

## ואינו חוזר בעבד - And he cannot retract concerning the slave

### OVERVIEW

The **עבד** granted all his **נכסים** to his **מרע** שכיב, and then recuperated, he may retract his gift of **נכסים**. He may not however retract the gift of freedom granted to his **עבד**, since **יצא עליו שם בן חורין**. People already assume that the **עבד** is a free-man. **תוספות** will be discussing the efficacy of a **שטר שחרור** written by a **מרע** שכיב, in connection with the assumption that **יצא עליו שם בן חורין**.

asks: תוספות

ואם תאמר ואמאי יצא בן חורין [ומותר בבית חורין<sup>1</sup>] הא מתנת שכיב מרע הוא -

You may ask; why does he go out as a free-man [and is permitted to marry a free-woman<sup>2</sup>] this is a gift of a death-bed ridden person -

ולא קנה אלא לאחר מיתה ואין גט לאחר מיתה -

And one does not acquire possession of the gift of a **מרע** שכיב until after his death, and there can be no **גט** after death.<sup>3</sup>

answers: תוספות

ויש לומר בדכתב לו מהיום -

One may answer that the **מרע** שכיב wrote in the **שטר שחרור** that it is effective retroactively 'from today' onward. [After the **מרע** שכיב dies the **עבד** will retroactively<sup>4</sup> be free from the present date on the **שטר**.] In such a case it is a good **שטר**. The **עבד** is being freed today. [There is an assumed provision that his freedom today depends on the death of the **מרע** שכיב. Only when the **מרע** שכיב dies will the **עבד** retroactively be freed.] Therefore, since the **עבד** will be ultimately freed by this **שטר** (if the **שכ"מ** dies), we consider that it was **מהיום** effective; especially since the **שכ"מ** wrote that the **גט** is effective **מהיום**.

<sup>1</sup> The **מהרש"ל** amends the text. See (הארוך) א **מהרש"א** who rejects this emendation.

<sup>2</sup> The fact that the **עבד** becomes free in a monetary sense, that the **אדון** no longer owns him is not as difficult to understand as the fact that he is permitted to marry a **בת חורין**, where there is an **איסור דאורייתא** involved.

<sup>3</sup> The **חכמים** instituted that the gift of a **מרע** שכיב is effective after he dies, not while he is still alive. (See **רש"י**, **נח"מ** and **סוכ"ד** אורח חיים.) A **שטר שחרור** or **גט** needs to be given by the **אדון** to the **עבד** while the **אדון** is still alive. A **שטר** that becomes effective after the death of the maker of the **שטר** is invalid. There is no one who is transferring the privileges conveyed by the **שטר** to the **עבד**. The purported giver is already dead (see 'Thinking it over' # 1). The question may be understood as follows (see **מהרש"א** ומהר"ם שי"ף): The **גמרא** says that the **עבד** is **נכנס** since **יצא עליו שם בן חורין** **תוספות** asks; since this is a **מתנת שכ"מ** which is ineffective for the **עבד** (since **גט לאחר מיתה**), why do we say that **יצא עליו שם בן חורין**. There is no **שם בן חורין** on this **עבד**, for he was given an ineffective **שטר**. The **דין** should be that he is **חוזר בעבד**, just as he is **נכנס** **חוזר בנכסים**.

<sup>4</sup> See 'Thinking it over' # 2.

'מהיום' write שכ"מ that it is not necessary that the offers another possibility; that it is not necessary that the explicitly:

**אי נמי אפילו סתמא דכיון דדעת שכיב מרע לשחררו -**

**Or you may also say; that the שכ"מ is freed even if the מרע wrote the שטר in the standard manner; he did not write מהיום. Nevertheless, since it is the intent of the שכ"מ to free the עבד -**

