ואם יש עליו עוררין יתקיים בחותמיו –

And if there are those **who contest** the validity of the גט[1], **it should be authenticated through its signatories.**

Overview

The גמרא teaches us[2] that עדים החתומים על השטר נעשה כמי שנחקרה עדותן בבי"ד; that we view a שטר with עדים as if בי"ד has already cross examined the witnesses and verified the truth of their testimony in the שטר. Nevertheless, the גמרא continues, ורבנן הוא דאצרוך, the חכמים require קיום השטר if the debtor[3] claims that it is forged. The question at hand is whether after this תקנת חכמים there is a real concern that the שטר may be מזוייף, even without the לוה claiming so, or that there is no real חשש מזוייף, unless the לוה explicitly claims so. If we assume the first option, that there is a concern that a שטר may be מזוייף, then if the לוה is not present, it may be incumbent upon בי"ד to express this concern on behalf of the affected party, and through טענת מזוייף, require the בעל השטר to be מקיים the שטר. Otherwise the שטר will be deemed invalid. If however we assume the second option that without the לוה explicitly claiming מזוייף, there is no reason for בי"ד to be concerned that a שטר is מזוייף, because people generally are not מזייף שטרות, then (even) in the absence of the לוה there is no need nor any authority for בי"ד to challenge the validity of the שטר with טענת מזוייף, for we accept the שטר as being valid. תוספות will be discussing this issue, seemingly accepting the first option namely that טענינן מזוייף, so that בי"ד will challenge the authenticity of any שטר brought before them.

Regarding a מלוה who presents a שטר שאינו מקויים to a לוה and demands payment, and the לוה claims פרעתי; there is a מחלוקת in the גמרא. One מאן דאמר holds מודה בשטר שכתבו צריך לקיימו, meaning that (even) if the לוה agrees that he wrote the שטר, i.e. he borrowed the money, but he claims that he already paid it, the מלוה cannot collect the money unless he is מקיים the שטר. The reason is because the לוה has a מיגו of מזוייף. If the לוה would be טוען מזוייף the מלוה would have to be מקיים the שטר, the same holds true by the טענה of

[1] The גמרא דף ט,א explains this to mean that the husband contests the גט, saying that it is forged.

[2] לקמן ג,א.

[3] The term לוה/debtor is used loosely here; it refers to anyone adversely affected by the שטר, i.e. a purported seller, giver of a gift etc.

פרעתי. The other מאן דאמר is of the opinion מודה בשטר שכתבו אין צריך לקיימו, because the טענה of פרוע is worthless in the face of a שטר in the hands of the מלוה. Our תוספות generally, will be following the view of מ"ד who maintains מודה בשטר שכתבו צריך לקיימו.

תוספות infers from the wording of the משנה that אם יש עליו עוררין יתקיים בחותמיו:

אבל כל זמן דלא אתי בעל ומערער נישאת על פי הגט ולא טענינן מזוייף –

However, as long as the husband does not come to contest the validity of the גט, **she may get married by virtue of the גט** alone[4]**,** which declares her to be a divorced women, even though we knew that she previously was a married woman, **and** בית דין **does not challenge** the validity of this גט, that perhaps it may be **forged** (that her husband never divorced her)**,** and therefore we should not permit her to marry until she can authenticate the signatures. The reason why we do not challenge the גט, continues תוס' –

דמשום עיגונא[5] הקילו בה רבנן –

because of the concern of בי"ד, that if we require her to be מקיים the גט, and it may be difficult for her to find proper עדים to do so[6], she will not be able to remarry and will remain an **עגונה**, therefore **the רבנן were lenient**[7] in **her** case, and allow her to marry, even without being מקיים the עדי הגט.

תוספות distinguishes between גט and monetary issues regarding קיום:

אבל בממון טענינן מזוייף –

However when it comes to **monetary issues,** then בי"ד **challenges** the bearer of the document to prove that it is not **forged,** before he is able to collect his monies**.** Why does בי"ד need to issue this challenge, let it be leveled by the debtor etc., and if the debtor does not claim that it is forged, how can בי"ד issue such a challenge? תוספות goes on to explain why בי"ד will issue such a challenge in the following circumstances where the debtor is not present; for instance:

לנפרע שלא בפניו ומיתומים ומלקוחות -

in the case where a מלוה seeks to **collect his debt not in the presence** of the

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[4] The משנה tells us that אם יש עליו עוררין, only then must it be יתקיים בחומתיו, otherwise she remarries without קיום.

[5] עינון refers to the status of a woman who was previously married, however her current marital status is indeterminate. We are not certain whether she is divorced or widowed, or still married. The word עיגון translates to 'an anchor' (of a ship). This woman is also anchored and has no freedom to remarry.

[6] See 'Thinking it Over' # 1

[7] See 'Thinking it Over' # 2

לוה; the מלוה presents his שטר חוב to בי"ד and/or to the family of the לוה that the loan is due, and he is seeking to collect the funds from the estate of the לוה who happens not to be here presently; Or in a case where he wishes to collect his debt **from the orphans** of the לוה, and he presents them with a שטר that their father borrowed money from him and it is presently due; **or** in a case where the מלוה wishes to collect his loan **from** those **who purchased** real property from the לוה, after the alleged loan was made, thereby giving the מלוה a lien on those properties, since they are משועבד to him for his loan. In all these three cases the לוה is not present to challenge the מלוה that the שטר חוב is מזוייף; and the family members, the orphans, and the purchasers are in no position to argue that the שטר חוב is forged[8], therefore in order to protect the rights of these aforementioned, בי"ד will present the challenge to the מלוה, that this שטר may be מזוייף[9] and the מלוה cannot collect this loan from the aforementioned until he is מקיים the שטר.

