

הני נוגעין בעדותן הן – These, have a vested interest in their testimony

OVERVIEW

ר"ב explained that the witnesses who testify that the מחזיק made a proper חזקה, are the tenants of the מחזיק, who claim that they lived in this house for three years day and night. ר"ב challenged this explanation; that these witnesses are biased. Their testimony cannot be accepted. It could be that they did not live in the house for three years ובליילה, however they have a reason to lie and say that they did live there ג"ש ביום ובליילה; for if they would say the truth that they did not live there ג"ש ביום ובליילה,¹ then the מחזיק would not have a חזקה. He has no proof that he was there ג"ש ביום ובליילה. The house would revert back to the מערער. The מערער in turn would demand from the עדים the rent for the past three years.² How can we believe these עדים who have a motive to lie? עדים must be completely objective. תוספות will originally challenge this assumption that they are נוגע בעדות, and subsequently resolve his question.

תוספות asks:

ואם תאמר ואמאי הוו נוגעין בעדות הא איכא מיגו דהוי מצי אמרי פרענא לך אגר –

And if you will say; and why are they considered biased in their testimony; there is a מיגו, which absolves the witnesses from any partiality for they could have said to the מערער we have paid the rent to you. When the עדים were called upon to testify, (even) if in truth they did not live there ג"ש ביום ובליילה, they had no need to lie (that they did live there ג"ש ביום ובליילה), out of concern that they would have to pay the מערער the rent (again), they could have said the truth (concerning the time they lived there) and concluded (with a different lie) that we paid the מערער the full rent that was owed to him for the period that we lived in this house. The מערער will have no recourse to claim the rent from them. The עדים, in their dispute against the מערער concerning the rent, will be considered as a כופר הכל, who is פטור even from a שבועה. The עדים, therefore, to protect themselves, if they are indeed lying, had no need to testify that we lived there ג"ש ביום ובליילה. They could have just as easily lied that we paid the rent to the מערער.³ They could say whichever of these two positions they choose. This מיגו

¹ The truth perhaps was that they missed some of the לילות, etc. There was no ג"ש ביום ובליילה.

² It is irrelevant, as far as paying the rent is concerned, whether the (עדים) tenants were there ג"ש ביום ובליילה or not; they must pay the full rent. It is only in regards to establishing a חזקה that ג"ש ביום ובליילה is required.

³ תוספות writes in many places that we do not say a מיגו with two associated litigants (on the same side). The reason תוספות gives is that each of the עדים will be afraid to claim the מיגו, because he does not know if the other witness will also claim this מיגו. Our תוספות seems to disregard this principle. However תוספות himself (in ד"ה מגב) קידושין מגב, ד"ה in answers that in a claim where they wish to acquit themselves from liability we do say a מיגו בי תרי, for they are confident in each other that they will present the same claim. See בל"י אות סה for an alternate explanation.

removes any bias from the testimony of the עדים;⁴ it was not necessary for them to say this particular testimony to protect themselves. The עדים therefore, should not be considered as נוגע בעדות and their testimony should be accepted.

anticipates a difficulty with this reasoning and resolves it:

ואף על גב דבתר דתקון רבנן שבועת היסט לא מהימני לאסהודי בהאי מיגו –

And even though that after the רבנן instituted a oath;⁵ this abovementioned מיגו would not make them believable witnesses, they would be considered biased; we can longer say that the עדים have a choice of which lie to say. The עדים will prefer to say that they lived in the house ג"ש ביום ובלילה (in which case they would be exempt from any further obligations) as opposed to claiming that they paid the מערער (which would obligate them to take the היסט שבועת היסט) –

כדאיתא בריש האיש מקדש (קדושין מג,ב) –

As it is cited in the גמרא in the beginning of פרק האיש מקדש,⁶ nevertheless –

הכא דאמתניתין קיימין ואכתי לא ניתקנה שבועת היסט מאי פריך להימניה במיגו –

Here, however, that we are discussing the משנה; how is it possible for the משנה to state that the הבתים ג"ש; who will testify to that effect. Concerning the משנה there is no difficulty **since the שבועת היסט was not yet instituted** at the time of the משנה. Therefore original question remains **what** does the גמרא ask that they are biased and should not be believed; it is not so, they are not biased **they should be believed on account** of the מיגו; they could have said we paid the rent to the מערער (and in the times of the משנה they would not be obligated (even) to swear).

