

הוי מחויב שבועה ואינו יכול לישבע –

He is obligated to swear but he cannot swear

OVERVIEW

In the case of נסכא דר"א, the claim of ידידי חטפי by the חוטף is not a credible claim, the only way it can be substantiated is via the מיגו of חטפי. However if he would claim לא חטפי he would be required to swear and contradict the ע"א who claims חטף. Therefore since his only credibility depends on swearing against the עד (that לא חטפי), and he cannot do that (because he claims ידידי חטפי), therefore he must return the נסכא.¹ Our תוספות discusses why he can't swear that ידידי חטפי and be believed with a מיגו of חטפי.

שהרי מודה² –

He cannot swear to contradict the עד (who is testifying that he grabbed away the נסכא) **since he admits** that he grabbed the נסכא.

תוספות asks:

ואם תאמר וליהמניה בשבועה במאי דאמר ידידי חטפי במיגו דאי בעי אמר לא חטפי –
And if you will say; and let us believe him, in that which he claims that ‘I grabbed mine’, with an oath (of ידידי חטפי), since he has a מיגו, for he could have said, ‘I did not grab’; in which case he would take the oath of לא חטפי and be believed, let him instead take an oath of ידידי חטפי and be believed.³ What difference should there be which oath he takes?

תוספות anticipates a possible solution to the question:

וכי תימא דהא לא חשיב מיגו דהא אם אמר לא חטפי היה חייב שבועה דאורייתא⁴ –
And if you will say; that this is not considered a מיגו, for if he would claim לא חטפי, he would be obligated to take a דאורייתא oath; however now when he claims ידידי חטפי there is no מדאורייתא שבועה, therefore it is not a מיגו –

¹ See the רשב"ם here.

² תוספות may be negating a different interpretation why he cannot swear; namely that once he says ידידי חטפי, he is considered a גזול and a גזולן is פסול לשבועה. If that would be the interpretation there would be no room for תוספות ensuing question. תוספות assumes that even though he says חטפי ידידי, he is not considered a גזולן since he claims ידידי חטפי.

³ See ‘Thinking it over’ # 1.

⁴ A מיגו is valid only if he could just as easily make the מיגו claim as his actual claim. Here however it is easier for him to make the actual claim of ידידי חטפי where there is no מדאורייתא שבועה (only the more lenient שבועה דרבנן) as opposed to making the מיגו claim of לא חטפי where there would be the more serious מדאורייתא שבועה.

rejects this solution:

לא היא דהא אמר בהמוכר את הבית (לקמן דף ע"א ושם) המפקיד אצל חבירו בשטר –

This is not so (there is no difference regarding a מיגו whether it is a שבועה דאורייתא or a שבועה דרבנן), **for** רב חסדא **stated in** את המוכר את הבית, regarding **one who deposited** an item by his friend with a שטר (which states the terms of the deposit) –

נאמן לומר החזרתיו לך בשבועה מיגו דאי בעי אמר נאנסו דהוי נאמן בשבועה –

The custodian is believed to say, 'I returned it to you' with an oath (even if the מפקיד is in possession of the שטר), since the custodian has a מיגו, **for he could have said, they were lost in an unpreventable manner**, in which case (if he claimed נאנסו) **he would have been believed with a שבועה** of נאנסו, therefore he is also believed with a שבועה of החזרתיו לך –

אף על גב דבנאנסו איכא שבועה דאורייתא –

Even though that by נאנסו there is a שבועה דאורייתא (the שבועת השומרים) and when he claims החזרתיו there is no שבועה מדאורייתא, nevertheless it is a valid מיגו. This proves that a מיגו is valid even if the claim does not require a שבועה דאורייתא and the מיגו requires a שבועה דאורייתא. The question remains why the חוטף is not believed with a שבועה that חטפי.

