ואפילו מיתמי. ואף על גב דאמור רבנן הבא ליפרע כולי – And even from orphans. And even though the רבנן state that one who comes to collect, etc.

Overview

There are two statements in the גמרא concerning whether or how a creditor may collect from יתומים; where the creditor has a שטר that their deceased father owed him money. One statement is cited here that 'הבא ליפרע מכנסי יתומים לא יפרע אלא בשבועה'; that the מלוה may collect from יתומים only if he swears to substantiate his claim; that the father did not pay and the monies are still owed. This rule applies to יתומים גדולים (and also to יתומים קטנים where applicable).[1]

A second statement[2], in the name of רב אסי, is that 'אין נזקקין לנכסי יתומין אא"כ רבית אוכלת בהם'; that we do not get involved to pay off the debts of יתומים (even with a שבועה), unless their assets are being consumed by the interest payments. This rule applies (only) to יתומים קטנים.

There is a dispute as to the reason for this second rule. רב פפא maintains that we cannot collect from יתומים קטנים, since the obligation of repaying a debt is (merely!!) a מצוה; therefore יתומים קטנים who are not obligated to perform מצות are exempt from paying the debt (as long as they are קטנים).

רב הונא בריה דרב יהושע maintains that the reason we cannot collect from יתומים קטנים is because there is a concern perhaps the father placed a bundle of valuables ('צררי') by the creditor before he died.[3]

The גמרא states that there will be a practical difference between these two reasons in a case where the לוה admitted owing the money immediately before he died[4]. According to ר"ה בדר"י, we will collect from the יתומים קטנים, since there is no concern of any payment. However according to רב פפא we cannot collect from the יתומים קטנים since they are לאו בני מיעבד מצוה.

Our גמרא states that the חזקה of א"א פורע תו"ז is so strong than one may collect from יתומים without a שבועה if the father died תו"ז.

The issue תוספות will be discussing is (according to ר"ה בדר"י) what is the ruling in a case of יתומים קטנים, where the לוה died תוך זמנו. Are יתומים קטנים

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[1] This rule applies generally to anyone who collects שלא בפניו. The reason is to protect the יתומים or לקוחות, etc., since they are not familiar with the case, etc.

[2] ערכין כב,א.

[3] This concern of 'צררי' is rather far fetched, and it is only applicable by קטנים who are totally defenseless; however by יתומים גדולים the מלוה may collect with a שבועה. See footnotes # 14 & 15.

[4] See footnote # 28 for an additional נפק"מ.

also included in the 'ואפילו מיתמי' or not[5]. Do we say that the חזקה of א"א פורע תו"ז is equal to an admission from the לוה that he owes the money, and therefore we may collect even from יתומים קטנים (בלא שבועה), or we may not collect?

נראה דביתומים גדולים מיירי – It appears that we are discussing (only) **mature orphans;** those that are over בר מצוה. It is only in that case that the מלוה can collect their father's debt from the יתומים without a שבועה if it was תוך זמנו.

אבל בקטנים לא גבי – however if the יתומים **are minors –** under בר מצוה – the creditor **will not be able to collect** his debt from the estate of the קטנים, which their father left them.

אפילו תוך זמנו – even if it was within the time; before the loan was due. Even if the father died before the due date of the loan, whereby we should assume that the loan was not paid, nevertheless the מלוה cannot collect the loan from the estate of the יתומים קטנים.[6]

תוספות will now expound on this statement that we cannot collect from יתומים קטנים even if the father died תוך זמנו.

[ולא מיבעיא[7]] לרב פפא – [and this is unquestionably certain] **according to רב פפא –**

דמפרש טעמא דאין נזקקין – who explains the reason for the law[8] which states **that we do not assign** the properties of יתומים קטנים (to pay off debts), unless their assets are being consumed by the accumulating interest on the loan[9]. Otherwise we wait until the יתומים mature and become גדולים. The reason for this law according to רב פפא is –

משום פריעת בעל חוב מצוה – because it is a מצוה to pay the creditor; that is the reason why a loan must be paid, however –

ויתמי לאו בני מיעבד מצוה נינהו – and minor **orphans are not required to do מצות.** Therefore there is no need to pay the loan, as long as they are minors. According to רב פפא, therefore, it is quite obvious that even though it is תוך זמנו, nevertheless we do not collect from the יתמי קטני, since they are לאו בני מיעבד מצוה נינהו.

אפילו לרב הונא בריה דרב יהושע (ו) [אלא[10]] – However, even according to ר"ה בריה דר''י who argues with רב פפא –

דמפרש טעמא – that he **explains the reason** for the aforementioned דין of אין נזקקין לנכסי יתומים (קטנים) אא"כ רבית אוכלת בהם, that the reason is –

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[5] If the גמרא would have cited the statement of רב אסי that 'כו (קטנים) אין נזקקין לנכסי יתומים (אע"ג דא"ר אסי), it would be obvious that תו"ז you may collect, the גמרא however chose the (more ambiguous) statement of הבא וכו' ליפרע. See later this תוספות by footnote # 21.

