

## כגון שקנו מידו –

**For instance, they received a commitment from him**

### OVERVIEW

לוקה explained that even according to שמואל there is a case where the לוקה can be compensated for the שבה (which the גזול took away from him), by the מוכר (who was a גזול), and there is no issue of רבית. This is in a case where at the time of the sale the מוכר committed himself with a קנין סודר<sup>1</sup> (in the presence of עדים<sup>2</sup>) to be responsible for the שבה.<sup>3</sup> Our תוספות reconciles the rule of שמואל that שבהא with the ruling of סתם קנין לכתיבה עומד.

asks: תוספות

ואם תאמר אם כן אמאי קאמר אמליך<sup>4</sup> הלא סתם קנין לכתיבה עומד<sup>5</sup> –

**And if you will say; if this is indeed so** (that the עדים were קנו מידו from the מוכר where he obligated himself [to the לוקה] to be responsible for the שבה), **why is it** then that שמואל **ruled** that it is necessary for the scribe **to consult** with the seller whether he is accepting responsibility for שבה (in order to write it in the שטר), **for isn't** the ruling that when a קנין is preformed it is **presumed that it will be written** in a שטר; there is no need for consultation.

answers: תוספות

ויש לומר הני מילי כגון שהקנה לו דבר שהוא בעין –

**And one can say; when is this rule** (that סתם קנין לכתיבה עומד) **valid, if for instance he transferred to the recipient** (the buyer) **something tangible** (a field for instance), in that case we say –

**דכיון דיפה כחו לעשות קנין רוצה שיכתבו לו:**

**That since he** (the seller) **strengthened his position** (of the buyer) **by making a קנין** (committing himself to sell) it is presumed **that the**

<sup>1</sup> The process is that the מוכר takes a כלי from the buyer (or from the עדים) and in 'return' he makes the commitment [for שבה or whatever the קנין is regarding]. The כלי is then returned to the owner.

<sup>2</sup> The עדים merely verify that the קנין took place (and also have the authority to put it in writing, sign it, and give it to the beneficiary), however the קנין is effective without עדים.

<sup>3</sup> It is not considered רבית, because it is as if the מוכר obligated himself now to be responsible for the שבה without regard to the loan.

<sup>4</sup> If the מוכר did not make a קנין then the obligation in the שטר is meaningless (since it is [similar] to רבית), and if he made a קנין there is no need to consult him whether it should be written in the שטר, since סתם קנין לכתיבה עומד!

<sup>5</sup> When one commits himself to a transaction (selling) with a קנין (in the presence of עדים), the עדים may write this in a שטר and give it to the recipient (buyer) as proof; thereby strengthening his position.

benefactor **wants they should write it** in a שטר for the benefit of the recipient. However,<sup>6</sup> here the seller is not giving the buyer anything substantial or tangible; it is merely a commitment of being obligated; in such a case we do not assume that this קנין is עומד לכתיבה. Therefore it is necessary to consult the seller if he wants the obligation of שבה to be written in the שטר.

### SUMMARY

קנין is only when the קנין is for something tangible, but not for a nebulous commitment.

### THINKING IT OVER

Why do we not say ממה נפשך;<sup>7</sup> if this קנין is a valid commitment to pay for the שבה, then why cannot it not be written without consulting the מוכר; and if it cannot be written since it is a nebulous commitment, then it should not be considered a קנין at all (but rather an אסמכתא which is not קונה)?!

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<sup>6</sup> In a case where the קנין is regarding something definitive, we assume that the מקנה certainly wants this קנין to become effective in the best way possible, including writing a שטר. However, when the קנין is concerning his obligation regarding paying for the שבה this is a nebulous commitment. There may be no need to fulfill this commitment (the נגזל may never reclaim the property); we do not know how much (if any) שבה there will be, etc. Therefore the מקנה is not totally committed to this קנין and we cannot write it in the שטר without his consent (see תוה"ר). See 'Thinking it over'. [Alternately when the item to be transferred is present to מקנה has the option of telling the קונה, 'go and acquire it' (through משיכה [by מטלטלין] or through חזקה [by זרקע]). The fact that the מקנה offers to make a קנין סודר and immediately transfer the item to the קונה, shows the eagerness of the מקנה to consummate this deal and is presumed to be agreeable that it should be written. However, when there is no tangible item present (as in our case) we cannot make this presumption that he is eager that it be written down (for there was no other way to effect the קנין other than through a קנין סודר.)]

<sup>7</sup> See footnote # 6.