

Even though the רבנן – הא ליפרע מנכסי יתומים כולי – said; ‘he who comes to collect from the assets of orphans, etc.’

OVERVIEW

הבא ליפרע מנכסי יתומים לא and גמרא Our refers to a well-known ruling that משנה Our is searching for the source of this ruling in a בשבועה.

ותניא נמי בפרק הכותב (כתובות דף פז, א ושם) –

And it is also stated in a ברייתא in פרק הכותב –

אבל מה אעשה שהרי אמרו חכמים הבא ליפרע כולי –

‘However what can I do, for the חכמים stated: that he who comes to collect, etc. from יתומים must swear’. The fact that this ruling is quoted in a ברייתא preceded by the phrase - שהרי אמרו חכמים

משמע שהיא משנה בשום מקום¹ –

indicates that it is a quote from a משנה somewhere. The ברייתא is quoting a known ruling. Such a universal ruling would be stated in a משנה.

asks: תוספות

ותימה היכא אמרו חכמים דמאלמנה ליכא למילף דשאני אלמנה דאית לה בתנאי בית דין –

And this is puzzling; for where have the חכמים stated this ruling in a משנה². For we cannot derive this ruling of הא ליפרע מנכסי יתומים לא יפרע אלא בשבועה, from the case of אלמנה, for אלמנה is different from other debts and obligations, for she is owed the כתובה by virtue of a stipulation of בי"ד; it is not a self-imposed obligation as other debts are.

וחיישינן לצררי טפי³ –

And therefore by אלמנה we are more concerned about the possibility of צררי; that the husband may have presented her (while he was alive) with a bundle of valuables to cover his obligation. Therefore she must swear. However by a regular loan since the מלוה is holding the שטר, there may be no need for a שבועה. Where then is the Mishnaic source for the ruling that הבא ליפרע מנכסי יתומים לא יפרע אלא בשבועה?

¹ From the fact that our גמרא states דאמור רבנן, there is no strong indication that it is a משנה, it could be a ruling of תנאים in a ברייתא or even of previous אמוראים. However since this ruling is quoted in a ברייתא, as a known ruling, that would indicate that the original source is a משנה.

² Our תוספות is aware that there is a משנה in (פז, א) which states that an אלמנה cannot collect from the יתומים אלא, however we cannot use אלמנה as a source that by other obligations as well, one must swear to collect from יתומים; as תוספות continues -

³ See previous תוספות ד"ה ואפילו (footnote # 17) at length.

answers: תוספות

ואומר רבינו יצחק מדתנן בפרק הכותב (שם דף פד,א) גבי מי שמת והניח אשה ובעל חוב –

And the ר"י said that the source is from the משנה in פרק הכותב which states concerning one who died and left over debts to his wife (כתובה) and/or a creditor to whom he owed a loan -

והיה לו מלוה ופקדון ביד אחרים כולי יתנו ליורשים⁴ –

And he possessed either a loan or a deposit by others, etc. He was a creditor as well; he was owed money. The question is how these owed assets should be distributed; should they be given to the wife for her כתובה or to the מלוה for his loan, etc. The משנה states that these owed assets should be given to the heirs; not to the אשה ובעל חוב. The reason is as the משנה there continues -

שכולם צריכים שבועה ואין היורשין צריכין שבועה –

For all the creditors require an oath to collect from the assets of the deceased (which belong to the heirs), however the heirs are not required to swear in order to collect their inheritance. We see from that משנה that both the אלמנה and the חוב בעל (מלוה) cannot collect from the estate of the יתומים – יורשים unless they swear.

offers an additional source: תוספות

ועוד תנן בשבועות (דף מה,א) וכן היתומים מן היתומים⁵ לא יפרעו אלא בשבועה וכולי –

And furthermore we learnt in a משנה in שבועות; ומסכת שבועות; and similarly orphans of the creditor who wish to collect from the orphans of the debtor they may not collect unless they swear, etc.; Even though they have a שטר that the deceased debtor owed their deceased father money. What do the creditor's orphans swear? The משנה continues -

שלא מצינו בין שטרותיו של אבא ששטר זה פרוע –

‘That we have not found among the documents of our deceased father that this note was paid’ -

אלמא גם האב היה נשבע שאינו פרוע –

We derive from this that the (creditor) father would also have to swear that the note was not paid up. If the father would be able to collect from the יתומים of the לווה without a שבועה, why impose a שבועה on his children?⁶ They should inherit his right of collection! The fact that they are required to swear proves that their father would not be able to collect without an oath; therefore we allow them to collect only if they swear.

⁴ This opinion is stated there in the name of רבי עקיבא.

