אף על גב דאמור רבנן הבא ליפרע מנכסי יתומים כולי – Even though that the רבנן said that **he who comes to collect from the assets of orphans, etc.**

Overview

Our גמרא and others refer to a well known ruling that הבא ליפרע מנכסי יתומים וכו' אלא בשבועה. תוספות is searching for the source of this ruling in a משנה.

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 – 'however what can I do, for the חכמים stated: that

הבא ליפרע כולי – he who comes to collect, etc. from יתומים must swear.

The fact that this ruling is quoted in a ברייתא[1] preceded by the phrase שהרי אמרו חכמים – **משמע שהיא משנה בשום מקום – 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.

תוספות asks:

ותימה היכא אמרו חכמים – And this **is puzzling;** for **where have the חכמים stated** this ruling in a משנה. Our תוספות is aware that there is a משנה in כתובות (פז,א) which states that an אלמנה cannot collect from the יתומים אלא בשבועה, however we cannot use אלמנה as a source that by other obligations as well one must swear to collect from נכסי יתומים; as תוספות continues –

דמאלמנה ליכא למילף – for we cannot derive this ruling of הבא ליפרע מנכסי יתומים לא יפרע אלא בשבועה **from** the case of **אלמנה.**

דשאני אלמנה – for אלמנה is different from other debts and obligations –

דאית לה בתנאי בית דין – 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 טפי – and therefore by אלמנה **we are more concerned about** the possibility **of צררי[2];** that the husband may have presented her (while he was alive) with a bundle of valuables to cover his כתובה 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?

תוספות answers:

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[1] From the fact that our גמרא states אע"ג 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] See previous תוספות ד"ה ואפילו at length.

ואומר רבינו יצחק מדתנן בפרק הכותב (שם דף פד,א) – And the ר"י said that the source is **from the משנה in פרק הכותב** which states –

גבי מי שמת והניח אשה ובעל חוב – 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 – 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 –

יתנו ליורשים – should be given to the heirs[3]; not to the אשה ובעל חוב. The reason is as the משנה continues –

שכולם צריכים שבועה – for all the creditors **require an oath** to collect from the assets of the deceased (which belong to the heirs) –

ואין היורשים צריכים שבועה – 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 בעל חוב (מלוה) cannot collect from the estate of the יתומים – יורשים unless they swear.

תוספות offers an additional source:

ועוד תנן בשבועות (דף מה,א) – and furthermore we learnt in a משנה in מסכת **שבועות**

וכן היתומים מן היתומים – and similarly orphans[4] of the creditor who wish to collect **from the orphans** of the debtor –

לא יפרעו אלא בשבועה וכולי – 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 – that we have not found among the documents of our deceased **father –**

ששטר זה פרוע – 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 לוה without a שבועה, why impose a שבועה on his children?![5] 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.

תוספות concludes:

מכאן משמע – it seems from this גמרא

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[3] This opinion is stated there in the name of רבי עקיבא.

[4] 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 לוה 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').

[5] See previous footnote # 4.

שאם הוציא שטר חוב על חבירו – that if one presented a promissory note against his friend; stating that he owes him money –
ואמר לו אישתבע לי דלא פרעתיך – and the לוה **said to** the מלוה **swear before me that I did not pay you –**
בגו זימניה – before the due date[6], 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 לוה can force the מלוה to take this oath, then by יתומים the מלוה would also be required to take the oath even if the לוה died תוך זמנו 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.[7]

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

Thinking it over
תוספות maintains that we can derive that the לוה cannot make the מלוה swear שלא פרעתיך תו"ז, from the fact that the מלוה does not swear to the יתומים תו"ז. Seemingly there is a difference. By the יתומים there is only a טענת שמא, perhaps the loan was paid. Therefore the חזקה of א"א פורע וכו' negates the שבועה. However by the לוה himself, since it is a טענת ברי perhaps he could require the מלוה to swear שלא פרעתיך תו"ז.[8]

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

Perhaps one can say (לחידודא עכ"פ) that תוספות 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 לא יפרעו אלא (מן היתומים) היתומים לא יפרעו אלא בשבועה. The actual משנה states; however the גמרא

[6] If the לוה 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 (מקוים). See שבועות מא,א.
[7] See 'Appendix'.
[8] See ועי' בבל"י ועוד .רא"ש סי' ט.

questions what it means. It cannot mean that the יתומים cannot collect from the לוה without a שבועה, for since the מלוה can collect without a שבועה, so too the יתומים should be able to collect without a שבועה. [Therefore it must mean that היתומים מן היתומים לא יפרעו אלא בשבועה.][9] However one may challenge the assumption of the גמרא, that the משנה cannot be discussing a case of היתומים מן הלוה. Perhaps there is a difference between המלוה מן הלוה where no שבועה is required and היתומים מן הלוה where a שבועה is required. When the מלוה claims that the לוה owes money it is a טענת ברי, therefore no שבועה is required. However when the יתומים want to collect from the לוה, there is no טענת ברי; it is possible that the לוה repaid the loan unbeknown to the יתומים. Why therefore does the גמרא assume that since the מלוה does not require a שבועה, the same applies for the יתומים?!

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

Similarly in our case if the father would be able to demand a שבועה תו"ז, this טענה would automatically be transferred to the יתומים 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) היתומים the יתומים have a שטר that supports their claim, therefore that טענינן is considered a טענת ודאי. In our case however the יתומים have no support for the טענה of פרעתיך תו"ז; on the contrary the חזקה of א"א פורע תו"ז contradicts such a claim. Perhaps in such a case there is a difference between a טענת ברי and the טענינן of בי"ד which is not a טענת ברי. ודו"ק!

[9] See footnote # 4.