**דעתו שיקנה בשעה שראויה לשחרר דהיינו מחיים -**

**His intent is that the עבד should acquire his freedom at the appropriate time when he can be freed; this means during the life of the מרע שכיב.** Therefore even though 'מהיום' was not explicitly written in the שטר it is assumed that the intent of the שכ"מ is that the עבד should be freed while the שכ"מ is living.<sup>5</sup> The שטר therefore is a good שטר, by which the עבד will be freed (upon the death of the שכ"מ). Consequently, since it is a good שטר, therefore, יצא עליו שם בן חורין בעבד, and אינו חוזר בעבד.

has a difficulty with the second answer, where we follow the intent of the שכ"מ, rather than what was specifically written in the שטר:

**ואם תאמר כיון דסתמא דדעת של שכיב מרע לחזור בו אם יעמוד אמאי אינו חוזר בעבד -**  
**And if you will say; since presumably the intent of the שכיב מרע is to retract his gift of freedom to the עבד if he (the אדון) recuperates, why indeed cannot the אדון retract and keep the עבד.** Why do we not follow the intent of the שכ"מ regarding חזרה, just as we follow his intent concerning freeing the עבד? Were we to follow his intent, then again חזרה עליו שם בן חורין, unless and until the שכ"מ dies.<sup>6</sup>

answers:

**ויש לומר דהכל תקנת חכמים היא גם מה שחזר בנכסים גם מה שאינו חוזר בעבד -**  
**And one may say; that all the laws concerning the gift of a שכיב מרע is a including the ruling that he may retract the gift of his belongings if he recuperates, and also including that he may not retract concerning the עבד<sup>7</sup> -**

**דמסתמא דעתו כמו שיאמרו לו חכמים -**

<sup>5</sup> See מעכשיו (as of now) that the intent of the שכ"מ is that it should be effective נה"מ.

<sup>6</sup> According to the first answer where he actually wrote מהיום, and we do not depend on the intent of the שכ"מ to validate the שטר, it is understood why יצא עליו שם בן חורין. He wrote מהיום and if the שכ"מ will die he is יצא, not because of any intent, but because it is stated explicitly. However, according to the second answer there really is no שחרור since גט לאחר מיתה אין and ultimately no שם בן חורין. The only reason that it may be considered a גט is because of his intent. His intent however is that there should be no גט if he recuperates. It is not fitting to consider it a גט on account of his intent; if his intent is that it should not be a גט (see (מהר"ם שי"ף and תוה"ר) (see however) קצב). See (however) בל"י אות קצב.

<sup>7</sup> See 'Thinking it over # 3.

**For presumably his intent is to follow whatever the חכמים will tell him.** Therefore there is no implicit intent on the part of the שכ"מ to retract the שחרור if he recuperates. Rather his intent is to follow the wishes of the חכמים. The חכמים want the עבד to be free, since the שכ"מ wrote a שטר שחרור, it is **יצא עליו שם בן חורין** <sup>8</sup>.

Tosfos makes a distinction:

**מיהו אם כתב בהדיא מהיום אם ימות [מהיום אם לא ימות] -**

**However if the שכ"מ wrote explicitly in the שטר that this gift is valid from today onwards; if the שכ"מ will die it should be a שחרור [and if he does not die then as of today it is not a שחרור] -**

**אין נראה שיועיל לענין זה יצא עליו שם בן חורין לומר שאינו חוזר בעבד -**

**It does not appear reasonable to assume that in this case the fact that the עבד is being called a free-man should be effective to the extent that we should say that he cannot retract the freeing of the עבד -**

**מאחר שהתנה בפירוש:**

**Since he made an explicit provision** that the עבד will be freed provided that the שכ"מ dies. The שכ"מ recuperated; therefore the עבד is not freed<sup>10</sup>.

## SUMMARY

There are two ways to explain the דין that if a שכ"מ gives a שטר שחרור to his עבד he will be freed, even though, generally the gift of a שכ"מ becomes effective **לאחר מיתה** and the rule is **גט לאחר מיתה**.