המפקיד אצל חבירו בשטר offers a refutation of the proof from תוספות:

ומיהו לפירוש רבינו תם דפירש שבועה דנאנסו דהתם היא מדרבנן –

However, according to the explanation of the ר"ת who explained that the שבועה of נאנסו there is only a מדרבנן, because –

דלא מיחייב שבועה דאורייתא אפילו בנאנסו אלא היכא דאיכא הודאה במקצת⁵ אתי שפיר –

One is not מחוייב in a שבועה דאורייתא claim unless there is a partial admission, according to this view it is properly understood, why by המפקיד there is a מיגו since both שבועות are מדרבנן (for there was no הודאה במקצת), however in our case where the מיגו requires a שבועה דאורייתא and the claim does not require a שבועה דאורייתא, therefore in our case there is no מיגו. According to the other opinions however that every נאנסו requires a שבועה דאורייתא (even without a הודאה במקצת) the question still remains why is he not believed with a שבועה since he has a מיגו.

anticipates a possible alternate solution:

וליכא למימר נמי דהאי לא חשיב מיגו דלא הוה חציף למימר לא חטפי להכחיש את העד⁶ –

And one cannot either say that this is not considered a מיגו since he is not that brazen to claim לא חטפי to contradict the עד –

או משום שירא שלא יפסלוהו לעדות העד ובעל הנסכא –

⁵ This is the view of חמא בר חמא (cited in ב"מ ה"א) that the שבועה השומרים is given only when there is a הודאה במקצת and a הודאה במקצת.

⁶ In the case of the מפקיד, the מיגו of נאנסו is not contradicting anyone; therefore he is comfortable to claim it.

Or it is not a מיגו because he is afraid to claim חטפי so that the ע"א and the owner of the נסכא should not invalidate him from being a עד כשר.⁷

will prove that the עדות of the בעל הנסכא (who is a litigant) will be accepted to the extent of making the חוטף a עדות:

כדאמר בפרק זה בורר (סנהדרין דף כה, א) דבעל דבר מהימן למימר [לדידי אוהפן ברביתא] –

As ruled in בורר זה בורר that the litigant (in this case the לווה) is believed to say ‘he lent me money with interest’, and can be combined with an ע"א to make the lender פסול לעדות. Here too the ע"א and the בעל הנסכא will make the grabber פסול לעדות. Either of these two reasons explains why there is no מיגו here because he does not want to use the claim. This would seemingly answer our question.

rejects this solution:

דהא משמע דאי לאו דעד מחייבו שבועה היה פטור⁸ והיינו על כרחך במיגו –

For it seems that if not for the fact that the עד obligates him to swear, the חוטף would be פטור and retain the נסכא, and perforce we must say that this is on account of the מיגו of חטפי –

goes on to prove that the reason he would be believed to claim חטפי (if the ע"א is not of חטפי) is only because the חוטף has a מיגו (שבועה a מחייב):

דאי לאו מיגו לאו כל כמיניה למימר דידי חטפי –

For if not for the מיגו (of חטפי) the חוטף would not be believed to claim דידי – חטפי proves this -

דהא כי איכא תרי סהדי משלם ואינו נאמן לומר דידי חטפי –

For if there are two witnesses who saw the grabbing, the חוטף must pay, and he is not believed to claim חטפי, because דידי חטפי is no claim at all (it is the equivalent of saying, ‘I stole it’); the only way that דידי חטפי is believed is if he has a מיגו of חטפי. Therefore by two עדים where there is no מיגו of חטפי, he is not believed. However if there is only one עד he would be believed [if we were to assume that an ע"א is not מחייב a שבועה]. The only reason he is believed to claim דידי חטפי against this ע"א (who is not מחייב a שבועה) is because of the מיגו of חטפי. This proves that the חוטף has no concern את העד להכחיש, or that this may make him a פסול לעדות (for we use this מיגו in the hypothetical case where the ע"א is not מחייב a שבועה). The

⁷ If he would claim חטפי the testimonies of the עד and the בעל הנסכא who claim that he was חטף will be combined to contradict him and make him פסול לעדות since he is a גזול. See ‘Thinking it over’ # 2.

⁸ ruled that since the חוטף is a מחויב שבועה (of חטפי) and אינו יכול לישבע (for he says חטפי) therefore he has to pay, but if he would not be a משוא"ל he would not have to pay. The question is why; it cannot be that דידי חטפי is a טענה (as תוספות will soon show), so it must be only because he has a מיגו of חטפי, which contradicts the ע"א and places him in danger of becoming פסול לעדות and nevertheless it is sufficient to have us believe him. This proves that חטפי is a valid מיגו.

question remains since it is a good מיגו and there is no difference (regarding a מיגו) whether it is a שבועה דאורייתא or a שבועה דרבנן, so the חוטף should be believed with a מיגו of חטפי. לא חטפי.

answers: תוספות

ואומר רבינו יצחק דודאי אם לא היה העד מחייבו שבועה –

And the ר"י says; that certainly (in the hypothetical case) where the עד would not obligate him to swear -

