ורבי יוחנן אומר אף על פי שאין זוכרה מעצמו

And ר"י says even if he does not recall it independently

Overview

There is a dispute between רב הונא and רבי יוחנן concerning the rule that one may rely on his personal notes to testify before בי"ד. ר"ה maintains that he may use these notes only if he remembers parts of testimony without the notes; then he may use the notes to fill in the rest. ר"י, however maintains that even if he remembers nothing without the notes he may still offer testimony based on the notes. תוספות will be offering various views as to the permissibility of relying on notes and not violating the rule of 'מפיהם ולא מפי כתבם', in view of the fact that a שטר, which is presumably מפי כתבם, is always accepted as valid testimony.

פירוש[1] אבל על ידי השטר זוכרה -

The explanation of the phrase 'אע"פ שאין זוכרה מעצמו', does not mean that he does not recollect the testimony at all; even after he reads the שטר. Rather it means that he does not recollect the testimony independently – מעצמו, before he reads the שטר; **however through** the reading of **the שטר he recalls** the testimony.

אבל אם אין זוכרה כלל לא דמפיהם ולא מפי כתבם -

However if he does not recall the testimony at all, even after he reads the שטר; then he is **not** permitted to testify. The reason is, **for** the testimony must come **'from their mouths, and not from their writings'.** The תורה writes[2] על פי שני עדים וגו' יקום דבר; substantiation of a fact is accomplished through two witnesses. The חכמים interpreted the words פי על, literally; 'through the mouth'. The testimony of עדים is valid only when it comes from their mouth; but not if it comes from their writings. Therefore in our case, even though the עדים are testifying 'with their mouth'; nevertheless since they do not recall the testimony; it is based solely on their writings, therefore it is considered מפי כתבם and the עדות is invalid.

תוספות will now prove that testimony which is based solely on the שטר, is invalid when the עדים who present it, do not recall it at all:

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[1] The term 'פירוש' (or כלומר) in רש"י and תוספות (usually), indicates that the valid explanation is different from what one may understand from a cursory reading. Here too תוספות is rejecting the following explanation.

[2] דברים (שופטים) יט, טו.

כדאמרינן בפרק ד' אחין (יבמות דף לא,ב ושם) גבי מפני מה לא תקנו זמן בקדושין -

As the גמרא **states in פרק ד' אחין, concerning** the discussion as to **why they did not institute** that a **קדושין** שטר should be **dated** (similar to a גט; which is dated) –

דקאמר לינחי גבי עדים[3] אי דכירי ליתו ולסהדו -

Where the גמרא **said; should we leave** this dated קדושין שטר **by the witnesses;** then let us see, **if** the עדים **remember** when the קדושין took place **let them come** forward to בי"ד **and testify** when the קדושין took place; there is no need that it be written in the קדושין שטר –

ואי לא זימנין דחזו בכתבא ואתו ומסהדי ואמר רחמנא מפיהם ולא מפי כתבם -

And if it will be in a situation where the עדים **do not** remember when the קדושין took place, then we cannot leave the שטר with the עדים, for **occasionally** when the עדים will forget the date, **they will look in the written** שטר קדושין **and they will come** to בי"ד **and testify** orally, the date which they saw in the שטר. The problem with that is, **but the Merciful One stated** in the תורה that witnesses are valid only **מפיהם,** but **not מפי כתבם.** This concludes the citation of the גמרא in יבמות. It is clear from that גמרא, that the oral testimony of עדים which is based solely on a שטר (where they have no recall[4]), is considered מפי כתבם and is an invalid testimony.

תוספות asks:

ואם תאמר הכא נמי אמאי לא אסרינן לכתוב עדות על השטר -

And if you will say; why do we not forbid here (in our גמרא) **as well, writing the testimony on a שטר.** The גמרא stated that a witness may write down his testimony to assist him in testifying at a later date. Concerning a שטר קדושין we do not allow it to remain in the possession of the עדים, for we are concerned that they may use it to testify even if they totally forgot the עדות. Here too, why is there not the same concern that –

שמא ישכח לגמרי ואתו ומסהדי מכתבא כדחיישינן התם -

Perhaps the עד **will totally forget** the testimony **and will** nevertheless **come** to בי"ד **and testify** based only on what he has **written** in his שטר, **as we are concerned there,** by the שטר קדושין?! Why, on one hand, do we not date a שטר קדושין, out of concern that it may eventually turn out to be מפי כתבם; and here, on the other hand, we permit עדים to write their testimony, and we are not concerned that it may turn out to

[3] The גמרא there explains why the שטר cannot be placed by either the husband or the wife.

