להתוודע ולהגלות מחמדי התורה בכל דף בש"ס
LEHISVADA
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Baba Kamma daf 49

Collateral Taken By A *Ger*

מ"ט: אמר רבה, משכונו של ישראל ביד גר, ומת הגר, ובא ישראל אחר והחזיק בו, מוציאין אותו מידו. מאי טעמא, כיון דמית ליה גר, פקע ליה שעבודיה.

משכונו של גר ביד ישראל, ומת הגר, ובא ישראל אחר והחזיק בו, זה קנה כנגד מעותיו, וזה קנה את השאר. ואמאי תקני ליה חצירו, דהאמר רבי יוסי בר חנינא חצירו של אדם קונה לו שלא מדעתו וכו', והלכתא דליתיה בחצירו, דלא קנה.

-א-

The collateral of a *ger* who died, where the collateral was not taken at the time of loaning

The lender acquisitions the collateral if he takes it after the time of lending / Whether the lender is liable for oness / Whether the collateral returns to the lender if the loan dissipates / An alternative way to acquisition the collateral through claiming the loan from it

תוספות, ש"ך, רשב"א, מחנה אפרים, מקצוע בתורה

The *Gemara* discusses two scenarios involving the collateral, *mashkon*, of a *ger*, convert. The laws of inheritance, yerushah, can only be applied for blood relations who were born after the conversion. The *ger* loses all family connection to his previous family. Therefore, when a *ger* dies and leaves no family, his property becomes hefker, and the first one to seize the possessions inherits them.

If the *ger* had a collateral taken from another Jew, *Rabbah* says that the collateral does not become free for all to take, rather, it reverts back to the possession of the borrower who gave it in the first place.

Further, the *Gemara* says, that if a *ger* gave a collateral to another Jew for a loan the *ger* took and then he dies, the lender automatically receives only up till the amount of his loan in the collateral, and the rest of the value is hefker for all.

Tosfos[1] explain the case of *Rabbah*, that his la is true even in a case where the *ger* took the *mashkon* after the time of the loan, since the borrower could have paid back and returned his collateral, when the *ger* dies, the *mashkon* reverts back to his possession.

The *Gemara* in *Baba Metzia* [*daf 82a*] brings the statement of *R' Yitzchak* that *'baal chov koneh mashkon'*, the lender attains ownership of the collateral, and he infers this from the *Passuk*. The *Gemara* establishes that this only applies to a *mashkon* which is taken by the messenger of the *Beis Din* in order to serve as the claiming of the debt. However, if the *mashkon* is given at the time of the loan, the lender does not acquire the *mashkon*, as this is not the type of *mashkon* taken to begin the claiming of the debt, rather as a safeguard.

To this end *Tosfos* stress that even a *mashkon* which is taken after the loan takes place, and is therefore subject to the law of *baal chov koneh mashkon*, and is considered thre property of the *ger* and not of the borrower, returns to its original owner on the death of the *ger*.

The reason *Tosfos* give, is because since the borrower can always redeem his *mashkon*, it is not entirely out of

his possession and therefore on the death of the *ger*, he has the first rights to this *mashkon*.

However, the *Shach*[2] disagrees with this, and he says that a *mashkon* taken after the loan belongs entirely to the lender, the *ger*, and on the *ger's* death becomes hefker for the first taker.

For a deeper understanding of this dispute, we must take a look at some of the definitions of the law that *baal chov koneh mashkon*.

Rashi in *Baba Metzia*[3] says that if one takes a *mashkon* after the loan, and the *mashkon* was damaged or lost in whilst in the possession of the lender, he is responsible even for *oness*, unavoidable circumstances, and he has no further right to claim the debt, since we view the debt as having been paid through the *mashkon* because of *baal chov koneh mashkon*.

Tosfos[4] there disagree and say that the extent of the responsibility of the lender who took the *mashkon* is limited to that of a *shomer sachar*, a paid guardian who is not responsible for *oness*.

The *Shach*[5] concurs with the opinion of *Rashi* that the lender is responsible for *oness*, and it is based on this reasoning that the *Shach* mentioned earlier disagrees with *Tosfos* regarding the extent of the ownership of the *ger*. A full ownership of the *mashkon* would certainly be adequate to consider him fully responsible for *oness*. *Tosfos* who say that the ownership of the *ger* in the *mashkon* is incomplete, are following their own reasoning that his responsibilities for damage are equally limited to those of a shomer sachar.

Towards the end of his discussion, the *Shach* conceeds that even according to *Rashi's* understanding of the extent of the responsibilities of the lender for the *mashkon*, which equate those of a true owner, it can still be said that his ownership is incomplete due to the rights of the borrower to redeem his *mashkon*.

The *Rashba* [here in *Baba Kamma*] also says explicitly that even according to *Rashi*'s opinion that the lender is liable for *oness*, it is nonetheless an incomplete ownership and is classified as a *shiabud*, a lien, albeit an extreme one, and therefore, on the death of the *ger*, the ownership reverts back to the true owner.

