## כל האומר תנו כאומר זכו דמי –

## Whoever says, 'give'; it is as if he said 'acquire it'

### Overview

ר' ירמיה explained the reason the master cannot retract the שטר שחרור is (not because התופס לב"ח במקום שחב לאחרים קנה, since ר' יוחנן ruled that it is לא קנה, but rather the reason he cannot retract is) because when one says to a שליח, 'give this to him', it is as if he said acquire it for him; so at the moment the receiver takes the item in his possession he acquires it for the intended recipient (if it is for his benefit), and the grantor cannot no longer retract. תוספות discusses when we do and do not rule that saying תן is like saying זכי.

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תוספות asks:

**ואם תאמר והא רבי יוחנן לית ליה תן כזכי –**

**And if you will say; but ר' יוחנן does not agree that תן is like זכי -**

**דקאמר בפרק קמא דבבא מציעא (דף י,א) המגביה מציאה לחבירו קנה חבירו[1] –**

**For** ר' יוחנן **ruled in the first פרק of ב"מ** מסכת that **המגביה מציאה לחבירו קנה חבירו** and ר"י continues there **-**

**ואם תאמר משנתינו[2] דקאמר תנה לי ולא אמר זכה לי[3] –**

**'and if you will ask from our משנה;** the case of the משנה is different **because he said 'give** the מציאה **to me', but he did not say 'acquire it for me'.** This indicates clearly that תן is not זכי,[4] which contradicts what ר' ירמיה states here (in explaining ר"י) that תן כזכי.

תוספות answers:

**ותירץ רבינו תם דדוקא היכא דדעת אחרת מקנה אותו אמרינן תן כזכי ולא במציאה –**

**And the ר"ת answered that we say תן כזכי only when there is a דעת אחרת**

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[1] See previous תוס' ד"ה התופס (footnote # 9).

[2] The משנה there (on ב,ט) is discussing a case where a man (who was riding on an animal) saw a מציאה and told his friend, 'give it to me'. The משנה rules if the friend (who picked up the מציאה) claims (now, after he picked it up but before giving it to the rider), 'I am acquiring this for myself', he owns the מציאה (and is not obligated to give it to the rider). The question is, according to ר"י that המגביה מציאה לחבירו קנה חבירו, then as soon as he picked up the מציאה for the rider, the rider acquired the מציאה, how can he say that he wants to acquire it for himself now, after he already picked it up for the rider.

[3] The rider (merely) said, 'give it to me', indicating that the rider will acquire ownership only after he receives it, therefore he is not קונה until later; in the meantime the person who picked up the מציאה can change his mind and claim it for himself.

[4] If תן were זכי then the rider was telling him to acquire it for him, the person would not be able to claim it for himself after he picked it up for the rider.

**מקנה אותו,**[5] (as in our משנה regarding עבד), **but not by a מציאה** where there is no דעת אחרת מקנה אותו.

תוספות asks:

**ואם תאמר למאן דאמר (לקמן דף יג,ב) דלא תקון מעמד שלשתן**[6] **אלא בפקדון**[7] **–**

**And if you will say; according to the מ"ד that מעמד שלשתן was only instituted by a deposit** (but not by a loan) -

**מה הוצרכו לתקן מעמד שלשתן דאמר בפירקין**[8] **דהוי הלכתא בלא טעמא**[9] **–**

**Why was it necessary to institute מעמד שלשתן which** the גמרא **refers to it** later **in our פרק as a 'rule without reason' -**

**תיפוק ליה משום דתן כזכי**[10] **–**

**Let** the transfer be **accomplished through תן כזכי?!**

תוספות answers:

**ויש לומר דהוצרכו לתקן במעמד שלשתן דקני אפילו אין הפקדון ביד הנפקד –**

**And one can say that it was necessary to institute מעמד שלשתן** in order **that the** recipient **be קונה even if the deposit is not in the possession of the watchman,** if for instance the watchman -

