

## **אמור רבנן הבא ליפרע כולי - The said, he who comes to collect, etc. רבנן**

### **OVERVIEW**

רב"ש was owed two debts by the father of the יתומים. One debt (on which there was a משכון) he already collected (by eating the produce of the field). רב"ש knew that if he tried to collect the additional (non-mortgaged) debt directly from the יתומים he would be obligated to swear. He wanted to circumvent taking this oath, and to collect this debt by continuing to consume the produce of the field under the pretense that the field was his.<sup>1</sup>

In this case these יתומים were קטנים (as אב"י mentions). By יתומים קטנים there is a greater restriction; one cannot collect at all from יתומים קטנים even with a שבועה (unless their assets will be diminished on account of interest payments). תוספות will discuss the ramification of this דין of יתומים קטנים in our case.

anticipates a difficulty: תוספות

אף על פי שאף בשבועה לא היה יכול ליפרע מהם עד שיגדלו –

**Even though that even with an oath he would not have been able to collect his debt from them until they grow up and become adults –**

כדקאמרינן ולכי גדלי אישתעי דינא בהדייהו –

**As אב"י shortly states: ‘and when they will grow up you can involve them in a lawsuit’;** meaning that until they mature there can be no דין תורה. Why therefore did רב"ש only mention the difficulty that he would have to take an oath, he should have also mentioned that he would be required to wait until they are גדולים, thus tying up his monies due to him.

replies: תוספות

**לא היה מקפיד על ההמתנה אלא על השבועה<sup>2</sup> –**

<sup>1</sup> After רב"ש would have collected his (additional) debt, he planned to return the property to the יתומים. If they would then claim that he collected more than the mortgage, he would show the שט"ח, that he was owed additional monies. רב"ש would not have to swear to the יתומים, since he (thought that he) has a מיגו of ידי. לקוחה היא בידי מיגו. The מיגו would exempt him from the שבועה. It seems from the conduct of רב"ש that the rule of לא יפרע מנכסי יתומים לא יפרע אלא is a דין for בי"ד only. The בי"ד will require that whoever wishes to collect from יתומים, or even whoever already collected a debt from יתומים is required to swear that he is/was owed the monies. An individual, however, is not bound by these rulings. If an individual can find a way to collect from יתומים without a שבועה he may do so. Eventually he may have to answer to בי"ד why he took the monies. He may then either have to swear, or as in the case of רב"ש be exempt from the שבועה if he has a מיגו. Initially however רב"ש could not use this מיגו, since it would be a מיגו להוציא. See footnotes # 3 & 7 for additional reasons why רב"ש did not initially go directly to בי"ד and use this מיגו.

<sup>2</sup> It is known that one should refrain from taking an oath even if one is swearing truthfully.

**He was not particularly disturbed concerning the waiting period but rather he was disturbed only about taking an oath.** Therefore he only addressed this issue. In truth however he decided to collect the monies while they were still קטנים and would not wait, because he wanted to circumvent the שבועה.

anticipates the following difficulty: Granted that רב"ש thought that he could circumvent the שבועה on account of the מיגו.<sup>3</sup> However how could he circumvent the ruling that one may not collect at all from יתומים קטנים?! Seemingly the מיגו itself would not be able to override this ruling.<sup>4</sup> תוספות responds:

**ונראה דרבא בר שרשום סבר כרב הונא בריה דרב יהושע –**

**- ר"ה בריה דר"י agrees with רב"ש**

**דמפרש טעמא<sup>5</sup> בשילהי מכילתין (דף קעז,א) טעמא דאין נזקקין לנכסי יתומים משום צררי-** **who explains, at the end of our מסכת, the reason for the ruling that we do not attach the assets of (minor) orphans to pay off any debts is because of 'bundles' of money.** There is a dispute between ר"ה בדר"י and רב פפא for the reason why אין נזקקין לנכסי יתומים is because there is a concern that the father of the יתומים already settled the debt by giving a bundle of money to his creditor (to hold as a security for the debt).<sup>7</sup> ר"ה בדר"י agrees with רב"ש that this is indeed the reason. Therefore רב"ש argued that since he knows for sure that the father of these יתומים did not place any צררי by רב"ש, therefore he may collect his debt (even) from יתומים קטנים.<sup>8</sup> **דאי כרב פפא דמפרש משום דפריעת בעל חוב מצוה<sup>9</sup> ויתמי לאו בני מיעבד מצוה נינהו –**

<sup>3</sup> It would seem from our סוגיא that אמרינן מיגו לאפטורי משבועה, עליית דר"י, who maintains that לא אמרינן מיגו לאפטורי משבועה (which may explain why he could not have initially gone to ב"ד with this מיגו), however here he would be considered a משיב אבידה for returning the field to the יתומים, when he (thought that he) could have kept it. A משיב אבידה is exempt from a שבועה.