The *Machaneh Efraim*[6] also concludes so in the opinion of *Rashi* and he proves this further from the words of *Rashi* in *Pesachim* [*daf 31a*[7]] who writes there that the law of *baal chov koneh mashkon* is limited to the time of his debt. This shows that his ownership over the *mashkon* is not absolute, and is limited to the extent of his rights to claim the debt, and therefore when the *ger* dies and the debt dissipates, the ownership of the *mashkon* reverts to the borrower. [1]

[Similarly, he concludes due to this, that if the lender were to be *moichel*, forgo his rights to the debt, the *mashkon* would then revert back to the borrower, as it does not belong absolutely to the lender, therefore when the debt dissipates, the *mashkon* goes back.]

The *Sefer Miktzo'a Batorah*[8] also discusses this topic, and he adds another explanation, that even though *Rashi* assumes that the lender assumes full responsibility for the *mashkon*, nevertheless, he only receives full rights and kinyan, ownership of the *mashkon* when the borrower neglects to pat back, then we say that the taking of the *mashkon* works retroactively to make it his. But if the debt never comes to a stage of non-payment by the borrower, the *mashkon* never will become the property of the lender.

NOTES

The definition of baal chov koneh mashkon

קובץ שיעורים

[1] *R' Elchonon Wasserman ztz"l hy"d*[14] explains that according to what we have said, that the acquisition of the lender of the *mashkon* is limited to the time that the debt is still in existence, means that the ownership of the lender is not in the actual object, rather he has ownership in its value.

Generally, ownership can be divided into two aspects, the actual object, and the value of the object. One cannot force someone to sell his possessions even if he pays their full value, because the actual object belongs to him and this gives him the right to refuse.

In the case of *mashkon* though, the borrower can force the lender to return the *mashkon* for its value, as the ownership of the object is still of the borrower. The lender only owns the value as granted to him by his rights to claim the debt.

If the debt dissipates, such as through the death of the borrower, the ownership of the value of the object which the lender has also dissipates, and it will transfer to whoever seizes the *mashkon* first.

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Debt claiming from the properties seized from the estate of the *ger*

There is no difference between the claiming from the mashkon or other properties / The claiming of a debt from moveable possessions / Whether there is a distinction between a loan in a shtar or a verbal loan / If the borrower renders his property hefker

רשב"א, עיטור, שולחן ערוך, קצות החושן, זכר יצחק

As we have seen, if a Jew lends money to a *ger* and he takes a *mashkon*, when the *ger* subsequently dies, the lender has first rights to claim the amount of his debt from the *mashkon*, and the rest of its value is hefker, free for the first one to take it.

If the *mashkon* is standing at the time of death in the possession of the lender, he acquires the whole value of the *mashkon* through *kinyan chatzer*, that a person's courtyard or any possessions can acquire things for him.

These laws are brought in the Rambam[9] and Shulchan Aruch[10].

The *Rashba* explains, that this law is not limited to a *mashkon*, rather, any time a *ger* owes money and he dies, the lender has first rights to his possessions as much as he needs to claim his debt. This is true even if the *ger* only left moveable items, '*metaltelin*'. Normally, if someone dies, his debtors cannot claim from his *metaltelin* as they belong to the *yorshim*, heirs. He can only take is debt from land on which he has a *shiabud*, lien, from the time of the loan.

The property of the *ger* is different as there are no heirs, and the lender has first rights to claim his possessions.

If so, why does *Rabbah* refer specifically to the case of *mashkon*. The *Rashba* answers tat *Rabbah* wanted to bring out the chiddush on the other side of the coin, that even though the lender has first rights on the *mashkon*, if someone else did seize the *mashkon*, the lender only can retrieve from him the amount of his debt.

The *Rashba* explains, that it is not possible to say that *Rabbah* meant his law specifically for *mashkon* and not for other possessions of the *ger*, as we have already learnt, tat *baal chov koneh mashkon* only applies to a *mashkon* taken after the loan, but a *mashkon* taken at the time of the loan does not beling to the lender. Since *Rabbah* did not differentiate between the different types of *mashkon*, it is clear that his statement is not limited to *mashkon*, but any possessions to which he has a claim.

The *Magid Mishneh* adds onto this from the *Ittur*, that *Rabbah's* law applies both to a *milveh bishtar*, a loan documented in a *shtar* at the time of lending which is generally viewed as being a stronger lien, and a *milveh baal peh*, which is not documented.

There is one difference, that the documented loan can be taken from the possessions of the *ger* whether the time for payment has arrived or not. However, a *milveh baal peh*, a non-documented loan, cannot be claimed from the possessions of the *ger* once the payment time arrives while the *ger* still lived. This is because, he cannot prove that the *ger* had not paid before he died.

Further, he writes from the *Ittur*, that when the lender takes the possessions from the one who seized them

Notes

We cannot remove the possessions of the ger from the one who seized them in order to provide the nesachim for the korban of the ger / The definition of the lien on properties of the borrower when the claim to the borrower himself no longer exists

תוספות, קהלת יעקב, עונג יום טוב, זרע אברהם

[2] The *Gemara* in *Menachos* [*daf 51b*] says that a *ger* who dies with no heirs and he leaves a *korban* which he had separated but not yet offered, and he had not yet seperated the wine offering, the *nesachim*, which come with the *korban*, the community must provide the wine for the *nesachim*. *Tosfos*[15] that since all of his possessions are *hefker*, therefore we must provide from the community.