[4] The גמרא there [when rejecting this testimony] certainly includes the case where the עדים do not remember at all (according to ר"ה, the גמרא may also include a case where he is reminded by the שטר)

be מפי כתבם?!

תוספות answers:

ויש לומר דודאי התם חשו חכמים לפי שבית דין מוסרים לו השטר -

And one can say; that certainly there (by a שטר קדושין) **the חכמים were concerned** that it may turn out to be מפי כתבם, **for** there the **בי"ד delivers the שטר to** the עד; after the man gives the שטר to his wife, בי"ד will deliver the שטר to (one of) the עדים. Therefore there is indeed a concern –

ויסבור שלכך מסרוהו לו שיעיד אפילו לא יזכור -

For the עד **will assume that indeed this is** the reason **that they delivered** the שטר **to him,** in order **that he should** be able **to testify even if he does not remember** the testimony (otherwise why are they giving him the שטר) –

אבל הכא שמעצמו כותב עדות על השטר לא חשו חכמים לכך -

However here where he is writing the testimony on the שטר on his own volition; בי"ד had no part in it, therefore **the חכמים were not concerned for the** violation of מפיהם ולא מפי כתבם. The חכמים did not assume that the עדים will consider this permission (to write down their testimony), as a right to testify מפי כתבם (if they cannot recall the עדות).

תוספות asks an additional question:

ואם תאמר ואמאי לא מצו חזו בכתבא ולאסהודי -

And if you will say; why indeed **are they not permitted to see the שטר** קדושין **and testify** (and similarly here also to testify from his note) even if they do not remember anything **–**

הא תנן בגט פשוט (בבא בתרא דף קסח,א) **מי שנמחק שטר חובו -**

For we have learnt in a משנה in פשוט גט פרק**; if someone's שט"ח was erased** and he was concerned that he will not be able to collect his loan with this שט"ח, the מלוה should –

מעמיד עליו עדים ובא לבי״ד ועושין לו קיומו ומפרש בגמרא מהו קיומו[5] **-**

produce witnesses who are familiar with what was written in this שטר **and** the מלוה **comes to בי"ד** with these עדים **and** בי"ד **will validate** a שטר for him, **and the גמרא** there explains **what this validation is.** This validation is based on עדים who merely saw a שטר. They were not present at the loan. Their testimony is completely מפי כתבם; it is what they saw written in a שטר. It seems identical to the עד who testifies what he reads in the note, when he does not recollect anything. How can בי"ד

[5] It is not clear why תוספות mentions this. עי' במהר"ם שי"ף.

grant the מלוה a new שטר based on a testimony of מפי כתבם?![6] It is evident from that משנה that an 'oral' מפי כתבם can be a valid testimony.[7] This contradicts (our גמרא as well as) the גמרא in יבמות, concerning a שטר קדושין.

תוספות will bring an additional example that seemingly an 'oral' מפי כתבם is valid.

וכן בהגוזל קמא (בבא קמא דף צח,א) דאמרינן גבי שורף שטרותיו של חבירו -

And similarly in הגוזל קמא פרק **, where the** גמרא **states concerning** the ruling that if one **burns the notes** (of debt) **of his friend –**

פטור מדיני אדם כולי -

He is exempt from the judgment of man; בי"ד cannot obligate the שורף to pay for the loss that he caused to the מלוה, etc.[8] The גמרא comments on this –

היכי דמי אי דאיכא סהדי דידעי מה הוה כתוב ביה בשטרא -

How is this case **like: if there are witnesses that know what was written in this שטר** that was burnt,[9] then –

נכתוב ליה שטרא אחרינא -

Let בי"ד **write a different שטר** for the מלוה! There is no loss. He will be able to collect with this new שטר. This ends the citation of the גמרא. תוספות concludes the question:

אלמא לא חשבינן ליה מפיהם ולא מפי כתבם -

It is evident (from the two גמרות in ב"ב and ב"ק) **that we do not consider this** to violate the ruling of **מפיהם ולא מפי כתבם;** even though their entire testimony is based only on what they read in a שטר! Let us say the same here and in יבמות. When the עדים testify orally it is an acceptable testimony even though their testimony relies completely on the שטר.

