They argue regarding the ruling of *Rabi Yitzchok* – בדרבי יצחק קמיפלגי

Overview

The גמרא concluded that the מחלוקת between ר"מ and the ת"ק is in a case where the חמץ was given as a משכון and they argue whether the rule[1] of ר"י that בע"ח קונה משכון applies even to a case where a ישראל received a משכון from a נכרי. Our תוספות explains how the ruling of ר' יצחק applies to our מחלוקת.

תוספות asks:

תימה הא רבי יצחק לא קאמר דקני משכון אלא שלא בשעת הלואה[2] -

It is astounding! For the ruling of **ר"י that** בע"ח **acquires the משכון was only said** if the משכון was given **not at the time of the loan -**

כדמוכח בהאומנין[3] (בבא מציעא פב,א) -

As is evident in האומנין פרק השוכר את

והכא ישראל שהלוה לנכרי על חמצו תנן דמשמע[4] בשעת הלואה -

However here the משנה **stated a ישראל who lent** money **to a נכרי, על חמצו which indicates** that the משכון was given **at the time of the loan -**

כדמשמע[5] בהאומנין דקתני[6] הלוהו על המשכון שומר שכר[7] והתניא שומר חנם -

As it seems from the גמרא **in** פרק **האומנין where the משנה stated הלוהו על המשכון,** the מלוה is a **שומר שכר, but** the גמרא asks **we learnt in a ברייתא** that he is a **שומר חנם -**

ומשני הא דמשכנו בשעת הלואתו והא שלא בשעת הלואתו -

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[1] See following תוספות that the ruling of ר"י that בע"ח קונה משכון applies to the responsibility of the מלוה to the לוה to restore the משכון to the לוה (if the לוה pays). The מלוה is responsible for the משכון; that means that he owns it. A measure of defining ownership is who suffers a loss if the item is gone; the one who suffers is considered the owner, therefore the מלוה who suffers the loss (he must restore the משכון to the לוה), is considered the owner.

[2] A משכון can be given at the time of the loan in which case the מלוה is merely a שומר חנם; he is liable only for being (grossly) negligent in watching the משכון; however he is exempt from paying if the משכון was lost or stolen. However, if the due date of the loan came and the לוה did not pay, the משכון that is taken then, is called משכנו שלא בשעת הלואה, it is in this case where ר"י ruled that the בע"ח is קונה משכון, meaning that he is liable even for גניבה ואבידה (see footnote # 1 and shortly in this תוספות). One of the reasons for this distinction is that a משכון בשעת הלואה is taken only for a reminder (to the מלוה) that he is owed money and so that the לוה cannot deny the loan. However a משכון שלא בשעת הלואה is taken as a means of payment (with the לוה having the option of redeeming the משכון by paying the loan [within a certain period of time]). Therefore since it is taken as a payment it 'belongs' to the מלוה.

[3] The גמרא there states; ותסברא אימור דאמר ר' יצחק במשכנו שלא בשעת הלואתו אבל משכנו בשעת הלואתו מי אמר.

[4] The words ... הלוה על; indicate that the משכון was taken בשעה הלואה; see immediately in this תוספות.

[5] תוספות cites this following גמרא on ב,פא (just) to prove that the phrase המלוה על המשכון refers to משכנו בשעת הלואה.

[6] משנה there on ב,פ.

[7] A שומר שכר (a paid custodian) is חייב even for גניבה ואבידה (stolen or lost), while a שומר חנם (an unpaid custodian) is חייב only for פשיעה ([gross] negligence).

And the גמרא **answered** that there is no contradiction, **this** ברייתא which states that he is a ש"ח is in a case where **משכנו בשעת הלואתו and the** משנה which states that he is a ש"ש is in a case where **- משכנו שלא בשעת הלואתו**

ופריך והא אידי ואידי על המשכון קתני[8] -

However the גמרא **challenges** this distinction, '**but both here and there it states** הלוהו **<u>על</u> המשכון',** which means בשעת הלואתו so how can you say that the משנה is in a case of משכנו שלא בשעת הלואתו. This concludes the citation of the גמרא. It is evident from that גמרא, that our ברייתא (and our משנה) of הלוהו על חמצו is also in a case of משכנו בשעת הלואתו where the rule of ר' יצחק does not apply; how can we say that they argue in ר' יצחק who is discussing a case of משכנו שלא בשעת הלואתו exclusively?!

