מאי לאו לנכרים – Does this not refer to gentiles

Overview

The גמרא cites a story concerning יוחנן חקוקאה that someone deposited חמץ by him and the mice ripped the sack and were depleting the חמץ. On ע"פ, he asked רבי if he should sell it in order to minimize the loss for the owner. רבי told him to wait; when the fifth hour came רבי instructed him to sell it. The גמרא assumed that רבי meant that he should sell it to נכרים and not to Jews (following the view of ר"י) since חמץ is אסור באכילה (even) בשעה החמישית. The גמרא rejects this assumption and maintains that he meant to sell it to a Jew (and it follows the view of ר"מ that חמץ may be eaten בשעה החמישית). אביי followed up by asking if he meant to sell it to a Jew (like ר"מ) then why could not יוחנן חקוקאה acquire it for himself instead of requiring him to sell it. The גמרא answered it looks suspicious. תוספות will explain why initially the גמרא assumed that it meant selling to a נכרי, and will also discuss when are we concerned of חשדא and when not.

◆

תוספות explains -

להכי משמע לנכרים דאי לישראל לישקול לנפשיה כדפריך אביי בסמוך.

Therefore[1] it was assumed that רבי meant to sell it **to gentiles; for if** רבי meant for him to sell it **to a ישראל, let** יוחנן חקוקאה **take it for himself** (and pay the owner its value) **as אביי shortly asks.**

תוספות continues with a discussion of חשדא:

בירושלמי[2] גרס צא ומוכרה בבית דין בשוק –

In ירושלמי תלמוד **the text reads;** that רבי said: **go out and sell it in the market** under the supervision **of בי"ד;** from this **–**

משמע אף על פי שנתן לו רשות רבי שהיה אב בית דין למכור –

It appears that even though רבי, who was an אב"ד, gave him permission to sell -

אפילו הכי צריך בית דין בשעת מכירה כדי לשומן –

Nevertheless it is required to have a בי"ד present **at the time of the sale in order to appraise** its value; that the owner should not be shortchanged. According to the

[1] תוספות is responding to the anticipated question; why indeed did the גמרא initially assume that רבי meant for יוחנן חקוקאה to sell it to נכרים as opposed to selling it to a ישראל.

[2] פ"א ה"ד.

ירושלמי, an item that is being put up for sale (for an absentee depositor) requires a שומת בי"ד; and in addition the purchase must be made by outsiders and not by the bailee (the נפקד). If the נפקד should purchase the item it would arouse suspicion that he gained unfairly in this trade.[3]
תוספות asks:

ואם תאמר מאי שנא מאלמנה דמוכרת לאחרים[4] שלא בבית דין[5] –

And if you will say; why is this different from a widow who sells from her husband's estate **to others, not in the presence of בי"ד.** Why was יוחנן חקוקאה instructed (according to the ירושלמי) to sell it בבי"ד if he was selling to others?!

תוספות has an additional question:

ובבית דין יכולה לעכב אפילו לעצמה –

And if she sells in the presence of בי"ד **she may keep it even for herself**; she need not sell it to others **-**

דאמר בכתובות (דף צח,א ושם) **אלמנה ששמה לעצמה[6] לא עשתה ולא כלום –**

As the גמרא **states in כתובות** מסכת; **a widow who appraised** items from her husband's estate **for herself, her actions are meaningless** -

דאמר מאן שם ליך משמע דבבית דין יכולה לשום –

For we say to her, **'who appraised it for you'; this indicates that in the** presence **of בי"ד she can appraise** the items for herself, for since it is in the presence of בי"ד we are certain that it is the proper value.

תוספות brings another example that in the presence of בי"ד one may appraise items to keep for himself:

וקאמרינן נמי התם ההוא גברא דאפקידו גביה כיסתא[7] דיתמי אזל שמה לנפשיה[8] –

And the גמרא **also relates there; there was a person by whom** בי"ד **deposited כיסתא of יתומים, he went and assessed it for himself -**

לסוף אייקר אמר ליה מאן שם ליך[9] –

Eventually the price of כיסתא **appreciated** and the יתומים suffered a loss;[10] **they said to him who assessed it for you.** It appears from these two גמרות that the problem of

---

[3] We are not concerned that there would be fraud (since there is שומת בי"ד); however the concern is that people may suspect fraud.

[4] An אלמנה may sell property from her husband's estate for her מזונות (if she is still living in her husband's house) or to collect her כתובה.

[5] There is no concern that perhaps she will sell it below its value thus unfairly diminishing the value of the heirs' property, for she will not gain from this.

[6] She appropriated a field and assessed it to be the value of her כתובה or her מזונות and kept it for herself.

[7] רש"י there offers two interpretation of כיסתא; either fodder or coral.

[8] He assessed the value of the deposited כיסתא and put that money aside to be given eventually to the יתומים (when they grow up) and he kept the כיסתא for himself.