תוספות will presently give a reason why the בי"ד can (and should) challenge the שטר that it may be מזוייף. For one may argue that בי"ד should not be able to claim that the שטר is מזוייף; either because it is very rare that a שטר should be forged[10], or because we are impinging on the חזקת כשרות of the מלוה by accusing him that he willingly and knowingly forged a שטר etc.,[11] nevertheless תוספות maintains that בי"ד must have the right to טענת מזוייף.

דאם לא כן לא שבקת חיי לכל בריה –

For if you will say **that it is not so**, and בי"ד will not have the right to טענת מזוייף, **you will not permit any creature to live!** There will be a catastrophe, because once people become aware that בי"ד will not challenge their שטרות to say that it may be מזוייף –

שיוכל כל אדם לכתוב שטר מלוה ולהחתים עדים מעצמו –

for everyone[12] will be able to write for himself a **שטר מלוה,** that so and so owes him money **and he himself will sign as the witnesses**, i.e. he will forge any two signatures he so desires –

ולטרוף שלא בפניו מיתומים ומלקוחות -

And he will collect this bogus debt **not in the presence** of the לוה, **either**

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[8] If they were to challenge the authenticity of the שטר, it would only be with a טענת שמא (maybe it is forged, since they are not sure), which would not be strong enough to require קיום השטר.

[9] Even though בי"ד cannot claim with certainty that the שטר is מזוייף; nevertheless the טענה of בי"ד, as a representative of the לוה, is considered a טענת ודאי (as opposed to any טענה by יורשים ולקוחות, which is considered a טענת שמא).

[10] See תוס' ב"מ יג,ב ד"ה הא (עיי"ש).

[11] It would seem inappropriate for בי"ד to be making far-fetched claims (with certainty!).

[12] Obviously תוספות means (only) those with no יראת שמים and no moral scruples.

from the orphans or the purchasers and no one will be able to prevent him from collecting monies on false pretenses. We cannot allow this state of affairs. Therefore it is incumbent upon בי"ד in such cases, that they get involved and challenge the מלוה to prove that his שטר is not מזוייף, and only then to collect his debt.

תוספות will now reconsider, that perhaps בי"ד cannot be טוען מזוייף[13], and as far as the concern of לא שבקת חיי לכל בריה, perhaps we can find another way to protect the innocent.

ומיהו מזה אין להוכיח דאפילו לא טענינן להו מזוייף טענינן להו פרוע –

However on account of the concern for לא שבקת חיי לכל בריה, that is **not** sufficient reason **to prove** that בי"ד is טוען מזוייף, **for even** if בי"ד **will not** be **טוען מזוייף for the aforementioned**, there will not necessarily be the problem of לא שבקת וכו'; because **בי"ד will argue on their behalf,** and challenge the מלוה to prove that the loan was not **paid** in full[14]; and until the מלוה proves that the loan was not paid he will not be able to collect his debt.

What is seemingly not understood is; if we are טוען פרוע, that means we agree that there was a loan, however we claim that it was paid off; but how can we argue that the loan was paid if the מלוה is in possession of the שטר, which would seem to preclude any claim of פרוע, for that is (one of) the main purposes of a שטר to prevent the לוה from claiming that the loan was paid.
In addition if we are to claim פרוע, how can the מלוה prove that it is not פרוע? This will become clearer presently, as תוספות continues to explain how בי"ד can be טוען פרוע –

דכיון דהוא עצמו הוי מהימן לומר פרוע מיגו דאי בעי אמר מזוייף –

For since the לוה **himself would be believed to claim** that the loan was **paid** through the power of a **מיגו**, **since he could have argued** that the שטר is **forged.** If the לוה himself would claim that the שטר is forged (that he never borrowed money from the מלוה), then in order for the מלוה to collect his debt, the מלוה would be required to be מקיים the עדי השטר. This fact indicates that the לוה can prevent the מלוה from collecting the debt, when the שטר is not מקויים, by the לוה claiming that the שטר is מזוייף. Therefore through the power of מיגו we grant the לוה this same right to withhold payment from the מלוה, even if he does not claim מזוייף, but rather he claims פרוע, nevertheless the מלוה cannot collect his debt without being מקיים the שטר. For a שטר which is not מקויים is not really that powerful, it is at the mercy of the לוה, who can invalidate this שטר by claiming מזוייף, therefore until the שטר is מקויים, it is not much of a שטר and cannot be

[13] For the reasons stated previously (See 'Overview').

[14] The advantage of having בי"ד use טענת פרוע over טענת מזוייף is; that פרוע as opposed to מזוייף is שכיח, people pay their loans, and also it does not impinge on the integrity of the מלוה as מזוייף does, for it could be that when the לוה paid the מלוה, he did not have the שטר at hand to return to the לוה, and subsequently when the מלוה had access to the שטר he forgot that the לוה paid him. [See בל"י אות יג.]

used to disprove the claim of the לוה that the שטר is פרוע. However once the שטר is מקויים, then it has the complete validity of two witnesses that say the לוה owes the מלוה money, then neither the טענה of מזוייף, nor פרוע will be accepted.

Therefore, since the לוה can claim פרוע, and force the מלוה to be מקיים the שטר, so too can ביד claim the טענה of פרוע and not let the מלוה collect שלא בפני הלוה unless he is מקיים the שטר. We see then, that it is possible to circumvent the problem of לא שבקת even if ביד is not טוען מזוייף, only פרוע. The result will be the same; the מלוה will have to be מקיים the שטר.