**שהניח הפקדון ביד אחרים –**

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[5] Literally this means that there is another 'mind' granting (the item) to him. In the cases of זכייה discussed there are three parties (1) the grantor who is giving the item to (2) the receiver (the זוכה or שליח) that he should pass it on to (3) the recipient. In such a case we say תן כזכי, since the grantor is a דעת אחרת who is מקנה the item to the ultimate recipient through the זוכה. However by מציאה there is no grantor; the זוכה is picking up the item from הפקר to give it to the recipient, but no one is giving it to the זוכה. One explanation for this distinction may be that when there is a דעת אחרת who is granting the item to the ultimate recipient we assume that when he says תן it is the equivalent of זכי, since he has the power to grant the item (and he is transferring the item to the recipient). However by מציאה the one who is saying תן is the recipient who has no power at all over the מציאה; in such a case we do not say תן כזכי. See 'Thinking it over' # 4.

[6] מעמד שלשתן means in the presence of all three. In the case of a פקדון, there is (1) the owner (or depositor, the מפקיד), (2) the watchman or נפקד, and (3) the intended receiver. If the מפקיד wants the item which is being watched to be transferred to the receiver, he says to the נפקד in the presence of the receiver that the item should be transferred to the receiver. Doing so במעמד שלשתן transfers ownership to the receiver.

[7] The גמרא mentions that there is a dispute whether מעמד שלשתן is effective only by פקדון (where the item to be transferred exists) or even by a loan (where the debt does not exist physically; it is merely owed).

[8] If מעמד שלשתן is effective even by a מלוה it is understood why תן כזכי is not sufficient (in the case of a מלוה), for even if the מלוה tells the לוה to pay a third party, there is no substantive transfer, for the money owed does not exist. Therefore it was necessary to institute מעמד שלשתן that even by a loan, the obligation of the לוה to pay is transferred from the מלוה to the third party.

[9] There is no conventional way to explain legally how the transfer takes place, since no valid קנין was made to transfer ownership. Nevertheless the חכמים instituted that מעמד שלשתן is קונה.

[10] The מפקיד should say to the נפקד (not [necessarily] in the presence of the recipient), 'give it to him'; since תן is כזכי, the recipient will acquire it legally and it will not be a הלכתא בלא טעמא. See 'Thinking it over' # 1.

**Placed the deposit by others -**

**או שיקנה אפילו בעל כרחו של נפקד –**

**Or** מעמד שלשתן was instituted in order that the recipient **should acquire** the item **even against the will of the נפקד -**

**כמו שאפרש לקמן בעזרת השם (שם דיבור המתחיל גופא) דקנה נמי בעל כרחו –**

**As I will explain later בע"ה that** by מעמד שלשתן the recipient is **קונה even against the will** of the נפקד. However תן כזכי (or even זכי) would not be effective in these situations.[11]

תוספות asks:

**ואם תאמר ומתניתין דלקמן (שם,א) תנו מנה לפלוני ומת יתנו לאחר מיתה –**

**And if you will say; and** regarding **the משנה later** where it states; 'if a person says **'give him a מנה'** and the grantor **died; it should be given** to the intended recipient **after the death** of the grantor.' This concludes the משנה -

**ומוקי לה רב זביד[12] במעמד ג'[13] ואמאי לא מפרש טעמא דמתניתין משום דתן כזכי –**

**And רב זביד established** that the granting was done **'במעמד ג; but why did not** רב זביד **explain the reason of the משנה is because תן כזכי?![14]**

תוספות answers:

**ואומר רבינו תם דתן לא הוי כזכי אלא כשמוסר לו הדבר מיד ליד –**

**And the ר"ת answered that תן is not כזכי unless the** grantor **transfers the item directly to** the זוכה for the recipient -

**ומתניתין לא משמע דמיירי בהכי[15] –**

**However it does not seem that in our משנה this was the case;** rather it seems the money was already by the זוכה, and the grantor directed him to give it to the recipient, in such a case there is מעמד שלשתן, but no תן כזכי.