[9] He was required to return the כיסתא (or the appreciated value) to the יתומים.

keeping it for oneself was that the assessment was done privately. However, if the assessment would be done in the presence of בי"ד, then the interested party (the אלמנה or the נפקד) could (pay the assessment and) keep the item for themselves. Why is it that here יוחנן חקוקאה could not have bought this חמץ for himself even if בי"ד would assess it?

תוספות answers (the first question[s] concerning אלמנה):

ויש לומר דמוכרת שלא בבית דין משום חינא[11] –

And one can say; that an אלמנה **may sell outside of בי"ד** to others **because of 'charm';** however in other cases where there is no issue of 'חן' one cannot sell (even to others) without שומת בי"ד[12]. This also explains why if there was a שומת בי"ד she may keep it for herself for we are more lenient with an אלמנה on account of חינא.[13]

תוספות responds to the second issue of כיסתא דיתמי:

וגבי כיסתא דיתמי דיכול לעכב לעצמו היינו דוקא בדיעבד –

And concerning כיסתא דיתמי where he can keep it for himself (if there would have been שומת בי"ד) **that is only if he already did it;** however initially even if there is שומת בי"ד it is necessary to sell it to others because of חשדא.

תוספות offers another resolution to the question of כיסתא דיתמי:

אי נמי גבי יתמי בית דין עצמן הן המפקידים ולכך יכול לעכב לעצמו[14] על פיהם –

Or you may **also** say; **concerning יתמי it was בי"ד itself who deposited** the כיסתא by this individual, **so therefore he may keep it for himself on the** assessment of בי"ד -

אבל פקדון של אחרים לא –

However a deposit of others (where בי"ד did not deposit it) **it is not** permissible to acquire it for oneself even if there is שומת בי"ד because of חשדא.

תוספות anticipates an additional question:

והא דאמר באלו מציאות (בבא מציעא כח,ב) שם דמיהם[15] ומניחן גבי מציאה –

---

[10] If the כיסתא would still belong to the יתומים the appreciation in value would be theirs.

[11] If the women will know that their כתובה obligations are secure and they can sell property [to others] on their own without waiting for בי"ד to assess it; the men will find 'favor in the eyes' of the women and the women will be more readily agreeable to marry them.

[12] The reason is not (necessarily) because we suspect him of fraud (for since he is selling to others, he gains nothing from it); but rather we are (also) concerned that it may arouse suspicion. However the טעם of חינא outweighs the concern of חשדא.

[13] The reason of חינא extends to allow her to acquire it even for herself (על פי שומת בי"ד); it is for her benefit and increases חינא (see [הארוך] מהרש"א and חת"ס). However the טעם of חינא would not allow us to permit her to buy it for herself without שומת בי"ד, for then there is a legitimate concern of fraud.

[14] It is obvious that בי"ד trusts him, therefore there is no חשדא and he may keep it even לכתחילה.

And that which the ברייתא **states in אלו מציאות** פרק, **concerning a found object,** that after the required time elapsed and no one claimed the מציאה**,** the finder **assesses the value** of the מציאה **and puts down** the money until the loser claims it (and he will receive the money), and the finder may keep the item for himself. He is not required to sell it to others

תוספות explains:

התם ליכא חשד שהרי הוא מחזיר אבידה:

There is no suspicion there, for he is returning a lost item; such a person is beyond suspicion (for he could have initially kept it for himself). A מחזיר אבידה may assess the lost item for himself without שומת בי"ד.

Summary

If one must sell items for an absentee depositor, it requires שומת בי"ד and must be sold to an outside party (not to the נפקד) on account of חשדא.

An אלמנה may sell (her husband's estate for מזונות or כתובה) to others without שומת בי"ד (and may acquire it for herself with שומת בי"ד) on account of חינא.

If בי"ד deposited the item by the נפקד he may acquire it for himself with שומת בי"ד (for he is trustworthy). In case the נפקד acquired the item for himself ע"פ שומת בי"ד, he may keep it בדיעבד.

Concerning a מוצא מציאה he may acquire it for himself (even without שומת בי"ד), for he is a מחזיר אבידה.

Thinking it over

There seem to be two types of restrictions; a) when selling to others (where there is no concern of fraud) one nevertheless requires שומת בי"ד, and b) even if there is שומת בי"ד, one is required to sell it to others (not to acquire it for himself). Under certain circumstances it is possible to overcome these restrictions; either to sell it to others without שומת בי"ד, or to acquire it for one's self with שומת בי"ד. Which of these two restrictions seems to be easier (or harder) to overcome?[16]

---

[15] רש"י there explains שם דמיהם to mean that he sells it to others. However it seems that our תוספות disagrees and maintains that he may acquire it even for himself without בי"ד.

[16] See אור חדש.