyers, for she defrauded them -

ולא תרויח כלום בקנוניא -

So she will not profit anything from this swindle. תוספות will now explain when and why we are concerned for this קנוניא -

ולא חיישינן אלא שמא מכרה בעודה תחתיו בטובת הנאה שהיא דבר מועט[20] -

For we are only concerned that perhaps she sold the כתובה, **while she was still married, for a טובת הנאה, which is a small amount -**

ואינה צריכה לשלם אלא מעט ומרווחת הרבה[21] -

In which case **she will only be required to pay a little, but she can profit a lot.**

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[16] The מהר"ם deletes the word לבעלה.

[17] The משנה there on פז,א states that האשה פגיעתן רע וכו' והם שחבלו באחרים פטורין. The גמרא asks, why should she be פטור, let her sell her כתובה for the טובת הנאה and pay the injured party. The גמרא answered, on account of שמואל she will certainly be מוחל her husband the כתובה. This is the meaning of לא הפסידה כתובתה; she does not sell her כתובה.

[18] In this case the כתובה is ראויה לגבות מיד. [This concern is according to the second answer of תוספות.]

[19] Let us assume that her כתובה payment is $1,000. There is a field worth $1,000 which is designated for her כתובה. Once she is divorced she can sell this כתובה field for $1,000 (or very close to it), because the buyer is assured that he will receive this field. If the husband will show the שובר that he paid his wife (in cash) in ניסן before she sold her כתובה field the buyer will have to return the field, but the woman will be required to return to the buyer his purchase price (of $1,000), so nothing is gained by this attempt to swindle.

[20] When she tries to sell her כתובה field while she is still married the price will be much lower than the $1,000 value of the field, for the buyer is not assured that he will receive anything, for perhaps the husband will never divorce his wife and she may predecease him. Therefore a buyer is only willing to pay a fraction of the value, much less than $1,000.

[21] She received let us say $200 for the sale of her כתובה field, but when the husband shows his predated שובר, he will take away the field from the buyer, and even after they pay him back his $200 they will see a net profit of $800. See 'Thinking it over' # 3.

תוספות continues with the גמרא:

ומשני איתא לדשמואל -

And the גמרא **answers; שמואל is correct -**

ואם היתה מוחלת לבעלה לא תפרע ללקוחות אלא דבר שנתנו ותרויח הרבה[22] -

So if she would forgive her **husband** the כתובה payment, **she would only have to pay the buyers, whatever** small amount **which they gave, so she will profit greatly –**

תוספות anticipates a difficulty:

ואף על גב דגבי ערב לאשה בכתובה ורוצה לגרשה[23] -

And even though that regarding the case **of a guarantor for a woman's כתובה, where** the husband **wants to divorce her -**

תנן בפרק גט פשוט (בבא בתרא דף קעג,ב) דידור הנאה[24] -

The משנה in פרק גט פשוט teaches us that the husband must **be מדיר הנאה -**

אלמא חיישינן לקנוניא אף על פי שיתחייב לפרוע הכל לערב[25] -

It is evident from that גמרא **that we are concerned for a קנוניא, even though he will be obligated to pay back everything to the ערב.** So we must say -

ולכך חיישינן לקנוניא לפי שאין לו במה לשלם -

That the reason we are חיישינן לקנוניא by the ערב is **because** the husband **has nothing with which to pay** the ערב, so let us say the same thing here by the שובר, that she sold the כתובה במעמ"ש after the גירושין (where מעמ"ש is effective), and the husband will illegally take away the field from the לקוחות, and when the לקוחות will ask her to repay them, she will claim that she has no assets, just as by the ערב. What is the difference between the ערב, where we are חושש לקנוניא and by the שובר we are not, since in both cases the money needs to be repaid and in both cases they can claim that there are no assets with which to repay?!

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[22] Therefore when she says return the שובר to the husband, it is equivalent of her saying, 'I am exempting my husband from the כתובה payment', therefore the husband has every right to retrieve the כתובה field from the buyer. תוספות seems to be ruling that if one is מוחל a חוב (which he sold), he pays only what he received ($200), but not the face value of the document ($1,000). See תוס' ב"ב קמז,ב ד"ה המוכר.

[23] A person wrote a כתובה for his wife and an ערב guaranteed the woman that if her husband cannot pay the כתובה to her that the ערב will pay for it. The husband is preparing to divorce his wife, and it is known that he does not have the assets to pay her כתובה.

[24] ידור הנאה means that the husband must take of vow that after the גירושין, he will not ever derive any benefit from his wife. The reason is because we are concerned that the husband and his wife are perpetrating a swindle on this ערב. The man will divorce his wife and the ערב will need to pay her the כתובה (since the husband has no assets), and later (after they remarry) the husband and wife will share the assets of this ערב. Therefore he is מדיר הנאה, so he cannot derive any benefit from her כתובה which she received from the ערב.

[25] The rule is that after the ערב pays for the לוה (in this case the husband [who owes his wife the כתובה payment]) the לוה (husband) is obligated to repay the ערב. We see here that we are חושש for a קנוניא even if they are (seemingly) not gaining anything, for the husband is liable to pay back the ערב everything. This is in contradiction to what תוספות stated previously (see footnote # 19) that if one is obligated to repay everything, there is no חשש of קנוניא.

