

**Since he could have said it was bought – מיגו דאי בעי אמר לקוחה היא**

### 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 <sup>1</sup>. His reasoning was that <sup>1</sup> 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 claimed **לקוחה היא בידי**.

has a difficulty:

**and it is perplexing! – ותימה**

**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 it would be mine without a 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 –

**for even if רב"ש claimed that I bought it – דאפילו אי טעין לקוחה היא בידי**

**he is always required to take a oath<sup>2</sup>. – שבועת היסט לעולם צריך**

**for granted that התורה – דנהי דאין נשבעין על קרקעות מדאורייתא no oath administered in disputes concerning land;<sup>3</sup> nevertheless –**

**there is a requirement מדרבנן to take a oath** even by **מדרבנן נשבעין**. Therefore even if רב"ש would have claimed that the קרקע is **לקוחה היא בידי**, 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 a שבועה) cannot exempt him from the שבועת היסט, which he is required to take, for his claim against their property<sup>4</sup>.

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

**deduced that מדרבנן רב האי גאון – כמו שדקדק רב האי גאון** – שבועת היסט – קרקע –

**from the גמרא in הכותב – מההיא דהכותב (כתובות דף פז,א) –** where the משנה states –

<sup>1</sup> See previous footnote # 1.

<sup>2</sup> 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.

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

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

**כתובה** – a wife who diminished her **הפוגמת כתובה**; she received partial payment for her כתובה while still married; or –

**where one witness testifies against her, that the was paid up**; 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<sup>5</sup>:

**sought to interpret this oath to mean – סבר רמי בר חמא למימר**

**a תורה oath**. In the case of פוגמת she is a מודה במקצת which requires a שבועה דאורייתא, as is also the case where one contradicts an אחד.

**said there are two refutation** **אמר רבא** – **there are two refutation** concerning **this matter**, in which you maintain that it is a שבועה דאורייתא, etc.

**and furthermore** (the second refutation is<sup>6</sup>) **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 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.

**It is evident that מדרבנן there is a שבועה** even on קרקע. **אלמא דמדרבנן נשבעין**

anticipates that this may not be a conclusive proof. The גמרא there is discussing a (נשבע ונפטר) שבועה היסת (which is נשבעין ונוטלין); we are discussing a (נשבעין ונוטלין) שבועה המשנה. Nevertheless תוספות concludes –

**and the same rule applies to a שבועת היסת**, that מדרבנן there is a שבועת היסת even for קרקע –

**for what difference** should there be between a שבועת המשנה and a שבועת היסת. If by קרקע by חיוב שבועה there is a שבועת המשנה, the same should apply to a שבועת היסת.

The question remains why would the מיגו of ידידיה be exempt לקוחה היא בידי מיגו, since even if he would claim לקוחה היא בידי מיגו, he would have to swear a שבועת היסת. תוספות offers an answer:

**and one can say – ויש לומר**

**that one does not swear a שבועת היסת** – **דאין נשבעין שבועת היסת**

<sup>5</sup> כתובות פז, ב.

<sup>6</sup> The first refutation is that 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.

<sup>7</sup> See footnote # 3.

**unless the opposing litigant presents his claim with certainty<sup>8</sup> – אלא היכא דטען ברי**

**however here in the case of רב"ש, there is no claim of certainty – אבל הכא לאו טענת ברי הוא**

**for the orphans are not sure – שאין ודאי ליתומים**

**רב"ש that this field was not purchased by** The. **שקרקה זו אינה לקוחה בידו** cannot 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 שמא טענת. –

**therefore if רב"ש would have claimed ‘I bought it’ – הלכך אי הוה טעין לקוחה היא בידי**

**he would not be required to take the שבועת היסט; לא הוה צריך שבועת היסט;** since there is no טענת ברי that contradicts him. רב"ש maintained therefore, that this מיגו of שבועה should exempt him from a שבועה.

### Summary

There is a שבועת היסט on קרקעות 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?

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

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<sup>8</sup> See ‘Thinking it over’ # 2.