תוספות differentiates between the מפי כתבם in יבמות and the cases of ב"ב and ב"ק:

ויש לומר דבפרק ד' אחין (יבמות לא,ב ושם) חיישינן דלמא אתי ומסהדי בסתם -

And one can say that in פרק ד' אחין (concerning the שטר קדושין) **we are concerned that perhaps** the עדים **will come** to בי"ד **and testify regularly –**

כאילו זוכרין העדות -

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[6] If an עד who was present by the incident cannot testify from a שטר if he has no recall, then certainly one who was not present at all at the incident should not be permitted to testify from a שטר.

[7] תוספות argues (at this point) that the פסול of מפי כתבם should apply only in a case where the עד is an אלם; he cannot speak. Alternately, it may only apply in cases where the עדים do not testify orally at all; they merely send in their testimony בכתב to בי"ד. However when they testify orally in person, it should be a valid testimony, even though they rely completely on the שטר. See 'Thinking it over' # 1.

[8] The reason is that he merely burnt papers which have little or no intrinsic value. It is considered a היזק שאינו ניכר. The fact that he caused him damage, by burning the שטרות, is considered merely a גרמא – an indirect cause of loss – and the ruling is that גרמא בנזקין is פטור.

[9] This means that they saw the שטר; however they were not (necessarily) present by the loan.

as if they actually **remember the testimony;** when the קדושין took place. This is considered מפי כתבם. The עדים do not independently know when the קדושין took place (they are merely repeating what they read in the שטר), but are testifying as if they do remember. The manner of their testimony renders it a מפי כתבם.[10]

אבל ודאי אם היו מעידים שכך ראו בחתימתן הא לא חשיב מפיהם ולא מפי כתבם -

However, certainly if they would testify that this is what they saw in **their signed** document; in the שטר קדושין; **that** testimony **would not be considered** that it violates the rule of **מפיהם ולא מפי כתבם.** The reason is –

דעדים החתומין על השטר נעשה כמי שנחקרה עדותן בבית דין -

For witnesses who are signed on a שטר, are considered as if their testimony was fully **investigated** and substantiated **in בי"ד –**

והוי כאילו מעידין ראינו עדות שנחקרה בבית דין -

And when these עדים testify that they saw what was written in the signed שטר, **it is as if they testify we have seen a testimony which בי"ד investigated** and substantiated. This is considered a valid testimony. Similarly when they testify what was written on a signed שטר it is also a valid testimony.[11] This also explains why in ב"ב and in ב"ק the עדים are believed to testify what the saw in a שטר חתום.

In summation; עדים may testify what the שטר stated, provided they state clearly that they saw it in a שטר. However they may not testify what the שטר stated if they are testifying as if they actually remember the incident.

תוספות asks an additional question:

ואם תאמר והכא אפילו אין זה זוכרה כלל מה בכך יביא שטרו בבית דין -

And you may ask; and here (where he is not permitted to testify what he wrote in his journal), **even if this** עד **does not recall** his testimony **at all** (even after reading his journal); **what of it; let him bring his journal to בי"ד!** Why do we say that if the עד does not remember the testimony at all, he cannot testify at all?[12] Let him show בי"ד his שטר.[13] It is seemingly not different than the עדים (in ב"ק וב"ב) who testify what they saw in the שטר!

תוספות answers:

ויש לומר דעד אחד בשטר לא חשיב שטר אלא אותו שיש בו שני עדים -

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[10] They are testifying that they witnessed an event; when in fact they do not know that this event took place. All they know is that there is a שטר that states they were present when this event took place. Other commentaries claim that this is really a פסול of עד מפי עד (rather than מפי כתבם). See footnote # 21.

[11] This is also (part of) the explanation why every שטר is not invalidated on account of מפי כתבם.

[12] It seems from the גמרא that if he is does not remember the עדות; there is no way that he can testify.

[13] See 'Thinking it over' # 2 & 3.