היה נאמן במיגו דאי בעי אמר לא חטפי שיכול להעזי פניו להכחיש את העד בלא שבועה –

He would be believed with a מיגו that he could have said חטפי, because he can be brazen (and claim חטפי) to contradict a weakened עד who cannot make him swear (לא חטפי) -

אבל השתא דמחייבו שבועה לא מהימן בשבועה –

But now that the ע"א obligates him to swear, he is not believed with a שבועה of ידי חטפי –

על ידי מיגו שהיה יכול להעזי פניו ולישבע בדבר שהעד מכחישו¹⁰ –

Through the מיגו of חטפי, since he [cannot] be brazen and swear on something which the strengthened עד contradicts him.¹¹

In summation: We do say a מיגו from a שבועה דרבנן to a שבועה דאורייתא (except according to the ר"ת). The מיגו of חטפי is an effective מיגו to contradict even an ע"א (if it does not require a שבועה). However it is not an effective מיגו if it will require him to contradict the ע"א and swear to that effect.¹²

asks: תוספות

אבל קשה אי ליכא מיגו מאי טעמא דרב ושמואל –

However, there is a difficulty; if, as תוספות states, there is no מיגו to be מכחיש with a שבועה a contradictory עד, what is the reason of רב ושמואל -

⁹ The מיגו שלא היה הגהות הב"ח amends this to read

¹⁰ He can be brazen and contradict the עד when it does not require a שבועה, but he cannot be brazen enough to contradict the עד and swear that the עד is testifying falsely (even though he is sufficiently brazen to swear [falsely] ידי חטפי [where no one contradicts him]).

¹¹ There are three levels; it is easiest to claim ידי חטפי (for he is not contradicting anyone), it may be more difficult to claim לא חטפי, even without a שבועה (for he is contradicting an ע"א), it is extremely difficult to claim חטפי and swear to that effect against an ע"א (who claims חטפי). Therefore there is a מיגו of חטפי if there would be no חיוב שבועה, however there is no מיגו of חטפי when there is a חיוב שבועה, for we assume he is not מעזי to swear לא חטפי and be מכחיש עד. He cannot swear to such a lie (where an עד contradicts him).

¹² In the case of החזרתי he is believed because there it is the opposite of here; the actual claim of החזרתי is contradicting the מפקיד, but the מיגו claim of נאנסו is not contradicting anyone, therefore the מיגו is effective since it is easier for him to claim the מיגו claim than the actual claim. See footnote # 17.

דפליגי בפרק כל הנשבעין (שבועות דף מז, א ושם) ארבי אבא ופטרי בנסכא –

Who argue with ר"א in פרק כל הנשבעין and they exempt the חוטף from returning the נסכא –

דלית להו מתוך שאינו יכול לישבע משלם –

For they do not agree to the concept of משלם יכול לישבע –

והשתא אמאי פטרי והא פשיטא דאינו נאמן לומר ידי חטפי בלא מיגו כדפרישית לעיל¹³ –

But now that we assume there is no מיגו, why do they exempt him from returning the נסכא (even if they do not maintain ממשאיל"מ), for it is obvious that he is not believed to say ידי חטפי without a מיגו as I explained previously (concerning the claim of ידי חטפי if there are two עדים that חטף).

Tosfos offers an alternate explanation:

לכך נראה כמו שפירש רבינו יצחק בן מאיר דודאי הוי מיגו¹⁴ –

Therefore (because of the aforementioned difficulty) Tosfos prefers what the עד explained that לא חטפי is certainly a valid מיגו (even though he contradicts the עד with a שבועה) –

ולכא פטרי רב ושמואל דנאמן בשבועה במיגו דאי בעי אמר לא חטפי –

And therefore (since לא חטפי is a valid מיגו) רב ושמואל exempt the חוטף, for he is believed with a שבועה that ידי חטפי with a מיגו that he could have claimed and sworn לא חטפי –

ורבי אבא סבר אף על גב דאית ליה מגו חייב –

And ר"א maintains that even though the חוטף has a מגו (of לא חטפי) nevertheless he is חייב to return the נסכא –

דכיון דאיכא אחד המחייבו שבועה מן התורה¹⁵ כן הוא הדין –

For since there is an ע"א who obligates him to swear התורה; this is the rule – שישבע להכחיש את העד או ישלם ואין מועיל לו מיגו¹⁶ ליפטר¹⁷ –

¹³ Tosfos asks that regardless whether we maintain ממשאיל"מ or not; since we have established that there is no מיגו to be מכחיש an שבועה, ע"א בשבועה, then he must return the נסכא, for ידי חטפי is no claim (without a מיגו of לא חטפי). The question can seemingly be on ר"א as well, why was it necessary for him to resort to ממשאיל"מ he should have ruled that he must return the נסכא since he has no מיגו. See 'Thinking it over' # 3.