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[11] It cannot be effective if he is not in possession of the item, for how can he acquire it on behalf of the recipient. The recipient will also not acquire the item if the 'זוכה' refuses to acquire it for him. Therefore מעמד שלשתן is necessary, because it is effective even in these cases as a הלכתא בלא טעמא.

[12] The issue which ר' זביד resolves is why is it required that the money be given to the recipient after the death of the grantor; how did the recipient acquire the money (with merely words) without a קנין? The monies should remain in the estate of the deceased.

[13] The מנה was in the possession of a third party, and the grantor told him [in the recipient's presence] to give the money to the recipient.

[14] It is not necessary to say that the recipient was present (for the משנה writes תנו מנה לפלוני, indicating that the recipient is not present); but merely since the grantor told the נפקד to give the money, the recipient acquires the money since תן כזכי.

[15] The משנה states תנו מנה לפלוני; if we were discussing a case where the grantor is passing the money to the זוכה at the time, the משנה would have stated תנו (תן) מנה זו לפלוני. We therefore assume that there was no current transfer.

**וניחא השתא ההוא דבבא מציעא גבי מציאה[16] –**

**And now the** גמרא **in ב"מ regarding מציאה will also be understood.**

This provides an additional explanation regarding the necessity for מעמד שלשתן:

**והוצרכו נמי לתקן מעמד שלשתן[17] דקנה אף על פי שמופקד בידו מקודם לכן –**

**And it was also necessary** for the חכמים **to institute מעמד שלשתן** in order **that it is קונה even though the item was deposited by** the נפקד **earlier -**

**אף על גב דהתם לא הוי תן כזכי[18] –**

**Even though that it that case תן would not be כזכי,** since nothing is being transferred when תן was said, nevertheless מעמד שלשתן will be קונה.

In summation: תן כזכי is effective only when there is a דעת אחרת and only when the item is transferred at the time תן is said. מעמד שלשתן is effective even if the item is (currently) not in the possession of the נפקד and even if the נפקד is unwilling to be זוכה.

תוספות addresses the initial question[19] and gives an alternate answer:

**ועוד פירש רבינו תם דשיחרור עבד הוי כעין מלוה –**

**And, in addition, the ר"ת explained that freeing a slave is like** paying **a debt -**

**דאמרינן בה תן והולך כזכי אף על גב דבמתנה לא הוי כזכי[20] –**

**Where** regarding the payment of a debt **we rule that תן and הולך is כזכי, even though that by** granting **a gift,** הולך ותן **are not כזכי –**

תוספות explains why שחרור עבד is like a מלוה -

**דשחרור אי לאו דעבד ליה נייח נפשיה לא הוה משחרר ליה[21] –**

**For** regarding **שחרור** of an עבד we assume **that if** the עבד **did not do an act pleasing** the master, **he would not have freed him -**

**משום הכי חשיב כחוב דאמרינן ביה תן כזכי –**

**Therefore** freeing the עבד **is considered as** paying **a debt, where we do**

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[16] See footnote # 2. We do not say תן כזכי there by מציאה, because the person who said תן (the rider) did not give anything to the finder. תן כזכי is only when the one saying תן is transferring the item to the זוכה.

[17] See footnotes # 6-10.

[18] See 'Thinking it over # 1.

[19] ר' יוחנן here (by עבד) maintains תן כזכי, but by מציאה he argues that תן is not כזכי. Alternately the ר"ת may be explaining why in the following משנה of תנו מנה לפלוני we do not say תן כזכי.

[20] This explains why by מציאה there is no תן כזכי and why we need מעמד שלשתן by a מתנה where תן לאו כזכי. According to this answer it is possible that by מלוה ופקדון where we say תן כזכי it is not necessary that he has to transfer the item at that time to the זוכה, as תוספות previously required. See 'Thinking it over' # 3.

