

**The B'raiso is by a healthy - ברייתא בבריא דלמא כתבה להאי ולא יהביה ליה - person; perhaps he wrote it to this one and did not give it to him**

### Overview

מל explained that the ברייתא (which states that even though that both the grantor and the recipient of a שטר מתנה [which was found] agree that it was given to the recipient, we do not return it to either of them), is in a case where the grantor was a healthy person (and he cannot retract any gifts that he gave), so we are concerned perhaps he wrote this שטר מתנה (which we found) to this recipient, but did not give it to him, rather he wrote a different שטר מתנה later to another person and gave it to him (so the second recipient is the owner), but the grantor changed his mind and wants to give the item to the first recipient (which he cannot do), so he is claiming that this found שטר was already given to the first recipient and since he has the earlier date he will be the owner (which is not true), therefore we do not return the שטר. Our תוספות qualifies the answer of ראב"מ.

היינו דלא כאביי דלדידיה אמאי לא נהדר כיון שהוא רוצה -

**This answer of ראב"מ is not according to אביי, for according to אביי, why should we not return it, since the grantor wants to give it to this recipient, and there is no concern -**

**דעדיו בחתומיו זכין לו היכא דמטא שטרא לידיה<sup>1</sup> -**

Since **עדיו בחתומיו זכין לו**, in a case where the שטר came into the recipients possession.<sup>2</sup> תוספות will now explain how אביי will resolve the contradiction between the משנה and the ברייתא -

**ואביי יתרץ כדרב זביד<sup>3</sup> דבסמוך:**

**And אביי will resolve the contradiction like רב זביד resolves it shortly.**

### Summary

If we maintain **לזכין לו בחתומיו**, the party whose עדים signed first is the proper owner, provided he eventually receives the שטר.

<sup>1</sup> אביי maintains that whenever the recipient of a שטר actually receives the שטר, the transfer becomes effective from the date of the שטר (when the עדים signed it), even though he received the actual שטר on a later date. It is implicit that when the maker of the שטר signed the עדים, that he was granting the recipient (through the signing of the עדים) the full rights of the שטר from this date onwards. Therefore even if the concern of ראב"מ (that perhaps he actually gave it to another first) is correct, nevertheless if it is eventually given to the first recipient, it belongs to him, since the עדים signed his שטר before the signing of the second שטר took place. See 'Thinking it over'.

<sup>2</sup> If the שטר never reaches the recipient, we do not say **לזכין לו בחתומיו** (as opposed to a שטר הקנאה see לעיל יג,א).

<sup>3</sup> עיי"ש, while the ברייתא is discussing the grantor, רב זביד explains that the משנה is discussing the grantor's son.

### **Thinking it over**

תוספות maintains that according to אב"י, the first one is זוכה, since the עדים signed his שטר first, therefore עדין בחתומיו זכין לו.<sup>4</sup> However, one can argue that the rule of עדין בחתומיו זכין לו (retroactively), is only if in the meantime the ownership did not transfer to anyone else (so עדין בחתומיו accomplishes that even if נתן עד תשרי ולא כתב בניסן ולא נתן עד תשרי, he is זוכה from ניסן), however in this case, where after the first שטר was written and signed, but was not delivered, and in the interim the מתנה was given to a second party, who was certainly the owner during this period, perhaps עדין בחתומיו זכין לו is not sufficient to remove the property from the second party and give it retroactively to the first party?!<sup>5</sup>

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<sup>4</sup> See footnote # 1.

<sup>5</sup> See נחלת משה.