There still remains a difficulty. The reason, why when the לוה is טוען פרעתי that the מלוה has to be מקיים the שטר is because the לוה has the מיגו, that he could have been טוען מזוייף. If that מיגו would not exist (if the שטר was מקויים, for instance), then the טענת פרעתי would not be acceptable; here however by ביד, we are now assuming that ביד does not (read: cannot) claim מזוייף, only פרוע, but we just explained that פרוע without מזוייף is an unacceptable claim. What good would it then do if ביד would only to be able to claim פרוע and not מזוייף. תוספות continues to address this issue: that since the לוה has the power to force the מלוה to be מקיים the שטר through his טענה of פרעתי, so too ביד, who take the place of the לוה, can also force the מלוה to be מקיים the שטר, by their טענה of פרוע, even though they cannot be טוען מזוייף. They do not need a מיגו to force the מלוה to be מקיים the שטר, the power of ביד stems from the fact that they are in the place of the לוה.[15]
תוספות will now prove this point:

דקיימא לן כמאן דאמר בפרק המוכר את הבית (בבא בתרא דף ע,ב) –

For we accept the view of the one who maintains in the פרק המוכר את הבית –

גבי שטר כיס היוצא על היתומים דנשבע וגובה מחצה –

regarding the case of a **certificate of investment**[16] **that was presented to יתומים** for collection of the investment[17]. The bearer/investor of the שטר כיס

[15] See 'Appendix'.

[16] We will assume that the שטר כיס was מקויים, and no טענה of מזוייף will be valid.

[17] A שטר כיס is a note confirming the investment of a sum of money by an investor with a manager of the monies, for business purposes. The investor will give the manager a sum of money; let us say $1,000, with the understanding that the manager will try to make a profit by doing some sort of business with it. The manager and the investor will both share in either the profit or loss. If, for instance all the monies are lost, the manager who is responsible for half will have to repay the investor $500. This שטר כיס arrangement is categorized by the גמרא as being מחצה מלוה ומחצה פקדון – half loan and half deposit; for we know when someone borrows money he is always liable to return the money he borrowed, regardless of what happened to the money. However by a פקדון – deposit, even if one is a שומר שכר, one is not liable if an unforeseen accident happened and the פקדון cannot be returned. So here by the שטר כיס the same applies; the manager was given $1000, and he lost all of it. Concerning the half loan of $500 he is liable and must repay it to the investor. Concerning the half פקדון of $500 (it is as if) an accident happened and he does not repay it, and the investor suffers the loss.

claims that he was not paid at all, and wants to collect the entire sum written in the שטר כיס from the יתומים of the original manager/borrower. According to one מאן דאמר the דין is **that the** מלוה/investor **swears**[18] that he was not paid at all, **and he may collect** from the יתומים **half** the amount of the שטר כיס. He collects the half that we consider a loan. For the father of the יתומים would also have to pay for it, since he does not have any counterclaim to the שטר כיס. Therefore the יתומים also have to pay.

אבל פלגא דפקדון טענינן להו פרוע הוא לך –

However concerning **the פקדון/deposit half** of the שטר כיס they do not pay, for בי"ד **will claim**[19] **on behalf** of the יתומים, that **it was already paid to you** by the father, and the יתומים do not have to pay the second half.

תוספות anticipates the following; how can the claim of פרוע outweigh the power of the שטר, since it is a שטר מקויים, and we know that פרוע is not a valid argument against a שטר מקום? However this שטר כיס is not a regular שטר הלואה but rather half the שטר is merely stating that the בעל השטר placed a פקדון in the רשות of the father. In the case of a פקדון even if the מפקיד has a שטר מקויים that states he deposited a certain item by the נפקד\שומר, nevertheless the שומר can claim that the פקדון was נאנס, and he will be פטור[20]. Going a step further; the שומר can claim that he returned the פקדון and still be believed[21], because he has a מיגו of נאנסו[22]. This places the שומר in a stronger position than the לוה, in that the שומר is believed with the טענה of פרוע\החזרתי even in the face of a שטר מקויים because of the מיגו of נאנסו, which a regular לוה does not have that specific מיגו.
From this גמרא it is evident that this טענה of פרוע by בי"ד in the case of שטר כיס is a valid טענה and prevents the בעל השטר from collecting from the יתומים –

אף על גב דלא טענינן להו נאנסו –

Even though בי"ד does not (cannot) **claim** on behalf of the יתומים **that** half the monies were lost due to an **אונס**[23], nevertheless בי"ד can claim החזירו and the

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[18] There is a general rule that one who collects from יתומים may not collect unless he swears, that he has not been paid up as of now.

[19] The גמרא there does not state explicitly that טענינן פרוע; however תוספות assumes that this is the manner in which the יתומים are פטור from paying the מחצה פקדון.

[20] The שומר will be פטור from paying for the article. However he will have to swear the שבועת השומרים that it was נאנס etc.

[21] The שומר will be פטור from paying for the article. However since the reason that he is פטור is on account of the מיגו, that he could have claimed נאנסו, therefore just as if he would have claimed נאנסו he would be פטור from payment, he would however be חייב a שבועה that it was נאנסו etc., the same if he claims החזרתי, he is פטור from paying but he must swear that החזרתי.

[22] We are now following the opinion of that one מאן דאמר that maintains the validity of טענת החזרתי במיגו דנאנסו

[23] בי"ד will not claim נאנסו, because אונס לא שכיח.

יתומים will be פטור**.** However if there is no טענה of נאנסו of what avail is the טענה of פרוע by בי"ד; without the מיגו of נאנסו the טענה of פרוע is worthless against a שטר מקויים. תוספות continues with his explanation –

משום דאביהם היה נאמן לומר החזרתיו לך במיגו דנאנסו –

because since **their father would have been believed to say I returned** the פקדון half **to you**, and we would have accepted his claim by virtue of his **מיגו,** that he could have claimed **נאנסו** and he would be believed, so therefore he is also believed when he claims החזרתיו. The same holds true by בי"ד, that their טענה of פרוע is accepted[24] (even though בי"ד has no מיגו).

We see from here that since the father is believed to claim החזרתיו במיגו דנאנסו, therefore בי"ד also has the right to claim החזירו, and be 'believed', just as the father would be believed, even though בי"ד does not possess this מיגו of נאנסו, nevertheless since בי"ד takes the place of the father, therefore any טענה by which the father would be believed, בי"ד is also believed. Therefore the same applies by a שטר שאינו מקויים. The בי"ד can claim פרעתי; just as the לוה can claim פרעתי and be פטור במיגו דמזוייף, so too בי"ד stands in the place of the לוה and can claim פרוע, thus requiring the מלוה to be מקיים the שטר, even without the מיגו of מזוייף.

