

They are believed

הרי אלו נאמנים –

OVERVIEW

The משנה states if עדים testify that they signed on a שטר, however they were unqualified to be witnesses, if there is no other way to authenticate the שטר, the עדים are believed.¹ The שטר is not valid.² Generally, when a שטר is presented, the only claim that can be made against it is that it is a forgery. If that claim is made, the bearer of the שטר is required to authenticate the signatures. However any other claim, including that the עדים were unqualified, is rejected (especially if the שטר was authenticated). It is assumable that the maker of the שטר used only qualified witnesses.

תוספות asks:

ואם תאמר ולמה נאמנים והא מגו במקום עדים הוא³ -

And if you will say; why are they believed to disqualify themselves; the מגו should not be effective **since it is a מגו which contradicts witnesses.** Their claim that they were פסולים contradicts עדים. תוספות will explain why it is a מגו במקום עדים. Seemingly no one is claiming that the signatories are qualified. תוספות explains that there is contradictory testimony to the disqualifiers –

דאנן סהדי שלא היו אנוסים ולא פסולי עדות –

For we testify; בי"ד are the witnesses who claim **that the עדים in the שטר were not forced to sign and are not unqualified witnesses.** Whenever there are (authenticated) עדים on a שטר it is assumed that they are כשרים. This assumption has the strength of עדים. These עדים signed on this שטר, as they themselves testified. Their signatures are authenticated. It is therefore assumable, with the strength of אגן סהדי, that they are כשרים. Therefore their claim that they were פסולים contradicts this עדות.

תוספות will prove that once עדים are authenticated on a שטר, it is considered as if there are witnesses that they are כשרים.

¹ There is a dispute whether they are believed to the extent that the שטר is destroyed, or that the שטר remains unauthenticated. See footnotes # 5&7. See סוכ"ד אות גז.

² The גמרא (later on this עמוד) states that the reason they are believed to claim 'וכי' is because this is a case of הפה שאסר הוא הפה שהתיר. The validity of this שטר is based solely on their testimony that they signed it; however they maintain simultaneously that they were ineligible to be witnesses. תוספות refers to this as a מגו; they did not have to testify at all (or they could have testified that it is not their signatures; see [however] following ד"ה אין תוס' ד"ה [footnote # 7]) and the שטר would not be valid

³ The term מגו במקום עדים means that the claim (which has a מגו) contradicts עדים. A מגו במקום עדים is not an effective מגו. The מגו is not sufficient to dislodge the עדים who contradict the claim.

דהא לקמן⁴ אמרינן דתרי ותרי נינהו –

For later the גמרא **states** that the witnesses who signed on the שטר and the witnesses who disqualify them are considered as if **there are two** witnesses against **two** witnesses. The question is that since in our משנה, there is an assumable testimony (through the אגן סהדי) that the עדים החתומים are עדים כשרים, therefore even though the עדים החתומים claim that we were פסולים, nevertheless they cannot be believed.⁵ The fact that the עדים החתומים have a מגו is meaningless, since it is a במקום עדים.⁶

answers: תוספות

ויש לומר דכיון דהצריכו חכמים קיום הכא לא חשיב קיום כלל⁷ -

And one can say; that since the חכמים require authentication by a שטר; otherwise it is not a שטר כשר, therefore **here** in the case of the משנה, **it is not considered קיום at all –**

– מה שאומרים כתב ידינו הוא זה –

that which the עדים החתומים state that this is our handwriting. The שטר is not

⁴ דף יט,ב. The גמרא there cites a ברייתא that if the two signatories died, and their signatures were authenticated, then if two other witnesses come to disqualify the signatories, the disqualifiers are not believed. This implies that the שטר is valid. The גמרא asks how can the שטר be valid, it is תרי ותרי; the disqualifiers versus those that oppose them. (The גמרא there resolves the difficulty; that the שטר is merely suspended.) We derive from that גמרא that it is assumed that the authenticated signatories are considered as two עדים, who claim that they were עדים כשרים and contradict the disqualifiers.

⁵ There is a dispute among the commentaries whether תוספות means to ask that they should not be believed at all, and the שטר is valid; or that they should not be believed and the status of the שטר will remain unresolved, until we can find other קיום (as in a case of תרי ותרי). See footnotes # 1&7.