And one can say that if only **one עד** signed **in a journal,** that journal **is not considered a שטר.** The rule of עדים החתומים על השטר נעשה כמי שנחקרה עדותן בבי"ד does not apply to a document that is signed by only one עד, **but rather only** a document, **in which there are two עדים,** as signers, is considered a שטר, with all its ramifications –

דומיא דספר מקנה -

similar to the 'ספר מקנה' ('the book of acquisition') which is mentioned by the נביא ירמיהו.[14] Many rules of שטרות are derived from there, including that a שטר requires two עדים in order to be considered a valid שטר. Therefore since in our גמרא the journal was written (signed) by one עד only, it is not a שטר. We cannot say that the עד is testifying on something which was נחקרה עדותן בבי"ד.

In summation; עדים may testify what they saw in a שטר; provided that it is a valid שטר, signed by two עדים. They cannot testify what they saw in a document (without two עדים), unless they are reminded of the testimony.

תוספות anticipates a question:

והא דאמר בגט פשוט (בבא בתרא דף קסה,א) עד אחד בשטר ועד אחד בעל פה אין מצטרפין -

And that which the גמרא **states in גט פשוט** פרק**, that we cannot combine** the testimony of **one עד in a שטר and one עד orally**[15] **–**

דמשמע הא שנים בשטר אפילו בשתי אגרות מצטרפין -

This indicates that if however **both** עדים testified **in a שטר, even** if the testimony **was in two** separate **journals** their testimony **may be combined** for a valid testimony.[16] This seems to contradict what תוספות previously said that a one עד journal is not considered a שטר at all.

תוספות answers:

התם מיירי כגון שהאחד בשטר -

There the גמרא **is discussing** a case where **for instance** (only) **one** עד **signed on the שטר;** that there was a loan –

והאחד בעל פה לא שאומר שראה הוא המלוה אלא שראה מסירת השטר מלוה למלוה -

And the one עד who testified **orally, he is not testifying that he saw the loan;** for if that were the case even if both testified in two שטרות that they saw the loan it would not be a proper שטר, **but rather the** עד בע"פ is

[14] לב, יא

[15] This is the opinion of אביי; however אמימר disagrees and maintains that they are מצטרף.

[16] Otherwise the גמרא should have said עד אחד בשטר זה וע"א בשטר שני אין מצטרפין, this is a greater חידוש than ע"א בשטר וע"א בע"פ.

testifying that **he saw the delivery of the שטר** (which the other עד signed) **from the borrower to the lender**. Therefore it is a valid שטר –

דהוי כשנים החתומים בשטר לרבי אליעזר דאמר עדי מסירה כרתי[17] -

For then **it is as if two** עדים **signed on this שטר, according to ר"א who maintains that the עדים** who testify concerning the **delivery** of the שטר, they are the ones who **validate** the שטר.[18] However if both עדים would sign on separate שטרות it would not be valid; for a שטר with one signature is no שטר (unless there are עדי מסירה).

תוספות gives an additional answer for the גמרא of ע"א בשטר וע"א בע"פ:

ועוד דבירושלמי[19] מפרש עד א׳ בשטר היינו ששנים חתומים בשטר -

And furthermore in ירושלמי תלמוד **it is explained** that **ע"א בשטר**, means **that** there were **two עדים** that **signed on the שטר**; however –

וקיימו כתב ידו של אחד ולא מצאו לקיים כתב ידו של שני -

They were only able **to authenticate the handwriting of one** of the witnesses, **and they were not able to authenticate the handwriting of the second** witness.[20] The case in גט פשוט is discussing a שטר with two עדים. However a שטר with only one עד is not a valid שטר, as תוספות previously stated.

תוספות concludes:

ומכל מקום נהי דעד אחד לא חשיב שטר -

And nonetheless, granted that an ע"א on a document **is not considered a שטר –**

לענין שאם יבואו עדים ויאמרו כך ראינו בשטר דחשבינן להו כעד מפי עד[21]-

Regarding a case **where if עדים come and testify this is what we saw in a שטר** signed by one עד; in that case it is not a valid testimony, **for we will consider it as hearsay;** a witness repeating what he heard from another witness, which is not a valid testimony. However; this note itself –

עדות מיהא הוי ויכול לשלוח כתב ידו לבית דין -

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[17] The word כרתי literally means to 'separate'. This term is used because the ruling of ר"א concerning עדי מסירה was initially stated by גיטין. Therefore the term used is עדי מסירה כרתי; the עדי מסירה actualize the divorce. However ר"א maintains 'כרתי' עדי מסירה, by all שטרות. This means that even if no עדים signed on the שטר it is a valid שטר, provided that two עדים saw the delivery of the שטר from the לוה to the מלוה.