Therefore we have no proof that טענינן מזוייף, because in order to prevent לא שבקת we can accomplish it by טענת פרוע, and it will be accepted even when there is no מיגו of מזוייף, because בי"ד takes the place of the לוה, and is believed to the same extent that the לוה would have been believed with the מיגו of מזוייף, as in the case of שטר כיס, where בי"ד is believed with טענת החזרתיו, just as the father would have been believed with the טענה of החזרתיו במיגו דנאנסו.

תוספות continues to argue that we can prove that טענינן מזוייף -

אבל יש להוכיח דטענינן להו מזוייף דאם לא כן –

However we can prove that בי"ד is טוען מזוייף, from a different perspective, (not from the case of a שטר חוב), **for if this were not so,** and בי"ד cannot claim מזוייף, we will have another similar problem, which cannot be solved by the טענה of פרוע -

כל אחד יכתוב שטר מכר או שטר מתנה ויחתום עדים –

Everyone will write a deed of sale, or a deed of a gift, indicating that the present owner of the property either sold or gifted to him this property **and he will** affix **the** false **signature** of **witnesses** on this deed. He will not present this deed to the present owner, for obviously the owner will rightfully claim that it is a שטר מזוייף, which will require him to be מקיים the שטר, which obviously he cannot do; rather what he

[24] The יתומים do not have to repay the פקדון פלגא, However they are still מחוייב a שבועה, just as their father would have to swear if he claimed נאנסו or החזרתי במיגו דנאנסו. The יתומים swear שלא פקדנו אבא; that our father never told us that he owes you anything.

will do is –

ויגבה שלא בפניו מיתומים מלקוחות –

and he will 'collect' this property **in the absence** of the original owner, either after his death, when he will present this שטר to take away the property **from the orphaned** children of the original owner, or he may present this שטר even while the original owner is alive to take away the field **from those that purchased** the field from the original owner, and show that his (bogus) deed of sale precedes theirs, and therefore their purchase is invalid and the field should revert to him -

דהשתא אין שייך לומר פרעתי –

For now in these cases **there does not exist the option** of claiming **פרעתי.** The only way בי"ד can prevent this type of fraud is by demanding of anyone claiming to have purchased property, and wants to remove an heir or purchaser presently occupying the property (who cannot knowingly contest his claim that he owned the property before the original owner died or sold it), is by בי"ד demanding that the claimant who bears such a שטר to be מקיים the שטר, otherwise we consider it מזוייף. This is a logical proof that טענינן מזוייף.

In addition to the logical proof that תוספות just presented, תוספות will now prove from the גמרא itself that טענינן מזוייף:

ועוד יש לדקדש מסוף פרק גט פשוט (שם דף קעד,ב) דטענינן ליתמי מזוייף –

And we may also infer from that which we learnt in **the end of פרק גט פשוט that** בי"ד is **טוען מזוייף on behalf of יתומים -**

דאמר רב הונא שכיב מרע שהקדיש כל נכסיו ואמר מנה לפלוני בידי נאמן –

for רב הונא said there **that a שכיב מרע**[25] **who was מקדיש all of his possessions** to הקדש, **and** consequently **the** שכ"מ **said that 'I owe that person a מנה'; he is believed**; so that we first pay the debt to this person from the possessions of the שכיב מרע, and then הקדש receives the rest of his possessions. The גמרא continues to explain the reason for this is because -

חזקה אין אדם עושה קנוניא על ההקדש -

There is a presumption that a person will not swindle הקדש, therefore we do not suspect that in reality the שכיב מרע did not owe this person anything, he just now decided to give this person some money, but since he was already מקדיש all his נכסים, the only way he can give this person money is by falsely claiming that he owed him money

[25] A שכיב מרע is a person who is deathly ill, and the חכמים were מתקן that in order that he have peace of mind, we are to heed his requests (even without a קנין), even when in ordinary circumstances these requests would not be honored except with an act of קנין.

prior to his being מקדיש his נכסים, therefore the הקדש was not חל on this מנה that he owed to this individual. We do not suspect him of this; because of the accepted rule that אין אדם עושה קנוניא על ההקדש.

ופריך וכי אדם עושה קנוניא על בניו –

And the גמרא **challenges** this ruling of רב הונא by asking, **will a person swindle his own children,** one would think certainly not! Nevertheless we find –

דרב ושמואל דאמרי תרוייהו שכיב מרע שאמר מנה לפלוני בידי -

That רב ושמואל both said: 'a שכיב מרע who said that "I owe that person a מנה", the דין is as follows:

אמר תנו נותנין לא אמר תנו אין נותנין –

if the שכיב מרע **said,** in addition to stating that he owes that person money, he also added: '**give** the money to him', then **we give** that person the money, **however if he did not** add and **say: 'give** him the money', then **we do not give** that person the money. The question is why if the שכיב מרע did not say תנו we do not give him the money, why is it different than הקדש, where the person gets the money even if the שכיב מרע did not say תנו, because we assume that he really owes him money since אין אדם עושה קנוניא על הקדש, here too he definitely must owe this person money for surely אין אדם עושה קנוניא על בניו?!

ומסיק דרב הונא איירי בשטר מקויים[26] –

And the גמרא **concludes** to resolve this apparent inconsistency, by saying that the case of **רב הונא** with הקדש **is in a situation where** the person in question is in possession of a **שטר מקויים,** which states that the שכיב מרע owes him money, and that is the reason why we give him the money; however in -

ורב ושמואל בדנקיט שטר שאינו מקויים –

The case of **רב ושמואל** we are discussing a situation where the person **is in possession of a שטר that was not מקויים**, therefore if the שכיב מרע also –

אמר תנו קיימיה לשטרא לא אמר תנו לא קיימי לשטרא –

Said, '**give** him the money', it is tantamount as **being שטר the מקיים,** and we have no choice but to give him the money, as in the case of הקדש. If however **the שכיב מרע did not say תנו, he was not מקיים the שטר,** and therefore we do not give him the money, even though the שכיב מרע admitted that he owes him money, nevertheless he does not receive the money, because in reality he may not owe him any money, and the reason he admitted that he does owe him money is because –

שמא שלא להשביע את בניו אמר כן –

[26] See תוספות there on קעה,א ד"ה הא, that the admission of the שכ"מ accomplishes that the מלוה need not swear in order to collect his debt (as he would have been required without the admission of the שכ"מ).