⁶ The רישא of the above cited ברייתא, states that if the שטר was not מקום, the disqualifiers are believed (even if they testify that the signatures are authentic). תוספות seemingly has no difficulty with that רישא, only with our משנה. See רע"א who explains that in our משנה since it is the עדי השטר who are testifying that קטנים היינו, this latter testimony of פסלות is not considered הגדת עדות for it is a חוזר ומגיד, since they already signed the שטר (and said כתב ידינו הוא זה), which indicates they are עדים כשרים. They can only be believed on account of the מגו. Therefore תוספות asks that it is a במקום עדים. In the ברייתא however the עדים הפוסלים are different from the עדים החתומים, therefore their testimony of פסלות is a proper הגדת עדות. In addition they also have a מגו, therefore it can be argued ([at least] in the הו"א) that together with a מגו may be effective even במקום עדים. See also קצג אות הרועים.

⁷ Surely realized that the ברייתא (where it is called תרי ותרי) is discussing a case of כתב ידם יוצא ממקום (תרי ותרי) (where they are נאמנים) is discussing a case of אין כתב ידם יוצא ממקום אחר (אחר), and our משנה (where they are נאמנים) is discussing a case of אין כתב ידם יוצא ממקום אחר (אחר) (See 'Thinking it over' # 1). Nevertheless תוספות maintained in the הו"א, since they testified that זה הוא זה (and did not retract it), it should be considered קיום sufficient to set the אגן סהדי in place. תוספות concludes that since they immediately negated the קיום by saying קטנים היינו, there is no קיום at all, and therefore no אגן סהדי. Alternately, according to the view (see footnotes # 1&5) that תוספות question was why they are believed to destroy the שטר; since it is a במקום עדים, the שטר should remain suspended as in תרי ותרי. Therefore תוספות never intended that זה הוא זה is a full קיום. Rather תוספות in the הו"א maintained that the כת"י and the פסולים should cancel out each other. תוספות responds that כת"י has no effect at all, and we must accept the פסולים היינו.

מקוים by this statement of זה כתב ידינו הוא זה. The reason for this is –

כיון דאינהו גופייהו אמרי תוך כדי דבור⁸ קטנים או אנוסים היינו –

Since these witnesses themselves; the very ones who stated זה כתב ידינו הוא זה **say within the כדי דיבור limit, ‘we were minors or we were forced** when we signed’. This statement automatically nullifies any קיום that may have been forthcoming through their opening statement of זה כתב ידינו הוא זה. There is an אגן סהדי that the שטר was signed by qualified witnesses, only if we know that there is a qualified שטר. There can be a qualified שטר only if it is a מקוים. In our case there is no שטר מקוים, hence there is no אגן סהדי. Therefore it is not a במקום עדים.⁹

אבל לקמן חשבינן להו כשני עדים כיון דכבר מקוים הוא –

However later in the גמרא which was previously cited **we do consider** the signatories **as two עדים** who contradict the testimony of the הפוסלים. The reason for this is **since it is already a מקוים** –

שכתב ידם יוצא ממקום אחר –

For their handwriting is already established elsewhere. Their signatures were already verified. This made it a שטר כשר. By a שטר כשר there is an אגן סהדי, that the עדים are qualified. Therefore the עדי השטר and the הפוסלים are considered תרי ותרי.

SUMMARY

When עדים testify that כת"י הוא זה אבל פסולים היינו עדים, they are not merely contesting the validity of the עדים (which would make it a במקום עדים), but rather they are testifying that there is no קיום, and therefore no שטר. The אגן סהדי that the signed עדים are כשרים is only by a valid authenticated שטר.

THINKING IT OVER

1. גמרא proves in the הו"א that there is an אגן סהדי in the משנה, from the גמרא later which states it is a תרי ותרי.¹⁰ Seemingly, when the גמרא later asks that it is תרי ותרי, the thrust of the question is that the עדים הפוסלים are תרי, not that the עדי השטר are תרי. (The עדי השטר there are תרי because יוצא ממקום אחר כת"י.)

⁸ The term תוך כדי דיבור means that it was said within the time that it takes to say the three words of 'שלום' עליך רבי. Anything said תוך כדי דיבור is considered as being said simultaneously with whatever preceded it. In our case it would be as if they initially said we were disqualified עדים. There would certainly be no קיום in such a situation.

⁹ The פה שאסר accomplishes that they have the power to nullify the קיום. There is no אגן סהדי on the קיום. When they said פסולים היינו, this renders the כת"י meaningless. They are saying we wrote our names on a piece of paper, not on a שטר. Without the פשא"ס, however, we would not believe them that פסולים היינו, since they already said כת"י הוא (and are not retracting it).

¹⁰ See footnote # 7.

How does this prove that by us there is an אגן סהדי¹¹?

2. What is the essential difference between the קשיא and the תירוץ of תוספות?¹²

¹¹ See מהרש"א א.

¹² See משכנות הרועים אות קצד ואילך.