[18] One of the עדי מסירה is the one who testifies בע"פ and the other עדי מסירה is the one who signed on the שטר. He is also considered as one of the עדי מסירה. See תוספות ד"ה אמר there in ב"ב. However, אביי maintains that it is פסול nevertheless, since the two עדי מסירה do not testify in the same manner.

[19] כתובות פ"ב ה"ד. In our texts on דף יב,א.

[20] A third witness came and substantiated the testimony of the שטר orally; he was present at the loan.

[21] See footnote # 10.

Is considered a valid **testimony, and** an עד **may send his handwritten note to בי"ד** as a valid testimony –

ולא חשיב מפיהם ולא מפי כתבם כיון שהוא זוכר העדות -

And it is not deemed to have violated the restriction of **מפיהם ולא מפי כתבם, since** the עד **remembers the testimony.** It may be difficult for the עד to appear before בי"ד; therefore he may deliver his testimony in writing.[22]

To summarize; an עד who is reminded of the testimony from any written document is permitted to either testify in בי"ד personally or to send the document as a testimony. However an עד who does not remember the testimony at all, may only testify what he read in a valid שטר signed by two עדים.

תוספות cites an opposing view:

ורש"י פירש בפירוש החומש מפיהם ולא מפי כתבם שלא ישלח בכתב עדותו לבית דין -

And רש"י in his explanation on חומש explained[23] the פסוק of **מפיהם ולא מפי כתבם** to mean **that** the witness **may not sent his handwritten testimony to בי"ד.**

תוספות offers a different approach to resolve the difficulty from פרק גט פשוט, from where we attempted to infer that an ע"א בשטר is valid:

אי נמי אומר רבינו יצחק דעד אחד מועיל בשטר -

Or if you wish you may **also say** according to the **ר"י that** the signature of **one עד validates a שטר**, and –

אם יש שני שטרות בכל אחד חתום עד אחד חשוב כשטר שלם -

If there are two שטרות, one עד signed on each שטר **it is considered as a complete** and valid **שטר**. This explains why אביי in גט פשוט maintained that only ע"א בשטר ועא"פ is פסול; however two ע"א in two שטרות is כשר –

תוספות anticipates the obvious question –

וכי תימא אם כן בשמעתין יביא כתבו לביד דין אפילו אינו זכור כלל -

And if you will say; if this is so, that an ע"א בשטר is חשוב שטר then **in our case let him bring his handwritten** journal **to בי"ד even if he does not remember at all!** Why is his handwritten note less of a שטר than a שטר בע"א?!

תוספות answers:

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[22] It seems from תוספות that the exclusion of מפי כתבם is limited to testifying from a note without remembering the facts.

[23] דברים (שופטים) יט,טו.

ויש לומר דלא חשיב שטר אלא כשעשוי מדעת שניהם -

And one can say that in order **to be considered a שטר, it is only when it is written with the knowledge** and consent **of both** parties; the מלוה, whose consent is assumed since the שטר is in his favor, and mainly –

מדעת הלוה שהוא חייב אז חשיב שטר -

With the knowledge and consent **of the לוה who is** being **obligated** by the שטר; only **then is it considered a שטר.** Therefore in גט פשוט if two עדים signed separately on two שטרות they are valid שטרות, since each שטר was written מדעת המתחייב –

אבל הכא שכותב עדותו שלא מדעת הלוה לא חשיב שטרא -

However here, where he is writing his testimony without the knowledge of the לוה; the לוה is not aware that the עד is recording this testimony, therefore this self-serving journal **is not considered a שטר.** Therefore he cannot use it to testify before בי"ד based on this note alone, for since it is a self serving document which was written without the consent of the לוה, it is not a שטר and therefore it is subject to the stricture of ולא מפי כתבם.