Perhaps he admitted it only **because he did not want** people to think that **his children are wealthy**, therefore he said I owe him money, giving the impression that his children will not inherit much money, because there are debts against the estate. That leaves the other person only with a שטר which is not מקויים, and that is insufficient to take away money from the יתומים.

תוספות comes now to prove his point that טענינן מזוייף ליתמי.

ואי לא טענינן מזוייף ליתומים מכל מקום יגבה דהא נקיט שטרא –

However, if בי"ד **does not claim מזוייף for יתומים,** what has בי"ד accomplished, **for nevertheless he will collect** the money from the יתומים **for he is in possession of a שטר,** that states that the deceased – the father of the יתומים – owes him money, and if בי"ד is not טוען מזוייף, when he presents this שטר, he will inevitably collect the 'debt'. That proves that טוענין מזוייף ליתומים, and therefore he cannot collect the debt without קיום השטר.

תוספות anticipates a possible rebuttal of this proof and refutes it:

ואין לומר דטענינן פרוע –

And one cannot say as a refutation of this proof, that really לא טענינן מזוייף, and nevertheless the בעל השטר will not collect the money from the יתומים **because** בי"ד **will claim פרוע,** and as we said previously that טענת פרוע of בי"ד requires that the מלוה should be מקיים the שטר, as if the לוה himself would have claimed פרוע, therefore seemingly this proof is refuted –

תוספות refutes this rebuttal, for one of the אמוראים that says this הלכה of שכיב מרע is רב, therefore the טענה of פרוע is no option –

דהא רב איתא ליה מודה בשטר שכתבו אין צריך לקיימו –

Because רב is of the opinion[27]**,** that a לוה who **admits that he wrote the שטר,** i.e. that he borrowed the money, but he claims that he repaid the loan, the דין is that the מלוה **does not have to be מקיים** the שטר and the לוה must repay the loan[28]. Therefore since the לוה himself is not believed with טענת פרוע, then בי"ד cannot claim פרוע, for according to רב the טענה of פרוע is meaningless even against a שטר which is not מקויים, and the לוה has a מיגו of מזוייף, so certainly בי"ד which will not have the מיגו of מזוייף cannot claim פרעתי. Therefore we must say that to prevent this alleged מלוה from collecting, [29]טענינן מזוייף.

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[27] See כתובות יט,א

[28] This ruling is in opposition to the ruling we were assuming in תוספות till now, that מודה בשטר שכתבו צריך לקיימו, i.e. that פרוע is נאמן במיגו דמזוייף. However, רב disagrees with this opinion.

[29] It is self-evident that the entire discussion in תוספות whether בי"ד claims מזוייף or פרוע (once we accept the

We have concluded, based both on the סברא of לא שבקת, and on the גמרא of שכיב מרע, that טענינן מזוייף. Now תוספות presents a challenge to our conclusion that טענינן מזוייף:

ואם תאמר בפרק קמא דבבא מציעא (דף יג,א) פליגי רבי מאיר ורבנן –

And if you will say; that in the first פרק of ב"מ there is an argument between ר"מ and the רבנן -

במצא שטר שאין בו אחריות –

Regarding a case where one **found a** loan **document that did not specify a lien** on the borrower's properties. [The מלוה claims that the loan has not been paid and the לוה claims that the שטר is a forgery.] -

דרבנן אמרי לא יחזיר ורבי מאיר סבר יחזיר –

The רבנן say we do not return the שטר חוב to the מלוה **and ר"מ maintains that we do return** the שטר to the מלוה -

ומוקי לה שמואל כשאין חייב מודה –

And שמואל establishes this משנה that we are discussing a case where **the debtor (לוה) does not admit** that he wrote the שטר; he claims the שטר is a forgery, and he never borrowed money from the מלוה. The reason why ר"מ maintains that we return the שטר to the מלוה, even though the לוה claims that it is forged; is because ר"מ is of the opinion that a שטר which does not contain in it אחריות נכסים cannot be used to collect the debt even from the לוה himself; it is a useless שטר.

ויחזיר לרבי מאיר לצור על פי צלוחיתו –

And the (only) purpose of **returning** the שטר to the מלוה **according to ר"מ** is that he may use it **to wrap it on the opening of his flask**[30], but he cannot collect with this [31]שטר. The רבנן however are of the opinion that even a שטר without אחריות can collect not only from the לוה but also from נכסים משועבדים; for they maintain אחריות טעות סופר; the lack of specifying אחריות in the שטר was an oversight by the סופר, but

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נאמן במיגו דמזוייף is טענת פרוע, since מודה בשטר שכתבו צריך לקיימו (לא שבקת of סברא). If however we maintain טענת פרוע במיגו דמזוייף is not נאמן, there was never a question whether בי"ד is טוען פרוע or מזוייף for it is obvious, as תוספות states clearly, טענה is no פרוע. Therefore the סברא of לא שבקת requires us to say טענינן מזוייף. The question then arises, how is תוספות proving that טענינן מזוייף, from רב who maintains that מודה בשטר שכתבו אין צריך לקיימו? Obviously according to רב, the בי"ד cannot claim פרוע, only מזוייף. See מהרש"א הארוך וכו'. One answer may be that רב ושמואל both said this דין of לא אמר תנו לא קיימיה לשטרא, and it would appear that the manner in which the מלוה is prevented from collecting his חוב is the same according to רב and שמואל, since they both said this הלכה together. Since according to רב the only way of preventing the מלוה from collecting is through טענת מזוייף, it follows that שמואל agrees, and שמואל is of the opinion, as תוספות states in ב"מ יג,ב ד"ה הא (and will soon [seemingly] state in our 'תוס), that מודה בשטר שכתבו צריך לקיימו, and nevertheless טענינן מזוייף. [Alternately, תוספות may be saying that we have proof from the גמרא that טענינן מזוייף (albeit according to רב).]