⁵ The משנה there states that יתומים collect only with a שבועה. The גמרא clarifies that the משנה cannot mean that יתומים cannot collect from the לווה only with a שבועה, for if the מלוה can collect without a שבועה so should the יתומים be able to collect without a שבועה. Therefore the גמרא concludes that it means that יתומים cannot collect from the יתומים without a שבועה (see ‘Appendix’).

⁶ See previous footnote # 5.

concludes תוספות:

מכאן משמע שאם הוציא שטר חוב על חבירו ואמר ליה אישתבע לי דלא פרעתיך בגו זימניה – it seems from this גמרא that if one presented a note against his friend; stating that he owes him money and the לווה said to the מלוה swear before me that I did not pay you before the due date,⁷ the דין would be that the מלוה –

אין צריך לעשות שבועה:

is not required to take this oath. If the דין would be that the לווה can force the מלוה to take this oath, then by יתומים the מלוה would also be required to take the oath even if the לווה died תוך יתומים and the יתומים are not requesting this oath. The דין is that בי"ד presents on behalf of the יתומים any claim that their father could have claimed. If the father can demand a שבועה תו"ז, then בי"ד would do the same for the יתומים. The fact, that the גמרא concludes that the מלוה does not swear for the יתומים תו"ז, proves that the father cannot demand such an oath either.⁸

SUMMARY

The ruling of 'הבא ליפרע מנכסי יתומים לא יפרע אלא בשבועה' can be derived either from the משנה in כתובות where it states that the בע"ה needs to swear, or from the משנה in שבועות where it states that the יתומים of the מלוה need to swear in order to collect from the יתומים of the לווה.

One cannot demand that the מלוה swear that תו"ז שלא פרעתיך.

THINKING IT OVER

שלא מלוה swear the לווה cannot make the מלוה swear שלא מלוה does not swear to the יתומים תו"ז. Seemingly from the fact that the מלוה does not swear to the יתומים תו"ז, פרעתיך תו"ז there is a difference. By the יתומים there is only a טענת שמא, perhaps the loan was paid. Therefore the חזקה of פורע תו"ז א"א negates the שבועה. However by the לווה himself, since it is a טענת ברי perhaps he could require the מלוה to swear שלא פרעתיך. ⁹תו"ז!

APPENDIX

It is not clear what is the connection between the end of תוספות concerning a שבועה with the beginning of תוספות concerning the source from where we derive the rule that 'הבא ליפרע וכו'.

⁷ If the לווה requests that the מלוה take an oath that he was not paid after the due date, then the מלוה must swear, even if he has a שטר (מקום). See שבועות מא,א.

⁸ See 'Appendix'.

⁹ See ועי' בבית לחם יהודה ועוד. רא"ש סי' ט.

Perhaps one can say (להידודא עכ"פ) that anticipated and (partially) resolved the question addressed in 'Thinking it over'. The second משנה that תוספות cited as a source for 'הבא ליפרע' is that היתומים מן היתומים לא יפרעו אלא בשבועה. The actual משנה states היתומים לא יפרעו אלא בשבועה; however the גמרא questions what it means. It cannot mean that the היתומים cannot collect from the לווה without a שבועה, for since the מלוה can collect without a שבועה, so too the היתומים should be able to collect without a שבועה. [Therefore it must mean that היתומים לא יפרעו אלא בשבועה.]¹⁰ However one may challenge the assumption of the גמרא, that the משנה cannot be discussing a case of הלוה מן הלוה. Perhaps there is a difference between הלוה where no שבועה is required and היתומים מן הלוה where a שבועה is required. When the מלוה claims that the לווה owes money it is a טענת ברי, therefore no שבועה is required. However when the היתומים want to collect from the לווה, there is no טענת ברי; it is possible that the לווה repaid the loan unbeknown to the היתומים. Why therefore does the גמרא assume that since the מלוה does not require a שבועה, the same applies for the היתומים?!

From the fact that the גמרא does not make this difference, we see that גמרא maintains that the היתומים have the same טענת ברי as their father. The בי"ד of טענין on behalf of the היתומים (that the loan is owed), has the same ודאות as the father's claim. Therefore by the היתומים it is also considered a טענת ברי and no שבועה is required. The source of ליפרע is based (according to this source) on the assumption that טענת ברי is considered a טענין ליתומים.

Similarly in our case if the father would be able to demand a שבועה תו"ז, this טענה would automatically be transferred to the היתומים as a טענת ודאי. This would seemingly answer the question posed in 'Thinking it over'.

However the question in 'Thinking it over' may still remain. We cannot compare the two cases. By מן הלוה (מן היתומים) the היתומים have a שטר that supports their claim, therefore that טענת ברי is considered a טענת ודאי. In our case however the היתומים have no support for the טענה of תו"ז; on the contrary the חזקה of א"א contradicts such a claim. Perhaps in such a case there is a difference between a טענת ברי and the טענין of בי"ד which is not a טענת ברי. ודו"ק.

¹⁰ See footnote # 5.