In summation; according to this view, one may testify what he saw on a document that was written מדעת המתחייב (even if signed by only one עד),[24] without being aware of the incident. If it was not written מדעת המתחייב, then this document may be used only if the עד is reminded of the testimony.

תוספות asks an additional question:

והקשה הרב רבי שמואל מוורדו"ן דאמר בחזקת הבתים (בבא בתרא דף מ,א[25] ושם) -

And ה"ר שמואל from Verdun asked that the גמרא **states in** פרק **חזקת הבתים** –

מחאה בפני שנים[26] ואין צריך לומר כתובו -

A protest against one who is (allegedly) occupying the protester's field is to be made **in the presence of two** עדים, **and** the protester **is not required to tell** the עדים **write** down this מחאה. Rather even if he does not request that they write the מחאה, the עדים are permitted to write the מחאה and hand it to the מערער as a proof that he made a מחאה to nullify the חזקה. This concludes the citation from the גמרא. תוספות continues with his question:

ומה מועיל כתובו כיון דאין עשוי מדעת המחזיק -

But what will (even) **telling** the עדים **to write accomplish, since it is not**

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[24] See 'Thinking it over' # 4.

[25] The גמרא actually begins on דף לט,ב בסופו.

[26] The rule is if someone occupies a field for three years and claims that he bought it from the previous owner, the occupier may retain the field even if he lost the deed; provided that the previous owner made no protest during the entire three year period.

written with the consent of the מחזיק. The מחזיק, who is currently occupying this field, is the מתחייב in this case. This שטר מחאה is detrimental to his ownership of the field. He did not give any consent to write this שטר מחאה. Therefore this שטר מחאה is not considered a שטר. Of what avail is this שטר to the מערער?! It is considered מפי כתבם, since it is not a valid שטר. The מערער cannot use this שטר מחאה to prove that he made a מחאה, it is מפי כתבם.

תוספות answers:

ולפי מה שפירשנו דעדות מיהא הוי כל זמן שזוכר העדות אתי שפיר -

However, according to what we previously **explained that** a self serving journal **is considered a valid testimony as long** as the עד **remembers the testimony,** the ruling **is well understood.** The עדים write the שטר מחאה and it may be used in בי"ד as long as the עדים remember the testimony (even from this שטר מחאה).

תוספות offers an additional answer to the question of ה"ר שמואל מוורדו"ן:

מיהו בלא זה מתרץ רבינו יצחק דגבי מחאה הקילו שאינה אלא מדרבנן[27] -

However, without resorting to the previous answer, **the ר"י explains** that there is no difficulty, **for concerning a מחאה which is only a רבנן** issue**, the** חכמים **were lenient** and do not require מפיהם, but even מפי כתבם is also sufficient.

תוספות offers proof that since מחאה is only מדרבנן therefore the were מקיל:

דהכי נמי הקילו לומר דמחאה שלא בפניו הוי מחאה אף על פי שלפעמים לא ישמע -

For in a similar manner the חכמים **were also lenient, saying that a מחאה not in the presence of** the מחזיק **is a** valid **מחאה; even though occasionally** the מחזיק **will not hear** of the מחאה.

וסמכו על זה דחברך חברא אית ליה -

And the חכמים **relied on this** understanding **that your friend has a friend,** etc. Therefore eventually we assume that the מחזיק will hear the מחאה, even though it is not necessarily so. The reason is the same; for the requirement to make a מחאה to undermine the חזקה is a דין דרבנן (for מדאורייתא a חזקה does not establish the מחזיק as the מוחזק) and the רבנן ruled that even a מחאה שלא בפניו is sufficient to destroy the חזקה.

תוספות offers an additional example that occasionally the חכמים were lenient when it came to שטרות without the דעת המתחייב:

וכן מודעה[28] בפני שנים הקילו לכתוב להציל אנוס מאונסו -

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[27] It seems that מן התורה a חזקה cannot be מוציא from a מרא קמא; rather a שטר (or עדים) is required. Therefore the requirement for a מחאה to be מבטל the חזקה is only מדרבנן. The רבנן were מתקן that even a מחאה מפי כתבם is also sufficient to be מבטל the חזקה.