[6] It would seem from later in תוספות that he cannot collect even with a שבועה (see footnote # 16).

[7] See ב"ח who inserts this phrase.

[8] See ערכין כב,א.

[9] In this case it is for their benefit that the loan be paid, so that their assets should no be diminished because of the accumulating interest payments.

[10] See הגהות הב"ח.

משום צררי – because we are concerned that perhaps the debtor handed the creditor **a bundle** containing valuables, as collateral for the debt. Therefore we cannot collect from the יתומים because perhaps the loan was already paid. It would seem that according to ר"ה בדר"י, if the father died תוך זמנו where there is no concern of צררי, since אין אדם פורע תוך זמנו, one should be able to collect from the יתומים קטנים (at least with a שבועה). Nonetheless, maintains תוספות that –

לא גבי מיתמי קטנים – he cannot collect from minor יתומים even according to ר"ה בדר"י

אפילו תוך זמנו – even if the father died **תוך זמנו,** so there is (seemingly) no concern for צררי, nevertheless the מלוה cannot collect.

The reason why he cannot collect מיתמי קטנים according to ר"ה בדר"י is –

דאין מקבלין עדים שלא בפני בעל דין – that בי"ד **does not accept witnesses in the absence of the** opposing **litigant.**

דקטנים חשוב שלא בפניו – for minors are considered as if they are not present –

כדמוכח בריש פרק הגוזל בתרא (בבא קמא דף קיב,א) – as is evident in the beginning of פרק הגוזל בתרא.[11]

The מלוה when he wishes to collect his debt from the יתומים must offer evidence that he is owed the money. This is usually in the form of a שטר with עדים. The בי"ד will not accept this evidence, for there is no לוה present to contest the evidence. The יתומים קטנים, even if they come to court, are not considered present. Therefore the מלוה cannot collect.[12]

תוספות will discuss a new case:

ואפילו נתקבלה עדות בחיי האב – and the aforementioned rule applies **even if the testimony was accepted during the father's lifetime;** and בי"ד ascertained that the לוה owes the מלוה money. The father subsequently died, before the מלוה was able to collect the debt. One may have thought that according to ר"ה בדר"י the מלוה can collect from the estate. There is no problem of קבלת עדות שלא בפני בע"ד, since that was already done בחיי האב. There is seemingly also no concern of צררי, since it is תוך זמנו. Nevertheless, he cannot collect from the יתומים. The reason is, for –

מצית למימר [נמי][13] – we can [still] say –

דחיישינן לצררי אפילו תוך הזמן לקטנים – that by קטנים[14] we are concerned for צררי even if it is תוך זמנו.[15]

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[11] The גמרא there relates the following: After s'רבי ירמיה father-in-law passed away, his (minor) son, the brother-in-law of ר' ירמיה would not allow ר' ירמיה entry to his deceased father's house. ר' ירמיה argued to ר' אבין that he has witnesses that he, ר' ירמיה, made a חזקה in the house during his father-in-law's lifetime (after it was sold or gifted to him). ר' אבין responded that we do not accept testimony שלא בפני בע"ד.

[12] See 'Thinking it over' # 1.

[13] See הגהות הב"ח.

[14] קטנים are considered utterly defenseless, therefore בי"ד has to be concerned about them in a greater measure than is usually accorded to other litigants such as לקוחות and יתומים גדולים.

[15] The fact that we are חושש for צררי בתוך זמנו is not in direct conflict with the חזקה of א"א פורע תו"ז. There is a difference between צררי and פרעון. By פרעון the לוה is paying off the loan and is giving up this payment money forever. The לוה will not part with his money before it is due. He needs the money. That is why he

תוספות will prove his point that there can be a צררי חשש even תוך זמנו.

כדאשכחן גבי אלמנה – as we find this same concern **by a widow – פרק השולח in – בפרק השולח** (גיטין דף לד,ב ושם)

דתנן אין האלמנה נפרעת מנכסי יתומים – for we learnt there **in a משנה; 'a widow cannot collect** her כתובה **from the assets of the orphans – אלא בשבועה – unless she swears'** that her former husband did not pay her any part of the כתובה during his lifetime.

וטעמא – and the reason why she cannot collect without a שבועה **משום שמא התפיסה הבעל צררי – because** we are concerned that **perhaps the husband placed צררי** in her possession –

אף על פי שהוא בתוך הזמן – even though while the husband was alive **it was תוך זמנו.** The time of payment for a כתובה is after (a divorce or after) the husband's death. The fact that the אלמנה must swear proves that the חשש of צררי exists even if it is תוך זמנו.[16] Therefore it is possible that by יתומים קטנים we are also concerned for צררי even תוך זמנו.