¹⁴ The ריב"ם rejects the notion of the ר"י that לא חטפי is not a מיגו since he cannot be מעיד to be מכחיש the עד with a לא חטפי להכחיש את העד ידי חטפי he is capable of swearing שבועה, rather just as he can swear ידי חטפי.

¹⁵ Tosfos writes that there is an ע"א המחייבו שבועה מן התורה even though he is claiming לא חטפי, so (seemingly) there is no חיוב שבועה since he is not contradicting the עד; nevertheless since (as mentioned earlier) the claim of ידי חטפי on its own merit is not a valid claim, it can only be effective because of the מיגו of לא חטפי, therefore we consider as מחויב שבועה. Therefore he is שבועה, therefore he is שבועה.

¹⁶ This answer may be better understood if we assume that a. an ע"א is ממון like עדים ב' except that there is an option not to pay, (only) if you swear to be מכחיש the עד, and b. a מיגו is not (necessarily) a proof that he is saying the truth (א ברירא), but rather that by a מיגו we give him the rights of the מיגו claim (it is a הטענה). He has a הטענה of claiming לא חטפי, but even if he would claim לא חטפי he would be obligated to pay unless he swears את העד להכחיש,

Either the חוטף swears to contradict the עד or he pays, and a מיגו is not effective to exempt him from paying, on account of the חיוב שבועה generated by the ע"א.

In summation: the view of the ריב"ם is that since there is a שבועה מדאורייתא a מיגו is not effective to counter this חיוב because of the concept משלם יכול לישבע משלם. However the מיגו is valid according to רב ושמואל who disagree with משאיל"מ.

Tosfos asks:

ואם תאמר ורבי אבא היכי מפיק לה בפרק כל הנשבעין (שם) –

And if you will say; and how does ר"א derive in פרק כל הנשבעין the rule of משאיל"מ – מדכתיב¹⁸ שבועת ה' תהיה בין שניהם ולא בין היורשין –

גמרא **Since it is written, 'The oath of ה' shall be between the two of them';** the גמרא infers from the words **בין שניהם** that the oath must be between the two principals, the מפקיד and the שומר, **but not between their heirs**, in that case there is no oath. The גמרא there continues to discuss what situation does the תורה refer to that the heirs are exempt from taking an oath. The גמרא concludes that the פטור is in a case –

דאמר ליה מנה לאבא ביד אביך ואמר חמשין ידענא וחמשין לא ידענא¹⁹ –

Where one son said to another son, 'your father owed my father a hundred זוז (מנה) and the son of the לווה **replied fifty I know of and am willing to repay, but I am not aware of the other fifty זוז –**

דדייק התם מדאיצטריך קרא למיפטר יורשים שמע מינה באביו כהאי גוונא מיחייב²⁰ –

which he is not doing, therefore the מיגו is ineffective. [Perhaps רב ושמואל maintain that the מיגו is effective since it is a בירור (as well) and ע"א שבועת is merely a way to verify the truth of the נשבע (see אות רטו).]

¹⁷ החזרתי does not explain the difference between this case of ע"א where a מיגו is ineffective, and the case of החזרתי where the מיגו is effective, even though there too there is a שבועה מדאורייתא. See תוספות הרא"ש who writes that by החזרתי when he claims החזרתי there is as of yet no חיוב שבועה (for he is not claiming נאנסו); however here there is an ע"א who is מחייב him a שבועה (see footnote # 14). [Another difference may be that there the שבועה of נאנסו is not generated by a טענת ברי (no one is saying that it was not נאנסו), therefore it is easier to claim and the מיגו is effective, however here where the טענת of חטפי לא contradicts the ע"א and the טענת ברי of the initial בעל, the הנסכא requires a שבועה to repudiate the ע"א and a מיגו is ineffective. Alternately the claim of החזרתי on its own is a valid claim (except that it cannot be believed on its own merit since the מפקיד has a contradicting שטר), therefore נאנסו of מיגו is effective; however regarding the claim of חטפי not only is it not a valid claim but he is (partially) admitting that he did an act of גזל; to substantiate such a claim (against an ע"א) the מיגו of חטפי is ineffective (or perhaps the actual שבועה by נאנסו, which is not in contradiction to the claim of החזרתי, as opposed to the שבועה of חטפי, which contradicts the claim of חטפי).]