And similarly by **a notification** which is required to be delivered **in the presence of two** עדים, the חכמים **were lenient** and permitted the עדים **to write up** this מודעה (as a proof for the אנוס) **in order to save the oppressed from his oppressor.** This was allowed even though there was no דעת המתחייב (the buyer of this property). Therefore even though generally a שטר must be written מדעת המתחייב, nevertheless occasionally (by a דרבנן or an אונס) the חכמים validated a שטר that was not written מדעת המתחייב.[29]

תוספות offers an alternate approach to the issue of שטרות:

ועוד אומר רבינו יצחק דלא בעינן דעת שניהם -

And furthermore says the ר"י that a שטר **does not require** that it be written **with the knowledge** and consent **of both** parties. In reality if עדים sign on a שטר it is a valid שטר even though it was written without the דעת המתחייב (and [perhaps] a שטר with only an ע"א is a valid שטר) –

והכא היה יכול להביא שטרו אם היה כתוב כתיקון שטרות -

And therefore **here he could have brought his שטר to בי"ד** as testimony, **provided that it was written in the correct manner of שטרות –**

אבל הכא מיירי שאינו כתוב כסדר השטר אלא זכרון דברים בעלמא -

However here we are discussing a case **where** his journal **was not written in the** proper **order of a שטר; but rather it written merely as a memorandum**; therefore it becomes disqualified on account of ולא מפי כתבם.

To summarize; according to this (last) view if an עד does not remember the testimony he may rely on any שטר written in the proper format of a שטר, regardless if it is signed by one or two עדים and/or if it is written מדעת המתחייב or not. However a self serving memorandum cannot be used, unless the עד is reminded of the testimony.

תוספות offers a different interpretation of our סוגיא:

ומתוך הירושלמי[30] נראה לפרש בענין אחר סוגיא זו -

And from the context of the ירושלמי תלמוד **it seems that this סוגיא may be interpreted in a different manner** altogether –

דקאמר התם רב הונא כרבי ורבי יוחנן כרבנן[31] -

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[28] A מודעה is the process which a seller utilizes when he is being coerced to sell his property unwillingly. He approaches two עדים before the actual sale takes place and he notifies them that this is a coerced sale, and the seller intends to nullify the sale when the opportunity arises.

[29] The previous example showed that we are lenient by (שלא בפניו) מחאה, in general. This example shows that occasionally דעת המתחייב is not required.

[30] פ"ב ה"ד דף יא,ב.

For it is stated in the ירושלמי **that ר"ה** (who maintains 'והוא שזוכרה מעצמו') follows the opinion of **רבי** (that על כת"י הם מעידים), **and ר"י** (who maintains that 'אע"פ שאינו זוכרה מעצמו') follows the view of the **רבנן** (that 'על מנה שבשטר הם מעידים) –

פירוש כשהעדים באים לקיים חתימתן אם זוכרין המלוה בלא שטר -

The explanation of the ירושלמי is; **when the עדים come to be מקיים their חתימה, if they remember the loan without** reading **the שטר,** then –

אפילו לרבי אין צריך לצרף עמהן אחר מן השוק דעל מנה שבשטר הן מעידין -

Even according to רבי it is not necessary to for them to combine with another outside עד; these two עדים that testify individually on their own חתימה is sufficient, **for** the עדים המקיימים **are testifying about the loan.** They remember the loan, and when they authenticate their signatures they are implicitly testifying that the loan took place.

וכשאין זוכרים המלוה אפילו על ידי השטר אפילו רבנן מודו דצריכין לצרף עמהן -

However if they cannot recollect the loan even by reading **the שטר,** then **even the רבנן admit that it is necessary to combine with them** another עד who will authenticate their חתימות –

דעל כרחין אין מעידין אלא על כתב ידן -

For we are forced to say that in this instance **they are only testifying concerning their handwriting**; however they cannot be testifying about the loan, since they do not remember the loan even after the saw the שט"ח -

וכי פליגי היינו כשזוכרים המלוה על ידי השטר -

And when do רבי and the רבנן **argue,** in a case **where** the עדים **remember the loan through** reading **the שטר –**