[30] This is meant euphemistically.

[31] We do not return it to the לוה for his 'flask'; because the לוה maintains that he never wrote the שטר so it is not his.

the intent was that there should be אחריות. Therefore we cannot return the שטר to the מלוה, since we do not know who is telling the truth. If we will return it to the מלוה he may collect money under false pretenses.

תוספות will now present his question:

והשתא לרבנן אמאי לא יחזיר –

But now that we concluded that טענינן מזוייף; **why, according to the רבנן[32], do we not return** the שטר to the מלוה? -

דהא ליכא למיחש למידי דאי מקיים ליה הדין עמו –

For we have nothing what to be concerned about; let us return the שטר to the מלוה, (because maybe he is telling the truth), and the מלוה will present the שטר to the לוה for collection. The לוה will obviously claim מזוייף, and then the מלוה will be obligated to be מקיים the שטר in order to collect his debt, and we shall see; **for if** the מלוה **is מקיים** the שטר then **he is entitled** to collect his debt, because he is truthful, while the לוה is lying –

ואי לא מקיים ליה אם כן מה מפסיד אי מהדר ליה –

And if the מלוה **is not מקיים** the שטר, he will not collect his debt **so in that case what will** the לוה **lose if we were to return** the שטר to the מלוה. Obviously we are not concerned that the מלוה will try to collect his debt from the לוה himself, for as we just pointed out, that in that case no undue harm can come to the לוה.

אלא ודאי חיישינן שמא יוציא שלא בפניו ולא נטעון מזוייף הוא –

Rather we are certainly concerned that perhaps the מלוה **will present** the שטר for collection **not in the presence** of the לוה; he will present it to the יתומים or לקוחות **and** בי"ד will not (be able to) **claim that it is מזוייף;** that is why we do not return the שטר. From this גמרא it would seem that בי"ד is not טוען מזוייף, for if טענינן מזוייף, why don't we return the שטר and whenever the מלוה will present it, בי"ד will always require that he be מקיים the שטר through טענת מזוייף. This therefore contradicts what תוספות previously maintained that טענינן מזוייף.

תוספות responds:

ויש לומר דעל כרחך אין הטעם בשביל כך דאכתי נטעון להו פרוע הוא[33] -

And one can say; that the **reason** we do not return the שטר is **certainly not on account** of לא טענינן מזוייף **for nevertheless** even if לא טענינן מזוייף, but

[32] It will soon be evident, that this question is also on ר"מ, why should we not return the שטר, even if it did have אחריות נכסים and could be used for collection. See footnote # 35.

[33] תוספות entire discussion is only whether בי"ד is טוען מזוייף (since it is לא שכיח), but certainly בי"ד will be טוען פרוע.

we will still claim on their behalf that the loan **is paid up,** and the טענה of פרוע will prevent the מלוה from collecting (if he is not מקיים the שטר) –

תוספות will now prove that שמואל (the בעל המימרא) maintains מודה בשטר צריך לקיימו:

דהא שמואל סבירא ליה בפרק מי שמת (בבא בתרא דף קנד,ב) בהדיא –

For שמואל[34] clearly maintains, in פרק מי שמת (that) the view -

אליבא דרבי מאיר מודה בשטר שכתבו צריך לקיימו –

according to ר"מ[35] (is); that if the לוה **admits to the writing of the שטר,** however he claims that it was paid, then the מלוה **is required to be מקיים** the שטר. It follows therefore[36] –

והיה נאמן לומר אביהן דפרוע הוא מיגו דאי בעי אמר מזוייף הוא[37] –

That since **their father** (the לוה) **would have been believed to claim that** the loan **was paid up,** and the מלוה could not collect without קיום, because the לוה has a מיגו **since he could have said that** the שטר **is forged -**

אף על גב דלדידהו לא טענינן מזוייף וליכא מיגו -

so even though as we are wont to suggest now, **that** בי"ד **will not be טוען מיגו** דמזוייף **and** for the טענת היתומים **there is no מזוייף for the** יתומים, so what will פרוע accomplish in the face of a שטר, since there is no מיגו דמזוייף -

מכל מקום כיון דלאביהן יש מיגו טענינן להו שפיר פרוע –

Nevertheless since their father had a מיגו we will have a valid טענה of פרוע, which will require קיום השטר. We know that we give the בי"ד the same power that the father had; namely that טענת פרוע by the בי"ד necessitates קיום השטר -

דקיימא לן כמאן דאמר בסוף פרק המוכר את הבית (שם דף ע,ב) –

For we maintain the דין **as the one who says in the end of פרק המוכר את הבית -**

דנשבע וגובה מחצה גבי שטר כיס –

that concerning a שטר כיס, the מלוה/investor swears that he was not paid, but **he collects** only **half** the amount of the שטר כיס; namely the חצי מלוה and not the חצי פקדון, for concerning the חצי פקדון their father would have been believed if he would

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[34] שמואל is the one who interpreted this מחלוקת in the abovementioned manner.

[35] From here it is evident that תוספות original question that we should return the שטר is also according to ר"מ, (even) when there is אחריות נכסים. This explains how תוספות can say that we will be טוען פרוע, since ר"מ maintains מודה בשטר שכתוב צריך לקיימו. Otherwise how can תוספות mention ר"מ when we were discussing the חכמים who maintain מודה בשטר שכתבו אין צריך לקיימו? See Footnote # 32

[36] תוספות is repeating the same line of reasoning mentioned earlier in the תוספות concerning שטר כיס.