תוספות explains that the similarity to אלמנה is not a compelling proof:

מיהו מאלמנה אין ראיה – However there can be no conclusive **proof** from the case of **אלמנה** that there is a צררי חשש even תוך זמנו by יתומים קטנים.

דהתם חיישינן לצררי אפילו בגדולים – for there by אלמנה **we are concerned for צררי even by adult** יתומים; she cannot collect from them without a שבועה. However by a מלוה ולוה if there are adult יתומים and it was תוך זמנו the מלוה can collect even without a שבועה, as we learnt in our גמרא. Therefore it is obvious that there is a difference between the כתובה of an אלמנה and a regular loan. The reason why by an אלמנה we are חושש for צררי even תוך זמנו and even by יתומים גדולים is –

משום דאית לה בתנאי בית דין – because she is owed the כתובה **by a stipulation of בי"ד.** The obligation of a כתובה is not merely self imposed (like a loan); but rather it is incumbent on every husband to provide a כתובה for his wife. Therefore when there is such a serious obligation on the husband, we suspect that out of concern to fulfill this obligation[17], the husband presented her with צררי while he was still married to her, even though it is תוך זמנו. However by a self imposed obligation such as a loan, perhaps there is no צררי חשש if it is תוך זמנו.

תוספות goes on to prove that there is a difference, in regards to the concern of צררי, between a self imposed obligation and a תנאי בי"ד.

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borrowed it in the first place. The idea of צררי, however, is that the לוה wants the מלוה to feel secure about his loan. He therefore places an object of value that he possesses, but may not need now, into the hands of the מלוה for security (hoping perhaps to even extend the due date). The לוה intends to retrieve the צררי when he ultimately pays up the loan. This type of 'security' is possible even תוך זמנו, since the לוה is not irrevocably giving up his rights to the צררי.

[16] There seems to be some difficulties in the comparison of אלמנה to our case. Firstly by אלמנה we are חושש לצררי even by יתומים גדולים (as תוספות will soon point out). Secondly by אלמנה she is believed with a שבועה; as opposed to our case of יתומים קטנים, where the מלוה cannot collect even with a שבועה (see footnote # 6).

[17] The husband may be concerned that his heirs will not fulfill this obligation. This in turn would reflect badly on him that he did not adhere to the תנאי בי"ד.

כדאמרינן בהנושא – as the גמרא **states** in **הנושא** פרק **–** **(כתובות דף קב,ב ושם)**
דחיישינן טפי לצררי – that we are more concerned that he deposited **צררי** concerning his obligation -
בבנותיו – for his daughters[18], than we concerned for צררי concerning his obligation –
מבבת אשתו – for his wife's daughter[19]. The reason we are more concerned בבנותיו is –
משום כיון דאיתנהו בתנאי בי"ד – because since his obligation to his daughters **is stipulated by בי"ד;** and it is not a self imposed obligation as בת אשתו, therefore –
אימור צררי אתפסינהו – I can say that perhaps **he deposited צררי** by בנותיו in order to fulfill his תנאי בי"ד. However by בת אשתו we are not concerned that צררי אתפסינהו since it is a self imposed obligation and not a תנאי בי"ד. We can derive from this גמרא that there is a greater concern for צררי when we are dealing with תנאי בי"ד. Similarly there is a greater concern of צררי by an אלמנה even though it is תוך זמנו since his obligation to her is a תנאי בי"ד. However by a regular הלואה perhaps we are not concerned for צררי if it is תוך זמנו, even by קטנים.[20]

To summarize: According to רב פפא one cannot collect from יתומים קטנים even תוך זמנו because they are לאו בני מיעבד מצוה נינהו. According to ר"ה בדר"י if בי"ד did not accept the testimony of the מלוה while the father was alive, the מלוה cannot collect from יתומים קטנים, since אין מקבלין עדות שלא בפני בע"ד. The question is, according to ר"ה בדר"י can the מלוה collect from יתומים קטנים if the testimony was already accepted בחיי האב, Are we concerned for צררי or not. The fact that by אלמנה we are concerned for צררי even though it is תוך זמנו does not prove that the same applies by a הלואה. The case of אלמנה is different since he owes her the money בתנאי בי"ד as opposed to הלואה which is a self imposed חיוב.

תוספות anticipates a possible proof from our גמרא that one cannot collect from יתומים קטנים תוך זמנו, and rejects it.
The גמרא, when it wants to convey to us the strength of the חזקה that תו"ז פורע א"א, states that even though generally one cannot collect from (גדולים) נכסי יתומים only with a שבועה,

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[18] After the father's death, his daughters are fed and sustained from his estate. However they cannot collect from נכסים משועבדים for we are concerned perhaps they received צררי.