[21] See previous תוספות (יא,ב) ד"ה ש"מ (footnote # 5). See 'Thinking it over' # 2.

**rule תן כזכי,** but there is no תן כזכי by a gift.

תוספות cites the sources that there is no תן כזכי by מתנה; only by מלוה:

**ומדקדק רבינו תם דיש חילוק בין מתנה למלוה –**

**And the ר"ת inferred that there is a difference between מתנה** (where תן לאו כזכי) **and מלוה** (where תן כזכי) -

**דתנינן לקמן** (דף יד,א) **הולך מנה לפלוני שאני חייב לו תן מנה לפלוני שאני חייב לו –**

**For we learnt in a ברייתא later, 'bring a מנה to him, whom I owe money to,** or **give a מנה to him, whom I owe money to -**

**וכן בפקדון חייב באחריותו[22] ואם בא לחזור אינו חוזר[23] –**

**And the same** applies **to a deposit,** the rule is that the sender **is liable for its loss, however** even **if he wishes to retract he cannot retract'.** This concludes the ברייתא -

**אלמא בחוב הוי הולך כזכי –**

**It is evident** from this ברייתא, which states that he cannot retract, that **by a debt** (תן and) **הולך is כזכי -**

**וגבי מתנה פסקינן בהדיא בסוף פירקין כרבי שמעון הנשיא[24] דהולך לאו כזכי –**

**However, regarding a מתנה it is clearly ruled on in the end of this פרק in accordance with ר"ש הנשיא that הולך is not כזכי –**

תוספות brings an additional proof that by מתנה we say הולך לאו כזכי:

**וכן בריש השולח** (לקמן לב,ב) **אמר שליח מתנה כשליח הגט והולך לאו כזכי –**

**And similarly in the beginning of השולח** פרק, there אביי **rules that a שליח מתנה is like a שליח הגט** regarding **that** in both cases **הולך is לאו כזכי -**

**וכיון דהולך לאו כזכי תן נמי לאו כזכי –**

**And since** we know that **הולך לאו כזכי** by מתנה, **then תן is also לאו כזכי** by מתנה -

**דאי הוי כזכי במתנה כמו גבי מלוה ופקדון אמאי תנן[25] תן –**

**For if תן is כזכי by מתנה just like by a מלוה ופקדון,** then **why does the ברייתא** (also) **teach** that by **תן** the rule is that אינו חוזר by מלוה ופקדון; it is superfluous-

**דכיון דכבר אשמועינן דאפילו הולך כזכי כל שכן תן כזכי דאפילו במתנה הוי כזכי –**

**For since** the ברייתא **informed us that even הולך כזכי then certainly תן כזכי,**

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[22] If the item is lost or stolen before the מלוה receives it, the לוה must reimburse him.

[23] The מלוה acquires the rights to this money to the extent that the לוה cannot retract; however, it is not considered as if the מלוה received the money so that the לוה should not be responsible for it.

[24] See ב,יד and א,טו where רב יוסף rules הלכה כר"ש הנשיא.

[25] תוספות is (seemingly) referring to the ברייתא on א,יד which תוספות cited previously that הולך מנה לפלוני שאני חייב לו תן מנה וכו' ואם בא לחזור אינו חוזר.

**for** תן is **כזכי even by מתנה** (where הולך is not כזכי [according to this assumption]). This proves that by מתנה both תן and הולך are not כזכי. Therefore the ברייתא teaches us that by מלוה ופקדון both תן והולך are כזכי.