דלרבנן חשיב זכירה ועל מנה הן מעידין ולרבי לא חשיב זכירה -

According to the רבנן this reminding is sufficient to be **considered a remembering** and therefore we say that **they are testifying concerning the מנה** of the מלוה; **however according to רבי this is not considered remembering** and therefore they need to be מצרף אחד מן השוק. This is what the ירושלמי said that ר"ה כרבי, because they both maintain that זכירה ע"י השטר is not a sufficient זכירה. However ר"י כרבנן, since they both maintain that זכירה ע"י השטר שמה זכירה. According to

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[31] In the following משנה דף כ,ב there is a מחלוקת between רבי and the חכמים concerning קיום שטרות. According to רבי if each עד (merely) authenticates his signature (but not of his partner) a third person must authenticate both חתימות, in order that two עדים are מקיים each חתימה. The רבנן argue and maintain that if each עד authenticates his own signature, that is sufficient. The גמרא subsequently states that this argument hinges on what the עדים are testifying when they are מקיים their חתימה. If they are merely being מקיים their חתימה then each חתימה requires two עדים for קיום (the view of רבי). If, however, each עד is verifying the content of the שטר then these two עדים alone are sufficient (the view of the רבנן).

this interpretation ר"ה and ר"י are not discussing the issue of מפיהם ולא מפי כתבם. Rather they are discussing whether it is necessary to be מצרף אחד מן השוק, when the עדים remember the incident only through the aid of the שט"ח. This would remove (many of) תוספות original questions.

However תוספות is not satisfied with this explanation:

ולשון כותב אדם לא משמע הכי:[32]

The expression that the גמרא uses to teach us this דין, namely **a person may write** his testimony on a שטר and give his testimony based on this שטר many years later, etc. **does not support this** interpretation of the ירושלמי. The לשון of כותב אדם indicates that we are permitting for him to write the testimony; not that he is permitted to testify on a שטר that he signed. According to the ירושלמי the expression should have been מעיד אדם על כת"י אפילו לאחר כמה שנים וכו'; not כותב אדם.

Summary

If an עד cannot remember the testimony even after reading the document stating the testimony, there are various views in which manner he may testify that he knows this testimony from the document:

A. He may testify, only if two עדים sign on the document; i.e. if it is a valid שטר.

B. He may testify only if it is written מדעת המתחייב; regardless if only one עד signs on the שטר.

C. He may testify in any case; if it is written כתיקון שטרות.

If the עד remembers the testimony after reading the document; he may testify in בי"ד; or alternately he may send this document to בי"ד (according to תוספות); רש"י however disagrees and prohibits sending any testimony בכתב.

Thinking it over

1. תוספות asked why here is he not permitted to testify מפי הכתב and by שט"ח he is permitted to testify מתוך הכתב. Why did not תוספות ask simply from a regular שטר? We accept the testimony of a שטר; there is no חסרון of מפי כתבם, then why cannot he testify מתוך הכתב?![33]

[32] See 'Thinking it over' # 5.
[33] See footnote # 7.

2. תוספות asks that he should bring his journal to בי"ד.[34] Why did not תוספות ask that he should testify that he saw it in his journal?[35]

3. Why did not תוספות ask the previous question (#2) on the גמרא in יבמות, that the עדים should bring the שטר קידושין to בי"ד? The answer of תוס' (that ע"א בשטר לא חשיב שטר) will not apply since there it is a שטר with two עדים![36]

4. Can one testify based on what he saw on a handwritten note by the לוה?[37]

5. תוספות asks on the ירושלמי (which states that the מחלוקת between ר"ה ור"י is the same as רבי ורבנן) that the לשון of כותב אדם does not coincide with the פי' הירושלמי.[38] It is evident that תוספות understands the ירושלמי to mean that the ברייתא (on which there is the מחלוקת between ר"ה ור"י) is discussing a case of קיום שטרות, and therefore תוספות has a difficulty with the לשון of the ברייתא. However, why cannot we assume that the ירושלמי interprets the ברייתא (and the ensuing מחלוקת between ר"ה ור"י as we do [regarding הגדת עדות]), the ירושלמי merely adds that the מחלוקת between ר"ה ור"י parallels the מחלוקת between ר"ה ור"י (as explained in the תוספות)?![39]

[34] See footnote # 13.
[35] See מהר"ם שי"ף.
[36] See מהר"ם שי"ף.
[37] See footnote # 24.
[38] See footnote # 32.
[39] See רש"ש.