[19] If a husband stipulated that he will support his wife's daughter (his stepdaughter) for a period of time, then if he died during this time, his stepdaughter can collect even from נכסים משועבדים; there is no concern of צררי.

[20] It seems evident from the expression מיהו מאלמנה אין ראיה, that תוספות realized (originally) that there is no conclusive proof from אלמנה that we are concerned for צררי by יתומים קטנים תוך זמנו. It is therefore somewhat not clear what does תוספות initially intend to accomplish by citing the case of אלמנה. The explanation may be as follows. It seems that תוספות maintains 'intuitively' that we cannot collect from יתומים קטנים, even if it is תוך זמנו. These יתומים are utterly defenseless. It would be a travesty of justice if בי"ד would allow the מלוה to collect from these hapless individuals. On the other hand, however, a certain 'mechanism' is required to justify, why בי"ד has the right to restrain the מלוה from collecting from the יתומים קטנים, since it is תוך זמנו. This 'mechanism' is the concern of צררי. The question arises; where do we find the חשש of צררי if it is תוך זמנו. The answer is by אלמנה. From אלמנה we see that under certain circumstances there is a חשש צררי even תוך זמנו. By אלמנה the 'trigger' for the חשש of צררי is because it is a תנאי בי"ד. In our case the 'trigger' is the fact that we are dealing with יתומים קטנים. However there is no proof from אלמנה, that יתומים קטנים can trigger the חשש of צררי תוך זמנו, but at least there is a precedent that on occasion there is a חשש צררי even תוך זמנו.

nevertheless if it is תוך זמנו one may collect from (גדולים) יתומים even without a שבועה. The proposed proof is that if the דין would be that you may collect תוך זמנו even from יתומים קטנים, the גמרא should have cited a different rule. תוספות offers the proposed proof:

ואין להביא ראיה – and one cannot bring proof that the מלוה cannot collect from יתומים קטנים תו"ז

מדלא קאמר הכא – from the fact **that** the גמרא **did not state here** a different citation than which the גמרא actually states**.** The גמרא should have stated -

אף על גב דאמור רבנן – even though the רבנן said[21] –

אין נזקקין לנכסי יתומין קטנים – 'we do not assign the assets of יתומים קטנים for collection –

אלא אם כן רבית אוכלת בהם כולי – unless the interest due **is consuming those** assets, **etc'** nevertheless if it is תוך זמנו the מלוה would collect even from יתומים קטנים**.** This citation would have clearly taught us that תוך זמנו one may collect from יתומים קטנים. However from the quote the גמרא cites 'הבא ליפרע מנכסי יתומים וכו', we cannot infer that one may collect even from יתומים קטנים תוך זמנו, for (perhaps) the expression מנכסי יתומים here means (only) יתומים גדולים. The fact that the גמרא chose this quote as opposed to אין נזקקין לנכסי יתומים קטנים וכו' (seemingly) proves

דלא מיירי בקטנים – that we are not discussing קטנים יתומים**,** that one may collect from them -

אלא דוקא בגדולים – but rather we are discussing **specifically only** יתומים **גדולים.** If the דין would be that even by יתומים קטנים one may collect from them תוך זמנו the גמרא should have cited the other דין of 'אין נזקקין לנכסי יתומים קטנים וכו. This concludes the proposed proof from our גמרא that we cannot collect from קטנים even if it is תוך זמנו.

תוספות rejects this proof. In reality according to ר"ה בדר"י[22] one may collect from יתומים קטנים if it is תוך זמנו; the reason why the גמרא does not cite the other rule which would indicate that we may collect from יתמי קטני תוך זמנו is –

דשמא משום רב פפא – that perhaps on account of רב פפא who definitely maintains that one cannot collect from יתמי קטני in any event, therefore –

נקט מילתיה בגדולים – he chose a case of גדולים יתומים**.** The בעל הגמרא did not want to get involved in this מחלוקת between רב פפא and ר"ה בדר"י whether one may collect from יתמי קטני. Therefore he chose to discuss only יתומים גדולים where all will agree that we may collect from them תוך זמנו. In truth however, perhaps according to ר"ה בדר"י one may collect from יתמי קטני תוך זמנו.

תוספות offers another rejection to the proposed proof:

אי נמי – or we may **also** say that you may collect from יתמי קטני תוך זמנו (according to ר"ה בדר"י) and the reason the גמרא did not cite the other quotation of אין נזקקין לנכסי יתומים קטנים וכו' is because there is a certain disadvantage in that quote versus the quote the גמרא actually uses.