תוספות offers an additional proof that we do not say תן כזכי by מתנה:

**ורבינו יצחק הביא ראיה מתוספתא[26] דקתני בהדיא –**

**And the ר"י brought proof** (that תן לאו כזכי by מתנה) **from a תוספותא where it states explicitly -**

**תן מנה לפלוני שאני חייב לו או פקדון שיש לו בידי וכן הולך כולי –**

**Give a מנה to him, whom I owe it to, or** give back **the deposit which he has by me, and similarly** if he said **הולך, etc.**, in all these cases -

**אינו חוזר וחייב באחריותן –**

**The** giver **cannot retract, but is responsible** for their loss. However, if he said -

**תן מנה זה לפלוני תן שטר מתנה זו לפלוני או הולך כולי רצה לחזור יחזור –**

**Give this מנה to him,** or **give this gift deed to him, or** he said **הולך, etc.**, in all these case by a מתנה **he can retract if he so desires.** If he said **-**

**זכה מנה זו לפלוני התקבל מנה זו לפלוני רצה לחזור לא יחזור[27] –**

**Acquire this מנה on behalf of him,** or **receive this מנה on behalf of him,** in these cases if **he desires to retract he cannot retract'.** This concludes the תוספתא.

**אלמא תניא בהדיא דבמתנה לא הוי תן כזכי:**

**It is clearly evident that the ברייתא teaches that regarding מתנה** we rule **that תן is not כזכי.**

## Summary

תן כזכי is effective only when there is a דעת אחרת and only when the item is transferred at the time תן is said. מעמד שלשתן is effective even if the item is not in the possession of the נפקד and even if the נפקד is unwilling to be זוכה.

[Alternately], (in addition)[28] תן (והולך) כזכי applies only to a מלוה (or שחרור עבד which is similar to a מלוה), but not by מתנה

## Thinking it over

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[26] פ"א הי"א.

[27] תוספות cites this line from the תוספתא to emphasize that (even though) זכה is effective by מתנה, nevertheless תן והולך are not effective (so one should not argue that perhaps this תוספתא maintains that even זכה is not effective).

[28] See footnote # 20.

1. תוספות asks if תן כזכי then why is מעמד שלשתן necessary; he could say תן.[29] Seemingly the same question applies even if we do not say תן כזכי, that the מפקיד could say זכי![30]

2. תוספות differentiates between מלוה (where we say תן כזכי) and מתנה (where תן לאו כזכי), and that שחרור is like a מלוה because he would not be משחרר the עבד unless עביד ליה נייח נפשיה.[31] However, we find the same by מתנה as the גמרא writes later[32], 'אי לאו דאית ליה הנאה מיניה לא יהיב ליה מתנה'. Why is there a difference between שחרור עבד and מתנה regarding תן כזכי?![33]

3. תוספות rules that by מתנה we do not say תן כזכי (only by מלוה ופקדון).[34] Our משנה states that if he said תנו גט לאשתי he can be חוזר since it is a חוב for her. However, according to תוספות that we only say תן כזכי by מלוה ופקדון, then even if it would be a זכות for her he can still retract, since we only say תן כזכי by מלוה ופקדון but not by מתנה (and similarly not by גט which is not a מלוה)![35]

4. תוספות initially explained that תן כזכי is only where דעת אחרת מקנה אותו, but not by מציאה.[36] Why then does the גמרא answer that by מציאה he did not say זכה לי (but rather תנה לי), when the גמרא could have answered that in the משנה there is a דעת אחרת מקנה אותו (and therefore he cannot be חוזר), however by מציאה there is no דעת אחרת מקנה אותו and therefore he is not קונה?![37]

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[29] See footnote # 10 & 18.
[30] See רש"ש and נח"מ. This question applies also to what תוספות states that מעמד שלשתן is necessary if it was deposited previously (see footnote # 18). See סוכ"ד אות עב בד"ה הנה.
[31] See footnote # 21.
[32] נ,ב.
[33] See רא"ש (in our פרק) סי' יט (towards the end), סוכ"ד אות עג בד"ה לכאורה and נח"מ.
[34] See footnote # 20.
[35] See בל"י אות רסג.
[36] See footnote # 5.
[37] See אמ"ה # 212.