The *Shu"t Oneg Yom Tov*[16] quotes the *Sefer Kehilas Yaakov*[17] who asks that *hekdesh* has a *shiabud*, a lien, on the possessions of the *ger* to complete his offering, so the law should be equal to that of a *ger* who dies and leaves a *baal chov*, a debtor.

[The *Kehilas Yaakov* himself answers, that all that we have said from the *Gemara* and the *Shulchan Aruch*, only applies according to the opinion that '*shiabuda deoraysa*', that the independent lien on properties of a borrower is *min hatorah*, therefore, when a *ger* dies

first, he must take an oath that the debt has not yet been paid, similar to one who claims his debt from the *yorshim*, heirs.

The *Shulchan Aruch*[11] brings these laws, that the lender must take an oath that the debt is not yet paid, and he adds that if several people seized the possessions, he must claim them from the last one first and so on, in reverse order.

The *Shiltei Gibborim*[12] questions where a borrower who *mafkir* his properties, renders them free for all, can the lender still lay claim to them first as in the case of a *ger* who dies, or is this case, where the borrower consciously divested himself of his possessions, whoever seizes them first can take them.

The *Ketzos Hachoshen* brings this question and he concludes that the lender does have first rights as by a *ger* who dies.

However, in *Shu"t Zecher Yitzchak*[13] writes that although this is true for land properties, if the borrower is *mafkir* his *metaltelin*, his moveable possessions, the lender loses his rights. The *Rashba* only said his opinion for the case of a *ger*, where the person on whom the debt lays is no long*er* alive, then the debt transfers to all of his possessions. But, when the borrower lives still, and can still be claimed for his debt, his possessions cannot be claimed independently of him after they are hefker. Only land possessions which carry the *shiabud*, strong lien, can be claimed independently of the borrower.

Notes

and leaves properties which have in them such a lien, the lender can claim them at any stage. However, *Tosfos* in *Menachos* are discussing the opinion that *shiabuda derabbanan*, that this lien only exists *miderabbanan*, and the *Rabbanan* only enacted this *shiabud* if the borrower or his descendants are alive, but not for a *ger* who dies.]

The *Oneg Yom Tov* answers, that the obligation to offer the wine only begins from the time that the animal part of the *korban* has already been offered up, but until then there is no obligation, and therefore there is definitely no lien on his possessions to that effect. Only if he has already separated his *nesachim* before he dies does a lien take place to ensure that the *mizbeiach* receives its rightful belongings.

The *Sefer Zera Avraham*[18] says a different answer using the opinion of the *Ran* in *Kesubos*[19] who asks that according to the opinion of *Rabbeinu Tam*, the lien on the properties cannot exist if the lien on the borrower himself dissipates. If so, asks the *Ran*, when the borrower dies and the properties transfer to his heirs, why does the lien on the property still exists in absence of the lien on the borrower himself.

The *Ran* answers, that since the borrower has heirs, the *shiabud haguf*, the lien on him himself also transfers to the heirs along with the properties.

However, says the *Zera Avraham*, this can only be said for a debt which occurred between two people from their own actions, as we can explain that this is their intent when he lent the money.

However, for a debt incurred through the *Torah's* obligations, such as a *korban*, when the owner dies, both the *shiabud haguf* and the *shiabud* on the property dissipate.

The *Gemara* in *Kiddushin* [*daf 13*] which states that the heirs must offer the *korbanos* of their deceased father, must understand that there is an intrinsic obligation on them to complete their father's offerings but not through the *shiabud* nechasim, the independent lien on his property, and subsequently, even the *shiabud* on the property remains.

However, for a *ger* who has no heirs, there is none to take over the obligation on him himself, and therefore, the lien on his property to *hekdesh* dissipates.

מראי מקומות

1. ד"ה משכונו 2. חו"מ סי' ע"ב ס"ק קמ"ט 3. דף פ"ב ד"ה שקונה 4. ד"ה אימור 5. סי' ע"ב סק"ט 6. דיני זכיה מהפקר סי' ט' 7. ד"ה קונה 8. סי' ע"ב סקפ"ט 9. פ"ב הל' זכיה
10. סי' ער"ה סעיף כ"ח 11. סי' ער"ה סעיף ל"א 12. פ"ג דב"ב דף ל. מדפי הרי"ף 13. סי' י"ב ד"ה הן 14. קובץ שיעורים פסחים דף ו' אות י"ח ד"ה ובאופן 15. ד"ה ומתנה הט"ו וט"ז
16. סי' פ"ז בהג"ה ד"ה ובזה 17. של הנתיבות המשפט [ואינו קהלות יעקב של הסטייפלער זצ"ל במובן] 18. סי' י"ד אות י' 19. פ"ט דכתובות מד: מדפי הרי"ף יש