[37] תוספות is now referring to the גמרא in ב"מ of מצא שטר חוב where תוספות asked that we should return the שטר (proving thereby that we do not claim מזוייף for the יתמי).

claim החזרתיו because he has a מיגו דנאנסו, so too with בי"ד, even though בי"ד does not טוען נאנסו, nevertheless the טענה of החזרתיו is valid to prevent the מלוה from collecting the חצי הפקדון. The same will also apply to this case of מצא שטר חוב, that the טענה of פרוע will require the מלוה to be מקיים the שטר (at least according to ר"מ).This confirms that we cannot say that we do not return the שטר חוב because we are afraid that בי"ד will not be able to prevent the מלוה from collecting illegally, for we can prevent the מלוה from collecting (either) through (טענת מזוייף or) טענת פרוע.

תוספות will now explain why indeed the שטר is not returned to the מלוה.

אלא היינו טעמא דלא יחזיר כיון דאיתרע בנפילתו ולוה טוען מזוייף הוא –

But rather this is the reason why we do not return the שטר חוב, **since it became flawed by** the fact **that it was lost[38] and** in addition **the לוה claims that** the שטר **is forged -**

אין לגבות מן הדין אפילו ימצא עדי קיום דחיישינן שמא זיופי זייף וחתים –

the מלוה **has no legal right to collect** with such a שטר **even if he can find witnesses to authenticate** the signatures of the שטר **for we are concerned that perhaps he forged the signatures** so well that the purported witnesses (themselves, or any others) that he will bring, will assume them to be authentic, even though in reality they are forged.

כי ההיא דגט פשוט (שם דף קסז,א) דאנח ידיה אזרנוקא -

Like the case in פרק גט פשוט[39], where he placed his hand on a hose to forge a trembling hand-writing[40].

וכן משמע התם לשון הקונטרס[41] –

And this is also how it seems from the interpretation that רש"י states there that קיום will not be effective if the שטר was lost (and the לוה claims מזויף).

We see that it is possible to forge signatures to such a degree that the witnesses may think that it is the correct signature. Therefore we cannot return the שטר to the מלוה, since it is flawed by virtue of its being lost, and the לוה also claims that it is forged, therefore we accept the probability that it is indeed so, and even קיום cannot help. This is the reason why לא יחזיר, but not due to any concern that בי"ד will not be טוען מזוייף.

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[38] People do not lose valid important documents. Only worthless documents are not cared for properly.

[39] Someone brought a שטר to רבא signed by him. רבא recognized his signature but said he never signed a document together with רב אחא בר אדא, the other signer. He asked the בעל השטר how were you able to forge the signature of רב אחא בר אדא whose hands trembled, and had a shaky signature.

[40] The actual quote there is אנחי ידא אמצרא ואמרי לה קם ארזנוקא וכתב – he placed his hand on a rope, and others say that he stood on a hose and wrote.

[41] תוספות is (likely) referring to רש"י in ב"מ יג,א ד"ה שמואל where רש"י states: וא"ת יתקיים בחותמיו, כיון שנפל אתרע ליה ואמרינן מפני שפסול היה לא נזהר ומהמנינן ליה להאי: It seems that רש"י is also mentioning two factors; that it was lost and מהימנינן ליה להאי who claims that the שטר is מזוייף.

תוספות concludes that even though we do not return the שטר to the מלוה, when the לוה claims that it is מזוייף,

אבל אי ליכא לוה קמן והמלוה מצא עדי קיום מחזירים לו -

However, in a case where the לוה is not present when the שטר was brought to בי"ד after it was found **and the מלוה found עדים to authenticate** the signatures of the שטר, **we return**[42] the שטר **to the** מלוה, and he can collect his debt with it; for we have no one claiming with certainty that the שטר is מזוייף (as in the case where the לוה is present and claims מזוייף), and the מלוה was מקיים the שטר.

ואי אתי לוה וטעין מזוייף הוא נראה דתו לא מהימן כיון דהוחזק בהיתר:

And if after the מלוה was מקיים the שטר and it was returned to him, **the לוה comes and claims that it is מזוייף, it appears** to תוספות, **that the לוה will not be believed at this point since** the שטר **was properly established** to be valid, for no one originally claimed with certainty that it is מזוייף, and it was subsequently מקויים, it receives that status of a proper שטר מקויים, against which one cannot claim מזוייף. If however the לוה originally claimed מזוייף, that casts aspersions on this שטר, and coupled with the fact that the שטר is flawed because it was lost, we do not give the מלוה an opportunity to be מקיים the שטר, because we are concerned that he may have forged it so well that it will be wrongfully מקויים

Summary

תוספות is of the opinion that by שטרי ממון which are presented שלא בפני הלוה, the דין is that טענינן מזוייף and the מלוה, לוקח וכו' cannot collect on the strength of the שטר, unless there is קיום. The reason/proof that טענינן מזוייף is; for if לא טענינן מזוייף, then לא שבקת חיי לכל בריה.

תוספות said that בי"ד could be טוען פרוע and not מזוייף and still force the מלוה to be מקיים the שטר, since בי"ד takes the place of the לוה, and the לוה would be able to force the מלוה to be מקיים the שטר through טענת פרוע במיגו דמזוייף, therefore בי"ד would have the same power of the לוה to force the מלוה to be מקיים the שטר with טענת פרוע even though there is no 'מיגו דמזוייף'.

This idea, that the power of the מיגו is transferred to בי"ד, can be seen from the case of שטר כיס היוצא על היתומים, that the מלוה cannot collect the חצי הפקדון because the מיגו of נאנסו which the father had, is transferred to בי"ד.

