

A witness and a judge can be combined עד ודיין מצטרפין –

OVERVIEW

stated in the name of רב יהודה that the testimony of an עד and a דיין can be combined. This is understood to mean¹ that if the הנפק challenges the לוח and claims that it was forged (together with the העדים), then one of the עדים together with one of the דינים can testify to verify their respective signatures, and the שטר (with the הנפק) is affirmed.

משמע דאפילו בשטר מקויים חיישינן שמא זיין לחתימת הדיינין –

It appears from this statement of ר"י אמר שמואל, that even by an authenticated שטר, there is a concern; perhaps the signatures of the judges were forged and the הנפק needs to be מקויים. For, if there is no concern of זיוף on the הנפק; why is there any need for the עד and the דיין to be מצטרף? What are they testifying; it is a שטר מקויים?!

וכן משמע בירושלמי דגיטין² ובפרק בן סורר³ –

And so it also seems in תלמוד ירושלמי in פרק בן סורר and in מסכת גיטין that there is a concern of זיוף on the הנפק itself, and if the לוח challenges the הנפק it needs to be מקויים.

anticipates a question:

והא דתניא בתוספתא דשביעית⁴ פרוזבול⁵ המקושר –

And that which we learnt in a ברייתא in the תוספתא of שביעית concerning a 'פרוזבול'⁶ –

רבי יהודה אומר עדים חותמין מבחוץ והדיינים מבפנים –

ר"י claims that the עדים sign on the outside (back) of the פרוזבול and the דינים sign on the inside; where the פרוזבול is written –

¹ See רש"י ד"ה עד (and the response of רבא).

² פ"ט ה"ז.

³ ספ"ג.

⁴ פ"ח ה"ט.

⁵ A פרוזבול is a document in which the מלוה transfers his outstanding loans to ב"ד, enabling the מלוה to collect them after שמיטה; which otherwise he would be forbidden to collect.

⁶ The המקושר is similar to a מקושר. In a מקושר, a few lines of the גט are written; the written lines of the גט are folded over the following blank lines. This fold is sewn or tied together and the עדים sign on the backside of the fold. This process is repeated several times until the entire גט is written and folded (like an accordion). In a פרוזבול המקושר the דינים sign on the blank lines under the written lines, it is then folded over, and according to ר"י the עדים sign on the back, to authenticate the signatures of the דינים; the reverse of a usual קיום, where the דינים authenticate the עדים.

אמרו לו אין מעשה בית דין צריך קיום –

The פרוזבול A **קיום does not require** בי"ד **that an act of** ר"י **said to** חכמים. The פרוזבול, signed by דיינים, is an act of בי"ד; therefore once the דיינים sign on the inside there is no need for the עדים to sign on the outside of the פרוזבול. It would follow that since a הנפק is also a מעשה בי"ד it does not require any further קיום. This contradicts our assumption that the הנפק may be challenged and it requires the דיינים to be מקיים the הנפק.

- קיום does not require מעשה בי"ד that a rule responds; this תוספות

היינו דווקא בפרוזבול משום דנאמן אדם לומר פרוזבול היה לי ואבד -

applies only to a פרוזבול, since a person is believed to claim 'I had a פרוזבול and it was lost'.⁷ Therefore the לווה cannot challenge the מלוה and refuse to pay the loan if a פרוזבול is not presented; for the מלוה can always claim I wrote a פרוזבול and it was lost. It is only by this type of a מעשה בי"ד, in which the לווה cannot challenge the underlying שטר (the פרוזבול), that we maintain קיום צריך קיום. However by a loan where the לווה can claim that the underlying שטר is מזוייף, he can also claim that the הנפק is מזוייף.

anticipates an additional question and resolves it: תוספות

ואפילו למאן דאמר אינו נאמן מודה הוא דלא בעי קיום:

And even according to the one who maintains that the מלוה is not believed to claim ואבד **לי ופרוזבול היה לי ואבד** (it would seem therefore that the לווה can challenge the מלוה concerning the (lack of a) פרוזבול and nevertheless there is no requirement for קיום); nevertheless even this מ"ד **admits** that if the מלוה does produce a (regular) פרוזבול **it does not require קיום**; the לווה cannot challenge it and claim that it is מזוייף.⁸ Therefore, since the לווה cannot challenge the פרוזבול; the דיינים on a מקושר פרוזבול need no קיום from עדים. However a regular שטר where the עדים can be challenged, the הנפק can be challenged as well.

SUMMARY

A **קיום** requires the הנפק if it is challenged that it is מזוייף.

⁷ The reason is because since the מלוה could have made a פרוזבול without any difficulty, we assume that he made it. There is a presumption איסורא ואכיל היתירא. A person will not forgo permitted food and eat forbidden food

⁸ The reason can be understood from the previous footnote # 7; לא שביק היתירא ואכיל איסורא. [Nevertheless this מ"ד maintains that if the מלוה shows no פרוזבול at all, this erodes the חזקה of 'וכו' לא שביק וכו'.] Alternately, a קיום is required for a מזוייף שטר; the לווה can claim that the שטר הלואה is מזוייף for it has to be written with his consent. However how can he claim that the פרוזבול is מזוייף; the פרוזבול can be written without the consent of the לווה (see השחר).

THINKING IT OVER

1. Why is there (even) a (slight) reluctance by תוספות to assume that a הנפק requires קיום if challenged? Why should not the לזה be believed to claim that the הנפק is מזוייף?!

2. According to תוספות (that there is no need for קיום by a פרוזבול since the לזה cannot challenge it) why do the חכמים say that there is no need for קיום since it is a מעשה בי"ד? Seemingly that is not the reason; rather it is what תוספות says because 'נאמן המלוה וכו'!