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פסחים ד׳ ע״א

"המשכיר בית לחברו על מי לבדוק"

The סוגיא in brief

The גמ׳ asked: If one rents a house on י״ד ניסן, who must perform the בדיקה? Is it the משכיר's obligation – being that the חמץ is his [״דחמירא דידיה הוא״], or is it the שוכר's obligation – being that the חמץ is in his domain [״דאיסורא ברשותיה קאי״]?

רב נחמן בר יצחק ultimately answers with the following ברייתא: "One who rents a house to his friend, if י״ד ניסן arrived before the משכיר handed the keys over to the שוכר, it is the משכיר's obligation to perform בדיקה. But if י״ד ניסן arrived after the משכיר handed over the keys to the שוכר, it is the שוכר's obligation to perform בדיקה."

Why does the obligation of בדיקה rest with the one who possesses the keys?

שיטת רש״י

According to רש״י, handing over the keys is considered a קנין; an act of acquisition[1]. Thus, if the משכיר still has the keys when י״ד ניסן arrived, the house is still in his control, and he must perform the בדיקה. However, if the שוכר already had the keys when י״ד ניסן arrived, then the שוכר must perform the בדיקה, being that the house has already transferred into his control.

In the גמ׳'s above-mentioned query, there was "two sides to the coin"; there was reason to obligate the משכיר – being that the חמץ is his, and there was reason to obligate the שוכר – being that the חמץ is within his domain. According to רש״י, the ברייתא completely adopts the latter position; the חיוב of בדיקה rests with the one who is in control of the house! However, the ברייתא adds a caveat; the obligation of בדיקה rests with the one who controlled the house when the **זמן בדיקה** began, and not necessarily with the one who controls it **now**.

תוס׳ (and many other ראשונים) disagree with רש״י, because in their opinion, handing over the keys is not a valid act of קנין. They prove this through a two-step process:

a. One of the acts through which property can be transferred is the קנין of חזקה. This is an act which demonstrates, and is symbolic of, the takeover of ownership by the one acquiring the property; for example, fencing in the property, or breaching its existing fence.

   Now, when the seller is absent, the buyer's act of חזקה is valid only when the seller explicitly authorized it, such as by saying ״לך חזק וקני״ ("go, perform a חזקה, and acquire"). In ב״ק (on דף נ״ב ע״א), the גמ׳ states that a seller who handed over the keys has adequately demonstrated his agreement to the sale, and his act is equivalent to stating ״לך חזק וקני״.

[1] Ownership of an item is not transferred from one person to another through mere agreement. Rather, a formal act of acquisition, a קנין, is necessary.

This דין clearly indicates that handing over the keys is nothing more than the seller's **authorization** to perform the קנין; it is **not** the actual **קנין**!

b. Once it has been proven that handing over the keys does not constitute an act of קנין for a property **purchase**, תוס׳ goes on to prove that is also the case for a property **rental**. For, in ב״ק (on דף ע״ט ע״א), the גמ׳ states: "just as land is **purchased** through a קנין of כסף, שטר or חזקה, so too, land is **rented** through a קנין of כסף, שטר or חזקה!" According to תוס׳, this גמ׳ basically equates a property rental with a property purchase; an act of קנין which is valid for a purchase is also valid for a rental, and an act of קנין which is invalid for a purchase is also invalid for a rental! Accordingly, since handing over the keys is not a valid קנין for a property purchase, it is also not a valid קנין for a property rental!

In defence of רש״י: The קרבן נתנאל (in אות ד׳) explains that רש״י agrees with the first step of תוס׳, but argues with the second. In other words, רש״י maintains that handing over the keys is not a valid קנין with regards to a purchase, but it is nonetheless a valid קנין with regards to a rental. Although תוס׳ asserted that the גמ׳ in ב״ק (on דף ע״ט ע״א) equates a property rental with a property purchase, this is not necessarily so! For, the גמ׳ stated: "just as land is purchased through a קנין of כסף, שטר or חזקה, so too, land is rented through a קנין of כסף, שטר or חזקה!" The only thing that the גמ׳ explicitly stated was that an act of קנין which is valid for a purchase is also valid for a rental. However, the גמ׳ did **not** say that the reverse is true; the גמ׳ did **not** say that an act of קנין which is invalid for a purchase is also invalid for a rental! Thus, it may very well be that there are acts of קנין (such as handing over the keys) which are invalid for a purchase, but valid for a rental!

Now that תוס׳'s proof has been negated, the קרבן נתנאל continues on to explain that there is logical reason to distinguish between a property purchase and a property rental. In a rental, the transaction transfers the rights to **use** the property; accordingly, it makes sense that handing over the keys, whose entire purpose is to facilitate the **usage** of the property, should be an effective קנין. With regards to a purchase however, the transaction transfers the **actual** property – from the depths of the earth upon which the house stands all the way to the "heights of the sky" (the airspace above the property). Thus, handing over the keys is not an effective קנין, being that the keys have no **integral** connection to the **actual** property, but rather, to its **usage**.