<sup>4</sup> The מיגו can be effective in responding to the claim of the יתומים, that רב"ש collected more than he was due. The fact that he has a מיגו allows רב"ש to keep the monies he collected for his שט"ח without the need for a שבועה. However how was רב"ש initially permitted to collect from the property of יתומים קטנים?!

<sup>5</sup> The טעמא deletes the word הגהות הב"ח.

<sup>6</sup> See (also) תוספות דף ה,ב ד"ה ואפילו.

<sup>7</sup> This concern of צררי by יתומים קטנים prevents the collection of a debt even with a שבועה. (One of) The reason(s) given is because since they are יתומים קטנים it is considered as if they are not present in ב"ד. There is a ruling that we do not accept evidence in the absence of the (opposing) litigant. [The reason רהבדר"י needs to add the concern of צררי is to exempt the יתמי even where ב"ד was האב בחיי האב (See תוד"ה ואפילו) (נח"מ ה,ב תוד"ה ואפילו).] This may also explain why רב"ש did not initially come to ב"ד with his מיגו of לקוחה בידי מיגו. This מיגו would not be accepted since they are יתומים קטנים. We do not accept any evidence בעל דין. See רמב"ן.

<sup>8</sup> The גמרא there (קעז,ב) states that in certain cases, where we are certain that the לווה owed the money, the rule of אין נזקקין לנכסי יתומים, does not apply according to ר"ה בדר"י. See 'Thinking it over'.

<sup>9</sup> According to ר"פ in the case of a מלוה (ע"פ), the מלוה has no inherent שעבוד on the properties of the לווה. It is merely an obligation (מצוה) on the לווה to repay the מלוה. The properties that the children inherit are not משועבד to the מלוה. The יתומים however are obligated to repay their father's loan. If the יתומים are קטנים, there can be no obligation on them until they become גדולים. See the various commentaries whether ר"פ maintains his stance even by a בשטר מלוה.

אין נזקקין לנכסי יתומים **for if** רב"ש would agree **with ר"פ** who explains the reason for **מצוה** (קטנים) is **because** since the obligation of repaying a creditor is 'merely' a **מצוה** and minor **יתומים** are not obligated to perform **מצוה** –

**אם כן** אפילו יהא אמת כדבריו לא היה יכול לעכב להם הקרקע בחובו – **if this were so**; that רב"ש agrees with ר"פ that the reason for **יתומים** is **because** since the obligation of repaying a creditor is 'merely' a **מצוה** and minor **יתומים** are not obligated to perform **מצוה**, then **even if it his claim were true**; that their father owed him additional monies, nevertheless רב"ש **would not have been** legally **capable to withhold the land from** the **יתומים** **on account of his debt** –

**כיון דלאו בני מיעבד מצוה ניהו** –

**Since the** **יתומים** **are not obligated to perform any מצוה**. רב"ש wanted to have his debt repaid without having to take an oath. However he wanted to collect it legally; as is evident in his claim to אב"י, that he could have received it through the מיגו. However if רב"ש agrees with ר"פ, then it is immaterial whether or not his claim is valid. ר"פ maintains that in all situations one may not collect from the estate of **יתומים**. This proves that רב"ש agreed with the reason of ר"ה בריה דר"י.

תוספות concludes:

**וכדבר הונא נמי פסקינן התם :**

**And there too** the **rules according to** ר"ה בד"י. This supports the contention that רב"ש follows the view of ר"י בד"י, in accordance with the הלכה.

## SUMMARY

רב"ש maintains (like ר"ה בד"י) that it is on account of the **צרי** that one may not collect from **יתומים** even with a שבועה. Therefore since רב"ש knew there was no **צרי**, he (thought that he) was able to collect the debt from the **יתומים** and would be able to circumvent the שבועה through the מיגו of **היא**.

## THINKING IT OVER

It seems that if we assume the reason of **יתומים** is on account of **צרי**, then רב"ש was justified in collecting his debt, because he knew there was no **צרי**.<sup>10</sup> If this is true, then why did רב"ש require a מיגו to circumvent the שבועה, he could have claimed that he knows for sure that he is owed the money?<sup>11</sup>

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and whether this relates to the מחלוקת if דאורייתא or not.

<sup>10</sup> See footnote # 8.

<sup>11</sup> See בל"י אות קעח.