

קטנים כל המחזיק בהן זכה בהן –

Whoever possesses the minors acquires them

OVERVIEW

The גמרא cites the view of אבא שאול in a ברייתא that if a גר died (the adult slaves acquire themselves and are freed, however), regarding the minor slaves whoever possesses them acquires them as slaves (while the ת"ק maintains that the עבדים are also freed). אבא שאול discusses the view of תוספות.

דאין להן יד לזכות בעצמן –

For the קטנים do not have a 'hand' (the capability) to acquire themselves -

וכן בפרק מי שמת (בבא בתרא קנו, ב) גבי פלוגתא דזכין לקטן ואין זכין לגדול² –

And similarly in שמת פרק מי שמת regarding the dispute whether we acquire on behalf of a קטן (since he cannot acquire on his own) but we do not acquire on behalf of a גדול (since he can acquire on his own) –

anticipates the following difficulty:

ואף על גב דאית ליה זכיה במציאה³ כדאמרין בהניזקין (לקמן נט, ב) –

And even though a קטן has זכיה by a lost object as the משנה states in הניזקין, it is evident that a קטן does have זכיה –

responds:

היינו מדרבנן מפני דרכי שלום⁴ והכא לא שייך ההוא טעמא⁵ –

That גר שמת by a מציאה is only מדרבנן because of דרכי שלום, however here by a שמת that reason is not applicable.

asks:

ואם תאמר בפרק לולב וערבה (סוכה מו, ב) אמר לא ליקני איניש לולבא לינוקא ביום טוב ראשון –

¹ If one wants to gift something to a קטן who is not present, he may give it to a third party, that this third party should acquire it (by making a 'הגבהה וכו') on behalf of the קטן.

² This is the view of ר' אליעזר while ר' יהושע maintains זכין לקטן and זכין לגדול. The reason why זכין לגדול ואין זכין לקטן is because a גדול has זכיה (so he can acquire it on his own) but a קטן has no זכיה (so the only way for him to acquire it is to be מזכה through another). See footnote # 11.

³ If a קטן (חרש שוטה וכו') finds a מציאה, it belongs to him and it is considered stealing if one takes it away from him.

⁴ דרכי שלום means peaceful paths. If people would take away by force the מציאה of a חש"ו, they (or their parents) would start fighting with them to keep what they found and feel that it belongs to them.

⁵ The קטנים will not fight for their freedom; they will assume they belong now to the new master (and there is no parent to fight for them). See 'Thinking it over' # 2.

And if you will say; פרק לולב וערבה taught in ר' זירא, a person should not grant his לולב to a child on the first day of סוכות (before the adult he is יוצא), the reason is - דינוקא מקני קני אקנויי לא מקני⁶ -

Because a child can acquire, but he cannot grant to others -

rejects a possible solution:

ולכא למימר דהתם בפיקח כגון צרור וזרקו אגוז ונוטלו -

And we cannot say that the גמרא there in סוכה is discussing a bright child, that if he is given a pebble he throws it away, but if he is given a walnut he takes it, and the rule of ר' זירא was only by such a child, this is not so -

דהא בפרק קמא דקדושין (דף כב, ב) בההוא עובדא⁷ דאמר ליה שלוף לי מסנאי -

Because in the first פרק of מסכת קדושין, in that story where מר זוטרא said to the slave, 'take off my shoe and bring it to my house' -

משמע דהוה בו דעת וקאמר התם איכא דאמרי קטן הוה⁸ -

It seems that the slave was mindful, and the גמרא says there, some say this עבד was a קטן⁹ -

answers:

ויש לומר דדעת אחרת מקנה אותן שאני¹⁰:

And one can say; it is different if there is another mind granting a gift to minors;¹¹ in that case a קטן can be קונה.

⁶ If the person will give his לולב to a קטן (before he was יוצא), the קטן will acquire the לולב, however when the קטן returns it to the adult it will still belong to the קטן (for the קטן cannot be מקנה); the adult will not be able to be מקיים the מצוה of לולב since it does not belong to him and the תורה states לכם ולקחתם לכם, that it must belong to you.

⁷ מר זוטרא was making a ביקור חולים visit to ר' יהודה הינדא (גר שאין לו יורשים) (who was a יורשים). When מר זוטרא noticed that ר' זוטרא was about to pass on, he told the slave of ר' זוטרא to take off his shoe and bring it home. The intent of מר זוטרא was to acquire this slave through חזקה; so that at the moment when ר' זוטרא would pass on, the slave would be in the employ of מר זוטרא (and would not be able to acquire himself as a חורין). Some say this slave was גדול and therefore מר זוטרא needed to take this action for otherwise the slave would become free at the moment ר' זוטרא passed on. However if the slave would have been a קטן there would be no need for מר זוטרא to do anything immediately. He could wait until after ר' זוטרא passed on and acquired the slave afterwards, according to אבא שאול that אבא שאול and אבא שאול disagree with דאמרי.

⁸ The מר זוטרא needed to act as he did regarding the קטן. גר קטן.

⁹ However according to the first opinion (that of אבא שאול) if the slave was a קטן even if he was a בר דעת (as the story indicates), he would not become a חורין. This proves that even a בר דעת קטן cannot be זוכה, why is it by לולב that a קונה is קטן.

¹⁰ Therefore by לולב where the adult is מקנה the לולב to the קטן, the קטן can be קונה (even מדאורייתא); however by מציאה or by גר where there is no דעת אחרת מקנה אותו, then there is no לקטן.

¹¹ It will be necessary to say that דעת אחרת מקנה applies only when the קטן is a פקח; otherwise there will be a difficulty from the abovementioned גמרא (פרק מי שמת) of זכין לקטן ואין זכין לגדול. See סה, א תוס' ד"ה צרור.

SUMMARY

A קטן can acquire for himself only if someone else is granting him the item (and he is a דעת), otherwise there is no זכיה for a קטן except by מציאה because of דרכי שלום.

THINKING IT OVER

1. תוספות states that קטנים have no יד to acquire themselves, as a reason why according to אבא שאול the rule is כל המחזיק בהם זכה בהם. Should we infer that the רבנן who maintain that even the קטנים acquire themselves as בני חורין, argue and maintain that קטנים do have a לזכות?

2. תוספות distinguishes between מציאה where a קטן can acquire it because of דרכי שלום, and גר, where there is no זכיה לקטן because the idea of דרכי שלום is inapplicable.¹² This indicates that if it were applicable the גר קטן would acquire himself as a בני חורין; however since מדאורייתא he is an עבד, how can we be מתיר an איסור דאורייתא (of עבד) because if דרכי שלום?¹³

¹² See footnote # 5.

¹³ See תפא"י.