

There it is a *Torah* prohibition

התם דאיסורא דאורייתא –

OVERVIEW

posed a query what is the rule if a person sold his slave to a נכרי and died, do we penalize the son that he is required to redeem the slave from the נכרי, or not. The גמרא says (even) if we assume that in the case where a person made a מום in a בכור,¹ and died; we penalize the son (and do not permit him to slaughter it and eat it), nevertheless we cannot assume that the same law applies here by עבד, because by the בכור the father transgressed an איסור מה"ת, however here selling a בכור to a נכרי is only an איסור מדרבנן. Our תוספות suggests that there were more options to consider.

ובפרק כל פסולי המוקדשין (בכורות לד, ב) גבי צרם אוזן הבכור קאמר -

And in **פרק כל פסולי המוקדשין**, regarding the case where one **nicked the ear of a בכור** (making it into a מום) and died, the גמרא there states -

דליכא למיפשט מהכא² דשאני עבד דמפקע ליה ממצות³ -

That we cannot resolve the case of בכור from the case of עבד that we penalize the son, for an עבד is different and stricter than בכור, since by selling him to a נכרי, you remove him from observing the מצות, so -

אם כן הוה מצי למימר הכא -

Therefore the גמרא could have said here (also) the opposite –

אם תימצי לומר דהתם לא קנסו הכא קנסו משום דמפקע ליה ממצות -

Even if we assume that there by בכור they did not penalize the son, nevertheless here by עבד they did penalize the son because he removed him from מצות -

וכן התם הוה מצי למימר איפכא⁴ כי הכא:

And similarly there in בכורות, the גמרא could have said the opposite as the reasoning is here that בכור is stricter than עבד.

¹ One is not permitted to make a מום in a בכור (so he will be permitted to eat it) because the תורה writes (in ויקרא כב, כא) regarding קדשים that לא יהיה בו מום; one is not permitted to make a מום in קדשים (for instance a בכור). If one made a מום in a בכור (consciously) he is penalized and may not slaughter and eat it.

² The גמרא there is saying that even if by עבד we do penalize the son, we cannot assume that the same rule applies by צרם אוזן בכור.

³ The גמרא there is saying that an עבד is stricter than בכור (the opposite of what the גמרא is saying here that בכור is stricter than עבד). From one perspective, not allowing an עבד to perform the מצות is a worse 'sin' than making a מום in a בכור.

⁴ The גמרא there could have said that even if by עבד they did not penalize the בן, it is not proof that by בכור we do not penalize the son, since בכור is stricter for it is a דאורייתא.

SUMMARY

בכור has a strictness over עבד that it is a דאורייתא and עבד has a strictness over בכור because he is מפקע the עבד from מצות.

THINKING IT OVER

1. Did תוספות mean that in each מסכת the גמרא should have **only** said the opposite of what it said, or should the גמרא **also** have said the opposite of what it said?
2. Is there any reason why indeed the גמרא did not mention (in either מסכת) that we cannot derive one from the other, even if we assume the opposite of what the גמרא assumes in each מסכת (as תוספות suggests)?⁵

⁵ See נחלת משה.