A. that the שכ"מ wrote explicitly that the שחרור take effect **מחיים**.

B. The שכ"מ need not write 'מחיים' in the שטר שחרור. We assume that his intent is that the שחרור be effective **מחיים**.

It is also assumed that when the שכ"מ writes a שטר granting his עבד all his possessions, his intent is that it should be in accordance to the will of the חכמים. Therefore if he recuperates he may retract his gift of property, but he

<sup>8</sup> See 'Appendix'.

<sup>9</sup> The תנאי כפול inserts this phrase; to assure that it will be a תנאי כפול; otherwise it is not a valid תנאי. See (however) נח"מ.

<sup>10</sup> It is questionable whether Tosfos is now retracting his first answer, and currently maintains that if the שכ"מ wrote מהיום we are not depending on his intent to do as the חכמים wish. Rather we assume that he only wishes it to be a שחרור if he dies. Therefore if עמד then he is חוזר even בעבד. Or perhaps there is a distinction between writing 'מהיום' and writing 'מהיום אם ימות'. When the שכ"מ writes merely 'מהיום' then it is a good שטר and אינו חוזר בעבד. If however the שכ"מ writes 'מהיום אם ימות', then he made a distinct provision that if ימות לא ימות, then we cannot use the **יצא עליו שם בן חורין** of סברא to prevent his retraction, and he is חוזר בעבד. See אמ"ה # 168.

may not retract his gift of freedom to the עבד. This too is the wish of the חכמים (יצא עליו שם בן חורין).

In a case where the שכ"מ wrote explicitly מהיום אם ימות שכ"מ, it appears that he may be חוזר בעבד, since he explicitly stated that it will be effective only if he dies.

### **THINKING IT OVER**

1. How is the עבד קונה after the death of the שכ"מ?<sup>11</sup> Who is מקנה it to him? How do we distinguish between the שחרור העבד and the נכסים קנין?

2. Is the עבד permitted to marry a בת חורין while the שכ"מ is still alive?<sup>12</sup>

3. Why does תוספות say וכו' מה שלא חוזר וכו' וכו' תוספות?<sup>13</sup> Seemingly if ע"פ דין he is able to be חוזר, then the תק"ח is only by עבד, that he is not חוזר. If ע"פ דין he is not able to be חוזר then the תק"ח is only that by נכסים he is חוזר!<sup>14</sup>

### **APPENDIX<sup>15</sup>**

The second תוס' of ואל"ת asks: since the intent of the שכ"מ is to be חוזר if he recuperates, why indeed can he not retract concerning the עבד? The question, as explained previously, is that since we are following his intent, there is no יצא עליו שם ב"ח. It is evident that even after the שכ"מ wrote the שטר שחרור, he does not intend to free him if he recuperates. It is not clear therefore what is the answer that תוספות gives. Why indeed were the חכמים מתקן that he is not חוזר בעבד, since seemingly ב"ח יצא עליו שם ב"ח?

It would seem perhaps that really in all cases, once a שטר שחרור is written there is to certain degree a שם ב"ח on this עבד. However it is not sufficient to deny the שכ"מ the right to be חוזר unless this שטר שחרור will ultimately free the עבד. Therefore תוספות's question was; we cannot deny the שכ"מ the right not to be חוזר בעבד if he did not explicitly write מהיום. The only reason why this שטר will ultimately free the עבד is because of his intent (and therefore you

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<sup>11</sup> See footnote # 3.

<sup>12</sup> See footnote # 4.

<sup>13</sup> See footnote # 7.

<sup>14</sup> See אמ"ה # 162

<sup>15</sup> See footnote # 8.

deny him the right to be חוזר); however this same intent declares that he chooses to be חוזר if he recuperates. We cannot use his intent to go against his intent!

answers that once the שטר שחרור was written there is automatically a שם ב"ה on this עבד; especially since the שכ"מ intends to be משחרר him properly – מחיים. Therefore there is a certain degree of שם ב"ה on this עבד. The חכמים therefore prefer that אינו חוזר בעבד. The שכ"מ in turn will follow the dictum of the חכמים not to be חוזר בעבד even if he recuperates.