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[21] This is the דין of אסי ר' in ערכין כב,א. The text actually reads יתומים and omits 'קטנים' (See Overview). See footnote # 5.

[22] תוספות has already established that according to רב פפא, who maintains the reason of יתמי לאו בני מצוה נינהו, one cannot collect from יתמי קטני in any event. The entire discussion is only according to ר"ה בדר"י.

הבא ליפרע מנכסי יתומים – that the גמרא **cites that** quote **of דנקט ההוא דהבא ליפרע** for even though it does not (explicitly) teach us that we may collect from יתמי קטני תוך זמנו however it cites this quote –

לאשמועינן דגבי אפילו בלא שבועה – to teach us that תוך זמנו, **one may collect** from יתומים **even without a שבועה.** If the גמרא would have cited אין נזקקין לנכסי יתומים קטנים כו', even though we would have derived that תוך זמנו one may collect even from יתמי קטני, however we would not be able to derive that one may collect from יתומים without a שבועה.[23]

תוספות offers an additional proof that we cannot collect from יתמי קטני תוך זמנו and rejects it as well:

ואין להביא ראיה – and one cannot bring proof that we cannot collect from יתמי קטני תוך זמנו –

משלהי מכילתין (דף קעד,ב) – from the end of our מסכת

דקאמר מאי בינייהו דרב פפא ורב הונא בריה דרב יהושע – where the גמרא **asks what is** the practical **difference between** the reasons **of רב פפא and ר"ה בדר"י;** what ramifications are there להלכה.

ולא קאמר איכא בינייהו – and the גמרא **does not respond: there is a** practical **difference between them –**

כגון דמית לוה תוך הזמן – for instance where the לוה dies before the due date:

לרב הונא גבי ר"ה בדר"י – according to the מלוה **may collect** even from יתמי קטני since there is no חשש of צררי because the לוה died תוך זמנו. However according to רב פפא the מלוה cannot collect from the יתמי קטני since they are לאו בני מיעבד מצוה. The fact that the גמרא does not offer this difference is proof that this difference does not exist. Even according to ר"ה בדר"י one cannot collect from יתמי קטני because of צררי.

תוספות rejects this proof. In reality if one would maintain the reason of צררי, then the מלוה would be able to collect from יתמי קטני תוך זמנו, since we maintain חזקה א"א פורע תו"ז. However the גמרא cannot cite this case as a מאי בינייהו between רב פפא and ר"ה בדר"י –

דהא רב הונא ורב פפא אמר בשמעתין – for concerning **ר"ה בדר"י and רב פפא, our גמרא states –**

דלית להו חזקה דריש לקיש – they do not agree with the חזקה of ר"ל that א"א פורע תוך זמנו; but rather they maintain that אדם פורע תוך זמנו. Therefore it is understood that both ר"ה בדר"י and רב פפא agree that we cannot collect from יתמי (קטני) since there is a possibility that the לוה paid the loan תוך זמנו before he died. Our discussion was only according to us; we who maintain the opinion of ר"ל that א"א פורע תו"ז and assume the view of ר"ה בדר"י concerning צררי, what would be the הלכה for us.

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[23] The גמרא cites a דין and teaches us that this דין does not apply תוך זמנו. We can infer the דין of תוך זמנו, by contrasting it with the original דין. If the original דין is that a שבועה is required from the יתומים, we can infer that תוך זמנו, no שבועה is required. If the original דין is that we cannot collect from יתומים קטנים at all, we can (only) infer that תו"ז we may collect from יתומים קטנים. However we will not be certain if it is with a שבועה or without a שבועה. The גמרא would rather teach us the דין that a שבועה is not required (which applies to all cases) rather than teaching us that we can collect from יתמי קטני (however [perhaps] with a שבועה).

תוספות offers an additional rejection of this latter proof. In reality according to the view of צררי the מלוה may collect from יתמי קטני תוך זמנו. However one cannot ask, why did not the גמרא mention this difference (between רב פפא and ר"ה בדר"י [as well]).

ועוד - and furthermore[24] the lack of mentioning this additional איכא בינייהו is no proof that ר"ה בדר"י agrees with ר"פ in תו"ז –

דבכמה מקומות יכול למצוא איכא בינייהו טובא – for in many instances the גמרא **can find many practical differences** between the disputing opinions -

ואינו חושש לומר אלא דבר אחד או שנים – however the גמרא **is not concerned** to mention all the differences; **rather** it suffices **to mention merely one**[25] **or two**[26] differences.