תוספות responds that there is a difference between the case of ערב and the case of שובר:

לא דמי דהתם מפסיד הערב מיד[26] וחיישינן לקנוניא -

The cases **are not similar, for there, the ערב loses** his money **immediately so** therefore we are **חיישינן לקנוניא -**

אבל הכא דאינו אלא חששא בעלמא שמא לא מכרה ואפילו מכרה שמא לא יפסידו הלקוחות -

However here by the שובר, **it is merely a concern** that the לקוחות will lose, but nothing definite, for **perhaps she never sold** the rights to the כתובה field so there is no קנוניא to speak of, **and even if she sold** it, **perhaps the לקוחות will not lose -**

כי אינו מוציא מהם אלא חוב שהיה להם על הבעל יהיה להם על האשה[27] -

For he is not taking away from them any tangible assets, **but rather, the lien that they had on the husband** (to collect the כתובה) **they will now have on the wife.**

תוספות responds to an anticipated difficulty:

וגבי חייב מודה דחיישינן לעיל[28] לקנוניא לפי שיוציא מיד מן הלקוחות[29] -

And regarding the case of **חייב מודה where previously we were concerned for a קנוניא; that is because he will take away** the properties **from the לקוחות** –

תוספות offers an alternate explanation why there is a חשש קנוניא by חייב מודה:

ועוד יש לחוש משום לקוחות שלא באחריות שיפסידו[30] לגמרי:

And additionally there is the concern for those לקוחות, who bought **without אחריות, for they will lose out entirely.**

Summary

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[26] As soon as the husband divorces his wife, the ערב pays her the כתובה, and this may be a swindle.

[27] See footnote # 19. The לקוחות paid (about) $1,000 for the כתובה rights, they were prepared to collect it from the husband, now that the שובר predates their purchase, they will collect it from the woman; there is no real loss. [There could be a loss in a case where the husband has assets and the woman does not, therefore תוספות writes שמא.]

[28] יג,א. The גמרא there states that the משנה which rules in a case where one found שטרי חוב that we do not return it to the מלוה even if the לוה admits that he owes the money. One reason given is because we are concerned that perhaps the לוה paid the debt, but together with the מלוה they are perpetrating a swindle against the לקוחות who bought fields from the לוה after the date on the שט"ח. The מלוה will show them this [found] שטר (which was already paid) and he will take away the field illegally from the לקוחות. The question is since תוספות said that whenever one has to pay back there is no חשש of קנוניא, why is there a חשש of קנוניא here, for if the מלוה takes away the fields from the לקוחות, the לוה will have to pay back to the לקוחות the purchase price which they paid him (provided they bought the field באחריות [with a guarantee]).

[29] תוספות answer is that case of חייב מודה is more similar to ערב than to שובר. Here too even though it is merely a 'concern' like by שובר, for who says he sold his fields in the meantime, nevertheless it is different from שובר where there is no tangible loss; it is merely shifting the collection process from the husband to the wife [see footnote # 27]), however here there is a real loss, for the לקוחות actually purchased and own the fields, and now when it is taken from them there is a real loss.

[30] If the שטר is returned to the מלוה, he may collect from those לקוחות who bought the field from the לוה, without a guarantee, so these לקוחות have no recourse at all, since they cannot collect from the לוה. See 'Thinking it over' # 2.

One cannot be מוחל a חוב which was transferred במעמ"ש. There is no concern that the woman sold her כתובה במעמ"ש either because the עדים will verify the veracity of the claim (and the lack of עדים makes the issue moot), or מעמ"ש is only by something which is עומד לגבות מיד. There is no concern for a מעמ"ש sale after גירושין for it does not pay. However by ערב or חייב מודה when there is an actual loss, we are concerned even if the swindler has to pay (or that it was bought שלא באחריות).

Thinking it over

1. Can one sell[31] a חוב במעמ"ש if it is still תוך זמנו (before the note is due)?[32]

2. תוספות final answer was that by חייב מודה it is possible that the לוה sold his fields שלא באחריות, and therefore there is the ששח of קנוניא, since the לוה will not have to pay the לקוחות anything.[33] Seemingly the same ששח is by a כתובה, perhaps the woman sold the כתובה (במעמ"ש לאחר הגירושין) without אחריות and the will be מוציא from the לקוחות and she would not be obligated to pay them since it is שלא באחריות! What is the difference between חייב מודה and כתובה?[34]

3. It appears from תוס' that the קנוניא is the profit they will make from the difference between the price which the woman received and the actual value of the field.[35] Seemingly the case here is where the husband paid the כתובה in תשרי (in cash). He will retrieve the כתובה field for which his wife received a טובת הנאה, but she will need to return the טובת הנאה to the buyer (since the שובר states that her sale was invalid). Where then is the profit? He paid the כתובה and he gets back the field, which was his anyways, he just switched, so that instead of paying her with the field he paid her in cash; where is the profit?![36]

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[31] See footnote # 14.

[32] See נחלת משה.

[33] See footnote # 30.

[34] See חידושי ר' עקיבא איגר.

[35] See footnote # 21.

[36] It would seem that initially the woman assumed that her husband will divorce her in ניסן, so she wrote a שובר. However in אייר she was still not divorced so she sold her כתובה בטובת הנאה (for she needed the cash). In תשרי (after the divorce) the husband gave the wife the deed to the כתובה field (and she gave him the שובר). The לקוחות took away the field from her (since they bought the כתובה in אייר). The woman tells her (former) husband, 'I am left only with the טובת הנאה (which is much less than the כתובה field), so let us say that this found שובר was actually paid in ניסן, so even though I will need to return the טובת הנאה, but we will get back the field which we will divide.' Both the husband and wife gain from this קנוניא.