

מיגו דאי בעי למימר לקוחה היא - Since he could have said it was bought

OVERVIEW

was of the opinion that if he would collect his debt from the estate of the deceased, he would not have to swear later when confronted by the יתומים.¹ His reasoning was that רב"ד would have to believe him (without a שבועה) that the monies were owed to him, for he has a מיגו that he could claim that the entire property belongs to him; that he purchased it from their father. It follows that רב"ש was convinced that if he would claim I bought it, he would not have to swear; otherwise, how would the מיגו exempt him from swearing now. תוספות challenges this assumption and claims that רב"ש would be required to swear even if he would have claimed היא בידי לקוחה.

asks: תוספות

ותימה מאי דעתיה דרבא בר שרשום –

And it is astounding! What was רב"ש thinking; when he claimed that he had a מיגו of לקוחה היא בידי? Seemingly he thought that if I would claim לקוחה היא בידי it would be mine without שבועה, therefore if I claim that I consumed the produce for the additional debt, I should also be exempt from a שבועה. However this is not so –

דאפילו אי טעין לקוחה היא בידי שבועת היסט² לעולם צריך –

For even if רב"ש claimed that I bought it, there is always a requirement to take a היסט oath.

דנהי דאין נשבעין על קרקעות מדאורייתא³ מדרבנן נשבעים –

For granted that מן התורה there is no oath administered in disputes concerning land; nevertheless **there is** a requirement **מדרבנן to take a היסט oath** even by קרקע. Therefore even if רב"ש would have claimed that the קרקע היא בידי קרקע, he would have to swear a שבועת היסט before he would be able to retain the קרקע. It should be obvious that this מיגו of לקוחה היא בידי (which is מחייב שבועה) cannot exempt him from the שבועת היתומים, which he is required to take, for his claim against their property.⁴

¹ See previous footnote # 1. ד"ה אמור תוספות

² The שבועת היסט was instituted in the times of the גמרא. It obligates (even) a כפר הכל to take this שבועה. In our (hypothetical) case, רב"ש is a כופר הכל; he is claiming that the field is his. The word 'היסט' is from the same root as מסית; to convince or persuade. The חכמים were convinced to administer this oath in order to persuade him to admit (see ד"ה היסט). The שבועת היסט is different than the שבועת המשנה which was instituted by the חכמי המשנה in specific instances for those who are collecting monies.

³ This is derived from a כלל ופרט וכלל. See ב"מ נז,ב.

⁴ A טענה cannot be better than the מיגו. If the מיגו requires a שבועה, then the טענה certainly requires a שבועה.

קרקע will now prove that מדרבנן there is a שבועת היסט.

כמו שדקדק רב האי גאון מההיא דהכותב (כתובות דף פז,א) –

As **inferred from the גמרא** that מדרבנן there is a שבועת היסט even by קרקע. The משנה there states –

הפוגמת כתובתה ועד אחד מעידה שהיא פרוע לא תפרע אלא בשבועה –

A wife **who diminished her כתובה**; she received partial payment for her כתובה while still married; or **where one witness testifies against her, that the כתובה was paid up in full**; in either case **she cannot collect** (what she claims is due to her) **unless** she takes **an oath**, that she is due payment for her כתובה. This concludes the quote from the משנה. The גמרא there states:⁵

סבר רמי בר חמא למימר שבועה דאורייתא –

ה' sought to interpret this oath to mean a תורה oath. In the case of פוגמת she is a עד אחד which requires a שבועה דאורייתא, as is also the case where one contradicts an אחד.

אמר רבא שתי תשובות בדבר כולי ועוד⁷ דאין נשבעין על כפירת שעבוד קרקעות⁸ –

there are two refutation concerning this matter, in which you (רב"ה) maintain that it is a שבועה דאורייתא, etc. **and furthermore** (the second refutation is) **that there is no שבועה דאורייתא for claims involving denying mortgaged properties.** There is no חיוב שבועה מן התורה for any claim or denial of a claim which involves collecting from קרקע. The כתובה generally is collected from the real estate of the husband, which is mortgaged towards her כתובה. Therefore there can be no שבועה דאורייתא concerning payment of a כתובה. The משנה can only mean a שבועה דרבנן.

אלמא דמדרבנן נשבעין⁹ והוא הדין שבועת היסט דמאי שנא –

It is evident that מדרבנן there is a שבועה even on קרקע. anticipates that this may not be a conclusive proof. The גמרא there is discussing a המשנה (which is נשבעין ונוטלין); we are discussing a שבועה היסט (which is נשבע ונפטר). Nevertheless concludes **and the same rule applies to a שבועת היסט**, that מדרבנן there is a שבועת המשנה even for קרקע, **for what difference** should there be between a שבועת היסט and a שבועת היסט. If by חיוב שבועה there is a שבועת המשנה, the same should apply to a שבועה לקוחה היא בידי מיגו of מיגו. The question remains why would the רב"ש exempt לקוחה היא בידי מיגו, since even if he would claim לקוחה היא בידי מיגו, he would have to swear a שבועת היסט.

⁵ כתובות פז, ב.

⁶ The husband (or the heirs) claims that she received her entire כתובה, while she claims that she only received a partial payment and the rest is due to her.

⁷ The first refutation is that התורה מן one only swears to be exempt from payment. Here she swears and collects her כתובה. This is indicative of a שבועת המשנה, which is נשבעין ונוטלין.

⁸ See footnote # 3.

⁹ The משנה states that a פוגמת וכו' must take an oath (מדרבנן as רבא stated) before she can collect her כתובה.

answers: תוספות

ויש לומר דאין נשבעין שבועת היסט אלא היכא דטעין ברי¹⁰ –

And one can say that one does not swear a שבועת היסט unless the opposing litigant presents his claim with certainty –

אבל הכא לאו טענת ברי הוא שאין ודאי ליתומים שקרקע זו אינה לקוחה בידו –

However, here in the case of רב"ש, there is no claim of certainty, for the orphans are not sure that this field was not purchased by רב"ש. The יתומים do not know for certain that רב"ש did not purchase this field from their father. All they can claim is that we know the field once belonged to our father. We want you to prove that you bought it from him. This is not a טענת ברי, but rather a טענת שמא. –

הלכך אי הוה טעין לקוחה היא בידי לא הוה צריך שבועת היסט :

Therefore if רב"ש would have claimed 'I bought it', he would not be required to take the שבועת היסט; since there is no טענת ברי that contradicts him. רב"ש maintained therefore, that this מיגו of בידי היא לקוחה should exempt him from a שבועה.

SUMMARY

There is a קרקעות on שבועת היסט מדרבנן. However there is no שבועת היסט unless there is a טענת ברי.

THINKING IT OVER

1. If a מחזיק retains the field on the basis of a חזקה, is he required to swear a שבועת היסט, if the מערער has a טענת ברי? What if he retains it on the basis of a שטר?¹¹

2. Why is a שבועת היסט administered only by a טענת ברי?¹²

¹⁰ See 'Thinking it over' # 2.

¹¹ See נח"מ.

¹² See בל"י אות קפא and נח"מ.