כדאמרינן בהמניח (בבא קמא דף לג,א ושם דיבור המתחיל הקדישו) – as we[27] **say in** פרק **המניח**

גבי פלוגתא דיושם השור – concerning the argument between רבי ישמעאל and רבי עקיבא whether the goring **ox is assessed** or confiscated. The גמרא there gives (only) one practical difference between these two opinions. תוספות there maintains that there are other practical differenced between these two opinions, nevertheless the גמרא is satisfied with one. Similarly in this dispute the גמרא (in פרק גט פשוט) is satisfied by offering two differences[28] between רב פפא and ר"ה בדר"י, even though there may be more, including that according to ר"ה בדר"י you may collect from יתמי קטני, but not according to רב פפא.

תוספות will now offer a (more acceptable) proof that even according to ר"ה בדר"י the מלוה cannot collect from יתמי קטני even תוך זמנו.

מיהו יש להביא ראיה – however we can bring a proof –

דאפילו רב הונא דמפרש טעמא משום צררי – that even according to **ר"ה** בדר"י **who explains** that **the reason** one may not collect from (קטנים) יתומים is **on account of צררי -**

לא גבי מיתומים קטנים אפילו תוך הזמן – one may not collect from יתומים קטנים even תוך הזמן. תוספות continues with his proof –

דפריך עליה דרב אסי – for the גמרא **asks on the** statement **of רב אסי**

בפרק שום היתומים (ערכין ד כב,א ושם) – in פרק שום היתומים. It is רב אסי who states that אין נזקקין לנכסי יתומים (קטנים) אא"כ רבית אוכלת בהם. The גמרא there asks that this statement seems to contradict the משנה there in ערכין.[29]

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[24] See "Thinking it over' # 2.

[25] As in המניח.

[26] As in גט פשוט.

[27] Seemingly תוספות is referring to his remarks in the תוספות there ד"ה הקדישו.

[28] The other difference is in a case where the לוה was placed in חרם for not willing to pay the debt, and died while the חרם was still valid. See 'Overview' (footnote # 4) for the first נפק"מ.

[29] The משנה there (כא,ב) states that שום היתומים ל' יום. That if there is a debt against the estate of the יתומים (from their father), בי"ד assesses the assets of the יתומים קטנים and announces for a period of thirty days, that these assets will be sold to satisfy the debt of the father. The גמרא asks who is the מלוה. If it is a gentile; he will not wait thirty days. If it is a ישראל, why should we assess the properties at all?! According to רב אסי we

ודחיק עליה לשנויי בבעל חוב – and the גמרא **forces itself to resolve** the contradiction, by answering that the משנה is discussing a gentile **מלוה**
שקיבל עליו לזו ולא לזו – that he accepted upon himself to follow **this** assessment procedure of thirty days, **but he did not** accept upon himself to forgo the interest. Therefore since there is interest charged against the assets of the יתומים קטנים therefore בי"ד assigns their property for collection. This concludes the citation from the גמרא in ערכין. תוספות continues with his proof –
ולא משני הכא במאי עסקינן – but the גמרא **does not resolve** the contradiction, by saying that **here** in the משנה **we are discussing** a case –
בשלא הגיע הזמן בחיי האב – that the due date did not arrive during the lifetime of the father; that is why we may collect from the יתומים. This explanation of the משנה according to רב אסי is much more reasonable than the explanation that the גמרא offers. Why indeed did the גמרא not offer this explanation?[30] The answer is that the גמרא cannot offer this explanation for even if the father died before the due date, nevertheless a ישראל will not be able to collect from יתמי קטני even תוך זמנו.

תוספות anticipates a possible refutation of this proof and rejects it.
ואין לומר – and we cannot argue that according to ר"ה בדר"י one is able to collect מיתמי קטני תוך זמנו; however the reason the גמרא did not offer this answer is –
דההוא סוגיא סברה כטעמא דרב פפא – because that גמרא (that gave this answer) **accepts the reasoning of רב פפא** who maintains that the reason one cannot collect from יתמי קטני is because they are לאו בני מיעבד מצוה. It makes no difference if it is תו"ז or not. However if we would maintain the opinion of ר"ה בדר"י then the מלוה would be able to collect מיתמי קטני תוך זמנו.

תוספות rejects this refutation. That סוגיא cannot be following the opinion of רב פפא
דהא במסקנא משני – for in the conclusion of that סוגיא the גמרא **resolves** the contradiction, that the משנה there is discussing a case -
כשחייב מודה – where the debtor (לוה) **admitted** right before he died that he owes the money. In such a case we may collect from יתמי קטני. The fact that the גמרא gives this answer proves that the סוגיא there does not agree with the opinion of רב פפא –
והאי שינויא ליתא אליבא דטעמא דרב פפא – for this answer, that the לוה admitted that he owes the money, **is not** valid **according to the reasoning of רב פפא.** According to רב פפא even if the לוה admits that he owes the money we still cannot collect from יתמי קטני, because קטני לאו בני מיעבד מצוה נינהו. The fact that the גמרא gives the answer that חייב מודה proves that the סוגיא disagrees with רב פפא, and maintains the opinion of ר"ה בדר"י. Nevertheless it would not give the answer of תוך זמנו. This proves that even if it is תוך זמנו the מלוה cannot collect מיתמי קטני. He can only collect if חייב מודה.

