

ואין צריך לומר כתובו – And it is not necessary to say, 'write it'

OVERVIEW

עדים taught that if a קנין is made in the presence of two עדים, those עדים may write up a שטר stating that this קנין took place and give it to the beneficiary even though the מקנה (seller, benefactor) did not tell them to write it up as a שטר. Our תוספות clarifies the details of this ruling.

וכותבין בלא רשותו כל זמן שלא חזר בו –

And the עדים may write this שטר without his explicit permission as long as he did not retract (and tell the עדים specifically that he does not want this קנין to be written up in a שטר) -

ומיהו יכול לחזור בו¹ כדאמרינן לקמן בפרק המוכר את הספינה (דף עז,א) –

However he can retract (and prevent the עדים from writing the שטר) as רב states later in הספינה את המוכר את הספינה - עדים if someone says to

זכו בשדה זו לפלוני² וכתבו לו את השטר³ חזר בשטר ואינו חוזר בשדה⁴ –

‘Acquire this field on behalf of that person and write a שטר for him that he owns the field’; the grantor may retract regarding the שטר (that the עדים who were זוכה the field on behalf of the recipient cannot write a שטר מתנה that the grantor gave this field to the recipient) however the grantor cannot retract the giving of the field (the field will belong to the קונה albeit without a שטר to prove that it is his).

anticipates a difficulty:

והא דאמרינן בריש אף על פי⁵ (כתובות דף נה,א ושם דיבור המתחיל כתובו) –

And regarding that which the גמרא states in the beginning of אע"פ, if פרק, if someone said to עדים -

כתובו וחתימו והבו ליה קנו מיניה לא צריך לאימלוכי ביה –

¹ The מקנה may have his reason why he does not want this transaction to be documented (he does not want it publicized, etc. [see חזר ד"ה חזר]).

² The עדים give the מקנה a סודר (on behalf of the recipient) and when the מקנה accepts the ownership of the field is transferred from the מקנה to the קונה through קנין חליפין. The recipient need not even be aware of this transactions, since it is for his benefit and זכין לאדם שלא בפניו,

³ The שטר (in this instance), which will be given to the קונה, will serve (merely) as proof that the קונה owns this field from this date onwards. The acquisition of the field was already accomplished through the קנין חליפין.

⁴ It is evident from this גמרא that even when the קנין חליפין is effective (אינו חוזר בשדה), nevertheless the מקנה can prevent the עדים from writing a שטר should he so desire (חזר בשטר).

⁵ The גמרא there states: אמר לעדים כתבו וחתימו והבו ליה קנו מיניה לא צריך אימלוכי ביה לא קנו מיני (פומבדיתא אמרי לא צריך אימלוכי ביה) בני מתא מחסיא אמרי צריך אימלוכי ביה והלכתא צריך אימלוכי ביה:

‘Write a שטר מתנה and sign it and give it to the recipient’, if the עדים preformed a קנין חליפין to acquire the property on behalf of the recipient, it is not necessary for the עדים to consult with the grantor. It would superficially seem from that גמרא that the reason the עדים need not consult with the grantor regarding writing the שטר is (only) because he told them 'כתובו', otherwise (it seems) the עדים would need to consult with the grantor, not as it seems from our גמרא⁶ –

responds; the reason they do not need to consult with the grantor -

לאו דוקא משום דאמר להו כתובו דאפילו לא אמר להו נמי כדאמרינן הכא –

Is not specifically because he told the עדים, ‘write it’, for even if he did not tell the עדים ‘write it’, the rule would also be that they do not need to consult him, as the גמרא states here -

אלא משום דבעי למימר⁷ לא קנו מיניה צריך לאימלוכי ביה אף על גב דאמר להו כתובו:
But rather the reason the גמרא mentions 'כתובו' is because the גמרא wanted to teach us (the concluding rule) that if the עדים did not make a קנין with the grantor, they do need to consult with him again immediately prior to writing the שטר even though he already told them 'כתובו'!

SUMMARY

The מקנה may change his mind and prevent the עדים from writing the שטר before it was written.⁸

THINKING IT OVER

1. Is question from תוספות⁹ פ"ק אע"פ⁹ connected to what תוספות stated initially that he may retract as long as the שטר was not written, or is it merely a contradiction between the two גמרות?

2. Can the מקנה prevent the delivery of the שטר to the קונה after it was written,¹⁰ but before it was delivered?¹¹

⁶ See 'Thinking it over # 1'

⁷ See footnote # 5.

⁸ See 'Thinking it over' # 2.

⁹ See footnote # 6.

¹⁰ See footnote # 8.

¹¹ See רשב"ם לקמן עז,א ד"ה חזור.