However תוספות concludes that טענת פרוע while it would work for שטרי הלואה nevertheless it would be useless for שטרי מכר ומתנה; therefore in order to

[42] It seems from תוספות that we return the שטר to the מלוה only if he was מקיים the שטר. See נחלת משה, בל"י. [See 'Thinking it over' # 5.]

prevent the לא שבקת, we are always טוען מזוייף.
תוספות proves that we are טוען מזוייף from the case in the גמרא concerning a שכיב מרע, who admitted that he owes someone money, and that person had a שטר שאינו מקויים to that effect, nevertheless the דין is that we do not pay him from the estate of the שכיב מרע (unless the שכיב מרע explicitly said תנו). תוספות point out that if לא טענינן מזוייף, the מלוה will collect regardless שלא בפני הלוה (and since the author of this הלכה is [ושמואל] רב, who maintains that פרוע is not believed במיגו דמזוייף, the option of טענת פרוע is nonexistent), that proves that we are טענינין מזוייף if he will be מוציא the שטר שלא בפני הלוה.
One cannot ask that if טענינן מזוייף then why if a שטר חוב is found and the לוה claims that it is מזוייף, we do not return it to the מלוה; if טענינן מזוייף let us return it to the מלוה, and he would not be able to collect anyways, even שלא בפני הלוה, unless he is מקיים the שטר, which would prove the מלוה right and the לוה wrong. The answer is that the reason we do not return such a שטר is because since it is flawed, by the fact that it was lost, and in addition, the לוה claims that it is מזוייף, we are concerned that he forged it so well that even the witnesses themselves will be fooled into thinking that it is their own handwriting. However, if one of these two conditions (i.e. a lost שטר and a claim of מזוייף by the לוה) is not met, we are not concerned about such a possibility, and קיום is accepted as a proof that it is a valid שטר.
All this is applicable by דיני ממונות, by גט אשה however we are not טוען מזוייף when the אשה brings a גט, and we allow her to get married without קיום, because of חשש עיגונא therefore הקילו בה רבנן.

THINKING IT OVER

1. The דין of ואם יש עליו עוררין יתקיים בחותמיו applies to ארץ ישראל, where there are עדים מצויים לקיימו; how can תוספות say that by גט, the דין is לא טענינן מזוייף because משום עיגונא אקילו בה רבנן,[43] why should there be עיגון if there are עדים מצויין לקיימו?[44]

2. תוספות explains that לא טענינן מזוייף by a גט because משום עיגונא אקילו בה רבנן.[45] Later it seems from תוספות that the reason why טענינן מזוייף is (only)

[43] See footnote # 6.
[44] See נחלת משה.
[45] See footnote # 7.

because of לא שבקת; since by גט the reason of לא שבקת does not apply there is no reason for טענינן מזוייף, so why does תוספות give the reason of משום עיגונא וכו'?[46]

3. Is the סברא of לא שבקת וכו' a reason why טענינן מזוייף or a proof that טענינן מזוייף. What may be some of the ramifications of these two approaches?

4. What difference is there whether טענינן מזוייף or טענינן פרוע? It seems only like a procedural matter to insure that the מלוה is מקיים the שטר.[47]

5. Why is there a difference whether the לוה claims מזויף before the שטר was returned to the מלוה,[48] or whether he claims מזוייף after the שטר was returned to the מלוה?[49]

Appendix[50]

The דין of מיגו is usually understood in one of two ways. For instance in the case where the לוה claims פרעתי and the מלוה has a שטר שאינו מקויים, according to the מ"ד who maintains מודה בשטר שכתבו צריך לקיימו, the לוה is 'believed' with his טענה of פרעתי, and the מלוה cannot collect unless he is מקיים the שטר, since the לוה has the מיגו that he could claim מזוייף and the מלוה would need to be מקיים the שטר.

We may understand this מיגו as a proof that the לוה is honest[51] when he claims פרעתי, for if he were a dishonest person he could have claimed מזוייף, and he would not have to pay the מלוה unless he is מקיים the שטר.

Another way of understanding the מיגו is that it does not necessarily prove that the לוה is honest, but rather since the לוה has the option of claiming מזוייף, we give him the right and the power of טענת מזוייף, as if he was טוען מזוייף, because he was able to use that טענה. Therefore the מלוה must be מקיים

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[46] See מהר"ם שי"ף, בית לחם יהודה.

[47] See מהר"ם, פנ"י and נח"מ ובל"י.

[48] See footnote # 42.

[49] See נח"מ.

[50] See footnote # 15.

[51] The case of פרעתי במיגו דמזוייף, may not be that appropriate as an example of the explanation that מיגו is a בירור, for seemingly one may wonder what happened to the בירור after the מלוה was מקיים the שטר. This case is being used here for this is the מיגו we are currently discussing. A better example may be החזרתי במיגו דנאנסו.

the שטר because the לוה possesses and utilizes his potential of טענת מזוייף. The first way is usually referred to as בירור; the second as נאמנות or זכות הטענה.

תוספות discusses the idea that בי"ד can claim פרוע on behalf of the יתומים and require the מלוה to be מקיים the שטר on the strength, that if their father would have claimed פרעתי the מלוה would have to be מקיים the שטר since he has a מיגו of מזוייף, therefore בי"ד even though it does not have the מיגו of מזוייף, nevertheless its טענה of פרעתי carries the same power as the father's טענה of פרעתי.

If we were to assume only the first explanation of מיגו, namely that it is a בירור that the לוה is honest, it is difficult to understand, how the power of this מיגו is transferred to בי"ד. The whole idea of transferring proof that בי"ד is telling the truth etc., is totally meaningless. How therefore can בי"ד cause the מלוה to be מקיים the שטר when it claims פרוע; there is nothing backing up the truthfulness of this claim, as it would have been, had the לוה claimed פרעתי.

If however we assume the other explanation of מיגו namely that it is a זכות הטענה, then it is easier to comprehend that this זכות that the לוה had, to force the מלוה to be מקיים the שטר through טענת מזוייף can be assumed by the בי"ד, since the בי"ד is in place of the לוה, therefore it too can cause the מלוה to be מקיים the שטר with טענת פרוע.