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should wait till they grow older. We cannot say that there is interest due on this loan, for בי"ד will prohibit the מלוה from collecting the רבית.
[30] See 'Thinking it over' # 3.

תוספות brought a proof from the סוגית הגמרא. Now תוספות will bring an additional proof from רב אסי himself that we cannot collect מיתמי קטני תוך זמנו.

וכן יש להוכיח – and similarly we can prove that we cannot collect מיתמי קטני תוך זמנו –

מגופיה דמילתא דרב אסי – from the words of רב אסי himself; not only from the סוגית הגמרא (that it did not give the תירוץ of תוך זמנו).

דקאמר אלא אם כן אוכלת בהם – for רב אסי stated that unless they are consumed by interest one may not assign their properties. This limiting phrase אא"כ רבית אוכלת בהם, indicates that only on account of רבית one may collect from יתמי קטני, but not under any other circumstances; even if it is תוך זמנו.[31]

ורבי יוחנן אינו מוסיף - and ר"י does not add any other exception to the rule of רב אסי –

כי אם כתובת אשה משום מזוני – except for a כתובה of a woman, which may be collected from יתמי קטני; **for** if we do not pay off the כתובה immediately the widow will be **sustained and fed** at the expense of the יתומים[32] –

משמע דבעל חוב לא משכחת בשום ענין דנפרעין – this indicates that by **a מלוה we cannot find any case[33] where he collects** from יתמי קטני even תוך זמנו.

תוספות anticipates the following objection. This may not be a conclusive proof. It is possible that רב אסי ור"י maintain that אדם פורע תו"ז, therefore אין נפרעין מנכסי יתומים קטנים even תו"ז. Our discussion however is according to those who maintain the חזקה of ר"ל that א"א פורע תו"ז. תוספות replies:

ומסתמא רב אסי ורבי יוחנן – and it is assumable that רב אסי and ר"י –

אית להו חזקה דריש לקיש – maintain the חזקה of ר"ל that א"א פורע תו"ז –

דהכי הלכתא כדפסיק בשמעתין – for that is the הלכה as our גמרא concludes.

Therefore since we do not find explicitly that רב אסי ור"י argue with ר"ל it is assumed that they concur with him.

תוספות will offer additional proof that (רב אסי and) ר"י concur[s] with ר"ל.

ועוד אי לית להו חזקה דריש לקיש – and furthermore if ר"י [and רב אסי] **do not maintain the חזקה of ר"ל;** there would then be a מחלוקת between ר"י ור"ל whether אדם פורע תוך זמנו. Our גמרא rules in favor of ר"ל. This will cause a difficulty –

דאם כן קיימא לן כריש לקיש בארבעה דברים – for then it would come out that **we accept** the opinion of **ר"ל** against the opinion of **ר"י in four instances;** this dispute being the fourth.

ובריש החולץ (יבמות לו,א ושם) – and in the beginning of פרק **החולץ**

לא פסיק רבא כוותיה – רבא did not rule according to ר"ל against ר"י

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[31] Even though כשחייב מודה he can collect; however that is so obvious that it does not contradict the phrase אא"כ, however collecting תוך זמנו is not so obvious and contradicts the 'אא"כ'. See מהר"ם.

[32] Once the כתובה is paid off, the אלמנה does not receive מזוני from the estate of her husband.

[33] See footnote # 31.

אלא בתלת – only in three instances; our case of תו"ז is not included in the three. If ר"י argues with ר"ל concerning תוך זמנו, and our גמרא rules in favor of ר"ל, then רבא should have mentioned a fourth case wherein we rule according to ר"ל against ר"י. The fact that רבא omits this case proves that ר"י does not argue with ר"ל concerning תו"ז.

תוספות anticipates a further difficulty with this proof. Perhaps ר"י does argue with ר"ל concerning תו"ז. רבא however does not mentioned this as a fourth case where the הלכה is like ר"ל and not like ר"י (even though our גמרא clearly maintains that the הלכה is like ר"ל). The reason is because רבא cannot say that the הלכה is like ר"ל by תו"ז –

ר"ל in our גמרא. דרבא ודאי פליג אריש לקיש בשמעתין – for רבא certainly argues on He definitely cannot maintain that the הלכה is like ר"ל and not like ר"י בתוך זמנו since he himself argues with ר"ל and maintains the view of ר"י. We therefore have no conclusive evidence that ר"י maintains א"א פורע תו"ז. Perhaps that is why he maintains that you may not collect from יתמי קטני. However what proof is there that if the הלכה is like ר"ל nevertheless one cannot collect from יתמי קטני?