תוספות answers:

ויש לומר דהכי פירושו כיון דשלא בשעת הלואה קונה לגמרי כדרבי יצחק -

And one can say; that this is the explanation why even though it is a משכון בשעת הלואה (and ר"י said his rule that בע"ח קונה משכון only if it was שלא בשעת הלואה), nevertheless he will be עובר on ב"י וב"י, for **since by שלא בשעת הלואה** the מלוה **acquires** the משכון **completely, as ר"י ruled** (that he is liable even for גניבה ואבידה) -

אם כן לענין חמץ יש לנו לחושבו כאילו הוא שלו -

Therefore regarding the איסור of ב"י וב"י by **חמץ we should consider it as if the חמץ belongs** to the מלוה, to the extent -

לעבור בלא ימצא אף בשעת הלואה[9] דחשבינן ליה מצוי[10] -

That he should transgress the לאו of **לא ימצא even** if the משכון was given **בשעת הלואה, for** the משכון **is considered מצוי (found)** in the רשות of the מלוה –

תוספות offers a similar example:

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[8] See רש"י there על ד"ה פב,א who writes; בשעת הלואה משמע ,על המשכון.

[9] Even though he is not חייב for גניבה ואבידה (so it is not really his), nevertheless it is sufficiently his to be עובר on ב"י וב"י.

[10] The general thrust of תוספות answer may be that without ר"י there is seemingly no קנין for the מלוה in this משכון, it does not belong to him at all. However once ר"י teaches us that there is a קנין by a משכון (granted שלא בשעת הלואתו) to the extent that he is liable to pay for its loss (which is a sign of ownership) so even though that by משכון בשעת הלואתו the responsibility of the מלוה is less, nevertheless there must be some limited ownership to the extent that it cannot be considered של אחרים which exempts him from ב"י, but rather the מלוה is considered to have a sufficient interest in this חמץ to be עובר on ב"י. See פני יהושע here. [It should be noted that the two rules by משכנו שלא בשעת הלואה that the משכון is קונה בע"ח, and he is חייב באחריותו, the cause for the latter (חייב באחריותו) is the former (קונה משכון). [See דבר שמואל in the next תוס' ד"ה שקונה and שו"ע אדה"ז סי' תמא ס"א.] He is קונה the משכון since he has an interest in it; he is taking it (as a security) for his payment. Therefore it is considered his (meaning that he (somehow) received payment) and therefore if it is lost, it is his loss. Similarly משכון בשעת הלואה is also in the interest of the מלוה (it is to protect his loan [see footnote # 2]), therefore even though he is פטור מגניבה, it is still considered partially his. This is different from a שומר חנם who has no interest at all in guarding the animal.]

וכן יש לפרש בהשולח (גיטין לז,א) גבי המלוה על המשכון אינו משמט[11] מדרבי יצחק[12] -
And so too we can explain what is taught in **השולח** פרק **regarding one who lends** money **for a משכון** (בשעת הלואה) the rule is that שמיטה **does not relinquish** this loan **because of** the ruling of **ר"י;** there too we can offer the same reasoning, that -

כיון[13] דקני ליה שלא בשעת הלואה בשעת הלואה נמי מיקרי של אחיך בידך:
Since the מלוה **acquires the** משכון when it was given **שלא בשעת הלואה,** therefore **even** if it was given **בשעה הלואה it is considered של אחיך בידך.**

Summary

Once we know that a בע"ח is קונה a משכון שלא בשעת הלואה completely, therefore even בשעת הלואה he has sufficient ownership in the משכון that he is עובר on ב"י and that שביעית is not משמטת.

Thinking it over

The גמרא stated that if a נכרי lent money to a ישראל for his חמץ, all agree that he is עובר since a נכרי is not קונה a משכון מישראל. However according to תוספות that we are discussing a משכון בשעת הלואה where the מלוה is not really קונה the משכון (but rather we consider it his (only) regarding ב"י), it is understood that the משכון (which does not belong to the מלוה) belongs to the לוה; so why was it necessary for the גמרא to say that a נכרי מישראל לא קני, even if a נכרי is קני מישראל, but it is a minimal קנין at best and truthfully it still belongs to the לוה (who is a ישראל), and therefore כ"ע maintain that he is עובר?![14]

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[11] שמיטה in this case does not exempt the לוה from his obligation to pay the מלוה (for it is as if the מלוה has the payment in his 'hand' already [since he is holding the משכון]).

[12] The תורה writes regarding שביעית (in דברים [ראה] טו,ג) that ואת אשר יהיה לך את אחיך תשמט ידיך. That you have to relinquish a loan that is של אחיך, but not a loan that is של אחיך בידך; meaning that if the (payment of the) loan is already in the hands of the מלוה [if for instance the מלוה has a משכון (שלא בשעת הלואה), so that it 'belongs' to the מלוה, he is no longer taking money from אחיך (the לוה) since it is already בידך (in the hand of the מלוה)].

[13] What needs explaining is that a משכון belongs to the מלוה only if it is משכנו שלא בשעת הלואה; however from the גמרא in השולח it appears that even by משכנו בשעת הלואה (where the rule of ר"י does not apply), nevertheless שמיטה is not משמט this loan. תוספות continues to explain.

[14] See אור חדש.