answers:

ויש לומר דהאי לאו מיגו הוא שיראים לומר פרענו לך –

And one can say; that this claim of למערער is not a proper מיגו; for they are afraid to say to the מערער we paid the rent to you -

⁴ The purpose of the מיגו here is not to be taken in the usual sense of מיגו, where the מיגו is the cause why he is believed. Rather the function of the מיגו here is to remove the נגיעה from the עדים. Once the נגיעה has been removed through the מיגו, the עדים are believed on their own merit, as עדים. See: 'Thinking it over' B.

⁵ In the times of the אמוראים, the חכמים instituted that even a כופר הכל must take an oath that he owes no money to the claimant. [Until that time a כופר הכל was פטור משבועה (even מדרבנן); only a מודה במקצת had to swear]. Therefore the עדים would be required to take this שבועת היסט if they claim that they paid the מערער the rent (and he denies it).

⁶ The גמרא there states that if a לווה sent payment to the מלוה with two שלוחים, the שלוחים can testify that they paid the loan to the מלוה and the לווה is פטור even if the מלוה claims that he never received the money. A similar question arises there. The עדים are נוגע בעדות. If they will not testify that they paid the מלוה, the לווה will request his money back. The גמרא answers that the עדים have a מיגו, they could say to the לווה that we returned the money to you. Therefore they are not נוגע בעדות and are believed. The גמרא there concludes that after the רבנן instituted היסט שבועת היסט, this מיגו exists no longer, therefore these שלוחים are נוגע בעדות and will not be believed. עיי"ש. We derive from that גמרא (both, that a מיגו can remove a נגיעה בעדות [see 'Thinking it over' A], and) that שבועת היסט invalidates the מיגו.

כי שמא יזכה האחר⁷ ויתבע מהם פעם שנית [ועיין עוד תוספות שבועות מה, ב דיבור המתחיל בעדים]:

For perhaps the other litigant (the מחזיק) will be successful [in this suit] and the מחזיק will demand from them a second payment. Therefore we are concerned that they are lying, and did not live in the house ג"ש ביום ובלילה and the best option for them, is to lie and say we did live ג"ש ביום ובלילה in order not to pay the מערער. They are reluctant to lie that they paid the מערער, since they do not know the outcome of this דין תורה. Perhaps the מחזיק will win the case (he will find other עדים, etc.) and then they will have to repay him the three years rent again. They are indeed בעדות בעדות.

SUMMARY

The מיגו that the עדים could have claimed that we paid the מערער is not sufficient to remove their גניעה בעדות. They are reluctant to claim למערער, since it is possible that the מחזיק will win the case and demand a second payment from them.

THINKING IT OVER

נוגע contends that since the עדים have a מיגו of למערער, they are not נוגע בעדות. Seemingly this is not sufficient:

A. When the עדים testify that they lived there ג"ש, they are benefitting themselves. Even though they could have achieved this benefit through other means, it does not detract from the fact that they are benefiting (somewhat) from their testimony. It is not comparable to other עדות, where the עדים are completely objective and gain nothing from their testimony. This should be considered נוגע בעדות!⁸

B. It would seem that given a choice of lies, the עדים would prefer⁹ to lie that they lived ג"ש ביום ובלילה, where no one is sure that they are lying; as opposed to lying that למערער, where the מערער knows that they are blatant liars.¹⁰ This מיגו should not be sufficient to remove their bias!¹¹

⁷ The האחר בדין ויתבע amends this to read הגהות הב"ח.

⁸ See footnote # 6.

⁹ In both claims – whether they paid the מלוה or returned the money to the לווה – are equal; as opposed to our case.

¹⁰ In a regular מיגו, the מיגו is usually a stronger and better claim than the actual טענה. It does not seem so in our case. In addition, when they claim ג"ש ביום ובלילה, ודיירנא ג"ש, they maintain a status of עדים; however when they claim למערער, they become litigants. The aloof status of עדים is preferable over the involvement of a litigant.

¹¹ See footnote # 4.