תוספות responds that we cannot say that ר"ל and ר"י argue over תו"ז for then the הלכה would be like ר"ל in four places not only the three that רבא mentions. Even though we understand why רבא does not mention this as a fourth instance –

מכל מקום גם לדידן מוכח – nevertheless it is evident[34] that even we who follow the opinion of ר"ל concerning תו"ז;

דלא קיימא לן כריש לקיש אלא בתלת – that we do not follow the opinion **of ר"ל** against ר"י **only in** the **three** cases (that רבא mentions), therefore it is obvious that ר"ל ור"י agree that א"א פורע תו"ז, and nevertheless ר"י ורב אסי agree that a מלוה can never collect מנכסי יתמי קטני even if it is תוך זמנו (unless רבית אוכלת בהם).

תוספות mentioned previously that the סוגיא in ערכין wherein רב אסי ור"י made their statements follows the view of צררי and not the view of רב פפא. תוספות anticipates a difficulty with this assumption:

ובפרק ד' וה' – and in פרק ד' וה' (בבא קמא דף לט,א ושם)

דפריך לרבי יוחנן – where the גמרא **challenges** the view **of ר"י**

דאמר - who maintains that if a מועד ox of the יתומים estate gored another ox we collect for the damages

מעליית היתומים – from the assets of the יתומים. The גמרא challenges this ruling for ר"י contradicts himself –

והאמר רבי יוחנן אין נזקקין לנכסי יתומים – for ר"י maintains that we do not assign the assets of יתומים for collection –

אלא לכתובת אשה – only for the purpose of giving **a woman her כתובה.** Why do we collect from the נכסי יתומים for the goring of their ox? This concludes the quote from the גמרא. תוספות proceeds to explain the difficulty with what was previously mentioned.

ואף על גב דקיימא לן – and even though we accept –

[34] תוספות does not inform us how it is evident. See סוכ"ד אות קכד.

דטעמא הוי משום צררי – that the reason we do not collect from יתומים is **because of צררי** and not because of יתמי לאו בני מיעבד מצוה נינהו; therefore the גמרא's question is not understood –

והתם בשור שנגח לא שייך צררי – for there by the case where **the ox** that belonged to their estate **gored,** and ר"י obligated them to pay from their estate **the** concern of **צררי is not applicable**, for the liability was incurred after the father died. It would seem that if the only concern is צררי the יתומים should be liable. How can the גמרא compare the case of שור שנגח to the case of a loan that was made to the father?

תוספות replies:

מכל מקום פריך שפיר – nevertheless even though the reason of צררי is not applicable by שור שנגח, **the** גמרא's **question is in order –**

דרבי יוחנן אית ליה דאין נזקקין בכל ענין – for ר"י maintain that we never assess the assets of יתומים **in any event –**

אפילו במלוה הבא מחמת עצמו – even by a loan which was generated by the יתום **himself;** the יתום borrowed the money

דלא שייך צררי – where the concern **of צררי is not applicable;** nevertheless one cannot collect מנכסי יתמי, this is

מטעם - on account of the reason –

דאין מקבלין עדות שלא בפני בעל דין – for בי"ד **does not accept testimony in the absence of the** opposing **litigant.** קטנים, as mentioned earlier in תוספות, are considered שלא בפני בע"ד.

Summary

תוספות maintains that (according to רב פפא and) even according to ר"ה בדר"י one cannot collect from יתומים קטנים even if the לוה died תו"ז. The reason is because by יתומים קטנים we are concerned for צררי even תו"ז. We find a (similar) חשש of צררי תו"ז by an אלמנה.

The proof that we do not collect מיתמי קטני תו"ז is: a) from the fact that the גמרא did not reconcile רב אסי and the משנה of שום היתומים, by saying that the משנה is discussing a case of תו"ז; and b) from the statements of רב אסי and ר"י which limit the collection from יתמי קטני to the instances of רבית אוכלת בהם and כתובת אשה exclusively; but no other – including תו"ז.

Thinking it over

1. If יתמי קטני are included in the rule of 'אין מקבלין עדות שלא בפני בע"ד', why is it necessary for ר"ה בדר"י to offer the reason of צררי?[35]

[35] See footnote # 12.

2. Why does תוספות find it necessary[36] to offer a second explanation as to why the גמרא did not say that the נפק"מ between ר"פ and ר"ר בדר"י is in a case of מית לוה בתוך הזמן?

3. What proof is there from the fact that the גמרא did not answer that the משנה is discussing a case where מית לוה קודם הזמן; perhaps that גמרא holds that אדם פורע תו"ז?[37]

[36] See footnote # 24.
[37] See footnote # 30. See מהרש"א.