שיטת התוס׳

As explained above, תוס׳ maintains that handing over the keys is not a valid act of קנין, even with regards to a property rental! They therefore explain our גמ׳ differently. In their opinion, the חיוב of בדיקה rests with the one who is in possession of the keys, simply because he has access to the house!

תוס׳ goes on to explain the ברייתא, but in doing so, they only explicitly explain the סיפא (the end) of the ברייתא, as follows: "If י״ד ניסן arrived after the משכיר handed over the keys to the שוכר, it is the שוכר's obligation to perform בדיקה – even if the house is still in the משכיר's control (i.e. the קנין had not yet occurred)."

What about the רישא (the beginning) of the ברייתא? There is a מחלוקת in the אחרונים regarding the opinion of תוס׳:

1. חק יעקב: "If י״ד ניסן arrived before the משכיר handed over the keys to the שוכר, it is the משכיר's obligation to perform בדיקה – even if the house is already in the שוכר's control (i.e. the קנין had already been performed)."
2. The ב״ח: "If י״ד ניסן arrived before the משכיר handed over the keys to the שוכר, it is the משכיר's obligation to perform בדיקה – but only if the house is still in the משכיר's control (i.e. the קנין had not yet been performed)." However, if the house is already in the שוכר's control (i.e. the קנין had already been performed), then the חיוב of בדיקה rests with the שוכר, even though he does not have the keys.

To summarize the position of תוס׳ regarding who must perform בדיקה:

At the beginning of י״ד ...	The משכיר had the keys.	The שוכר had the keys.
The משכיר controlled the house. [I.e. the קנין didn't occur yet.]	**משכיר**	**שוכר**
The שוכר controlled the house. [I.e. the קנין occurred.]	**חק יעקב = משכיר** **ב״ח = שוכר**	**שוכר**

As discussed in the previous שיעור, תוס׳ understood the query of the גמ׳ as follows: When there was initially more reason to obligate the משכיר, but there is currently more reason to obligate the שוכר, does the initial חיוב of the משכיר remain with him, even though there is currently more reason to obligate the שוכר?

According to the ב״ח's explanation of תוס׳, the answer of the גמ׳ (i.e. the ברייתא) basically accepts all the premises of the query[2]. In other words, the שוכר must certainly perform the בדיקה when the house was already in his control at the beginning of the זמן בדיקה – both according to the question and answer of the גמ׳! And if the house was in the משכיר's control at the beginning of the זמן בדיקה, there is reason to obligate either the משכיר or the שוכר – both according to the question and answer of the גמ׳! Therefore, the ברייתא settles the matter, on the basis of who can easily access the property. In doing so, the ברייתא does not mean to suggest that possession of the keys is an important factor in and of itself. Rather, since there is reason to obligate both the משכיר and the שוכר, possession of the keys is a practical way of determining who must perform the בדיקה.

According to the חק יעקב's explanation of תוס׳ however, the answer of the גמ׳ accepts one premise of the question, and rejects another. For, on the one hand, the גמ׳'s question assumed that the חיוב of בדיקה remains with the one who was חייב at the beginning of the זמן בדיקה. This is the conclusion of the גמ׳. [Even with regards to this point, there is still a difference between the question and answer of the גמ׳; the גמ׳ question thought that this **might** be the case, whereas the גמ׳'s answer establishes that this is **certainly** the case.]

On the other hand, the גמ׳'s question assumed that control of the house was the decisive factor in determining who must perform בדיקה. [Thus, the גמ׳ asked whether the משכיר should be חייב – being that he controlled the house at the beginning of the זמן בדיקה, or whether the שוכר should be חייב – being that he controls the house at present.] According to the גמ׳'s answer however, it makes no difference whatsoever as to who was or is in control of the house. The only decisive factor is possession of the keys; the משכיר is חייב when he had the keys at the beginning of י״ד, and the שוכר is חייב when he had the keys at the beginning of י״ד.

At the conclusion of their words, תוס׳ added that possession of the keys is not sufficient grounds to obligate one to perform בדיקה, unless he at least has plans to live in the house. Therefore, a נפקד (someone who is safeguarding the keys) is certainly not obligated to perform the בדיקה.

Now, according to the ב״ח's explanation of תוס׳, this statement is extremely obviously. For, as explained above, תוס׳ (according to the ב״ח) did not ever suggest that possession of the keys was an important factor, in and of itself. If so, since there is no other reason to obligate the נפקד, why would תוס׳ find it necessary to point out that he is פטור?[3]

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[2] See שפ״א.

[3] See שו״ת צ״צ או״ח סי׳ מ״ה.

However, according to the חק יעקב's explanation of תוס׳, this דין is not obvious at all. For, as explained above, תוס׳ (according to the חק יעקב) holds that possession of the keys is the only important factor. Therefore, it is far from obvious that the נפקד is פטור, being that he possesses the keys. Therefore, it was necessary for תוס׳ to point out that possession of the keys is grounds to obligate one to perform בדיקה only when he at least had plans to live at the house.