

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 **said to ר"י that an act of בי"ד does not require קיום**. A 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 a rule that responds; this rule 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 מלוה 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 מלוה cannot challenge the underlying שטר (the פרוזבול), that we maintain קיום צריך קיום. However by a loan where the מלוה 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 (it would seem therefore that the מלוה 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 מלוה cannot challenge it and claim that it is מזוייף.⁸ Therefore, since the מלוה cannot challenge the עדים from קיום need no פרוזבול מקושר on a דיינים; the פרוזבול; however a regular שטר where the עדים can be challenged, the הנפק can be challenged as well.

SUMMARY

A requires קיום 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; the מלוה can claim that the שטר הלוואה 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 מלוה (see אילת 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 the לוח not be believed to claim that the הנפק is מזויף?!

2. According to תוספות (that there is no need for קיום by a פרוזבול since the לוח 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'!