וכותב בכתב ידו ואחרים חותמים –

And he writes with his handwriting and others sign

Overview

אביי attempted to resolve the query whether ידעה לאקנויי (אשה), from the ברייתא of the זקן אחד who would write the שטר (מלוה) with his handwriting and others would sign the שטר; indicating that he knew how to be מקנה.[1] Our תוספות discusses and explains the connection between גט and the case of the זקן אחד.

תוספות asks:

ואם תאמר מה ענין שטרי הלואה לגט דאינם אלא לראיה[2] –

And if you will say; what is the connection of a loan document to a גט; for loan document **are only for proof** of the debt**,** they do not create the debt, as opposed to a גט where it creates the divorce[3] -

תוספות explains that even the lien on the borrower's properties does not require a שטר:

ואפילו במלוה על פה היה גובה ממשעבדי[4] אי לא משום דאין לה קול –

For the מלוה **would be able to collect from משעבדי even if it was an oral loan** (without a שטר), **if not** for the fact **that there is no publicity** to this loan -

כדאמרינן בחזקת הבתים (בבא בתרא מב,א) דמאן דיזיף בצנעה יזיף[5] –

As the גמרא **states in** פרק **חזקת הבתים, that one who borrows, borrows in stealth -**

ומכר שיש לו קול אמרינן (שם מא,ב) המוכר שדהו בעדים גובה מנכסים משועבדים[6] –

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[1] Usually the לוה writes the שטר מלוה, thereby obligating him to repay the loan and places a lien on his properties from which the מלוה can collect. This seemingly requires a ספר המקנה by which this obligation takes effect. If the מלוה writes the שטר, the לוה seemingly is not obligating himself, proving that the מלוה is מקנה the שטר to the לוה and therefore there is a proper obligation on part of the לוה.

[2] The obligation to repay the debt (as well as the lien on the properties) is created through the loan, not by the writing of the שטר מלוה whose purpose is only that the לוה should not deny that he borrowed and owes the money. Therefore there is no need (by a loan) of a ספר המקנה.

[3] The גט is not merely a proof that she was divorced (as a שטר מלוה is a proof of the loan), but rather the גט creates the divorce; therefore the husband must own the גט to comply with the ונתן.

[4] משעבדי are the fields which the לוה sold after the loan, on which the מלוה has a lien. In truth the מלוה should always be able to collect from משעבדי even if it is a מלוה ע"פ (whether because שעבודא דאורייתא or שלא תנעול דלת בפני לווין), however the חכמים (in order to protect the buyers) instituted that unless there is a קול (through a שטר בעדים) that the לוה owes monies which are guaranteed by these properties, the מלוה cannot collect from משעבדי. The שטר does not make the שעבוד (the שעבוד is made by the loan), it only makes the קול.

[5] Therefore the buyers are not aware that a loan took place and that there is a lien on the properties they wish to purchase. To protect the buyers and promote commerce the rule is that if there is no קול there is no שעבוד.

[6] If a מלוה or a נגזל takes away the field from the buyer, the buyer can seek recourse from the seller; even from his נכסים משעובדים, for at the time of the sale the seller's other properties were משעובד to guarantee the sale.

For regarding a sale where there is publicity רב states, one who sells his field with witnesses he can collect from the encumbered assets even if there is no שטר –

תוספות replies:

ונראה לפרש דנראה לגמרא דמסתמא כיון שהיה מלוה לכל בני העיר –

And the explanation seems to be that it appears to the גמרא that presumably since this זקן **was lending money to the all the people of the city -**

גם הם היו עושים לו טובה ונותנים לו במתנה[7] או מוכרים לו שדות –

They would also grant him favors and would gift to him or sell to him fields -

דפעמים שלא היו קנויין לו אלא בשטר[8] כגון שדי נתונה לך או מכורה לך[9] –

Where oftentimes these fields **would not be acquired by him only with a שטר;** which would state **for instance, my field is gifted to you or it is sold to you -**

וגם השטרות האלו היה כותב אותם ואחרים חותמים:[10]

And this זקן **would write even these שטרות** (which are שטרי קנין) **and others would sign.** They are effective only because presumably the זקן was ידע לאקנויי these שטרות to the grantors or sellers.

Summary

The proof from the זקן was from the שטרי קנין (of מתנה or מכר), but not from the שטרי ראיה of מלוה.

Thinking it over

תוספות says that the people (because he lent them money) would give the זקן מתנות.[11] However, that should be considered רבית and we refer to him as a זקן (a ת"ח)![12]

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[7] See 'Thinking it over'.

[8] A מתנה or מכר can also be acquired through קנין חזקה (and by מכר [sometimes] through קנין כסף), nevertheless there are times where the קנין is accomplished by a שטר קנין.

[9] In these cases the שטר is not merely a שטר ראיה to prove the transfer of ownership, but rather it is a שטר קנין it creates the transfer of ownership; such a שטר is a ספר מקנה and must belong to the grantor or seller in order that the transfer of ownership take place.

[10] We need to say that when the גמרא states וכותב בכת"י ואחרים חותמים it is referring to these שטרי קנין.

[11] See footnote # 7.

[12] See חתם סופר (בגמ' ד"ה והיה מלוה) and בל"י אות תצד.