¹⁸ נאנסו (משפטים) כבי, כפרה. The פרשה is discussing the שומר who has to swear (if he claims).

¹⁹ This is a case of a מודה במקצת where the לווה would have to swear (if he said emphatically I do not owe the other fifty). However here by the יורשים there is no חיוב שבועה on the son of the לווה.

²⁰ If the father would also be פטור when he claims ידענא וחמשין לא ידענא, why the need for a פסוק to tell us that the יורשין need not swear and they are פטור, they are no different from their father. Therefore we must conclude as follows if the father would say ידענא וחמשין לא ידענא he would be מחייב a שבועה for he is a מודה במקצת on the יורשין and since he cannot swear on the ידענא לא ידענא he has to pay because משאיל"מ. However when the יורשין

Where the גמרא there infers that since it is necessary for the פסוק to exempt the יורשים (meaning that the בן הלוי need not pay), this teaches us that the father would be liable to pay the other fifty in a similar situation; the גמרא concludes - אלמא מחויב שבועה ואינו יכול ליטבע משלם -

It is evident that one who is מחויב שבועה (מודה במקצת) and cannot swear (to deny the other fifty, since he is unsure), he has to pay. This concludes the גמרא which derives (from 'וגו' וכו', the rule) that משואל"מ.

תוספות continues with his question:

והיכי דייק מינה אנסכא התם ודאי משלם דליכא מיגו²¹ -

But how can we infer from the case there regarding חמשין ידענא וכו' to our case of מיגו to our case of חמשין לא ידענא, the מוב"מ certainly has to pay, for he has no מיגו to exempt himself -

אבל הכא דאיכא מיגו מנא לן דמשלם -

However, here where there is a מיגו for the חוטף (he could claim חטפי), how do we know that he has to pay back the נסכא?!

תוספות answers:

ונראה לרבינו יצחק דרבי אבא לא הוי טעמיה מקרא אלא מסברא בעלמא כדמפרש²² -

And it is the view of the ר"י that the reason why ר"א maintains משאל"מ is not because of the פסוק (בין שניהם ולא בין שני היורשין) but rather he bases it merely on logic as [was] explained. Therefore the logic applies in all cases, that wherever there is a מיגו (by an ע"א) there are only two options; either swear or pay. מיגו does not enter into the picture.

תוספות anticipates a difficulty:

והא דקאמר התם²³ כוותיה דרבי אבא מסתברא -

And that which the גמרא states there, it is reasonable to assume the view of ר"א. מדתני רבי אמי שבועת ה' תהיה בין שניהם ולא בין היורשין -

Since שבועת ה' תהיה בין שניהם of פסוק regarding ברייתא רב אמי taught the ברייתא רב אמי from which we infer בין היורשין (that which was cited above). It would seem that since the

מודה הוי יורש was a teaches us that even though the בן שניהם ולא בין היורשים of פסוק the חמשין ידענא וחמשין לא ידענא say nevertheless there is no חיוב שבועה on him, therefore the rule of מתוך cannot apply. [The difference is that the father should know whether he owes the other fifty, but the יורשים cannot be blamed for not knowing.]

²¹ He would be מחויב a שבועה if he denied the other fifty; that is a classic case of במקצת. He has no מיגו of כופר (ב"מ ג, א) אין אדם מעיז פניו בפני בע"ה because of the rule that הכל

²² Others amend this to read either כדפירשנו or כדפירש הריב"ם. See the text previously in this תוספות by footnote # 16.

²³ The גמרא there cites the incident and ruling of אבא נסכא דר' אבא and concludes מסתברא.

cites the דרשה of גמרא to support ר' אבא, that the reasoning of ר' אבא is from this פסוק and not from סברא בעלמא as maintains –

replies: תוספות

קרא למיפטר יורשים אתא ולא לחייב האב²⁴ –

The פסוק of פטור comes to exempt the heirs but not to obligate the father.

anticipates an additional difficulty: תוספות

והא דקאמר התם רב ושמואל האי שבועת ה' וגומר מאי דרשי ביה –

And that which the גמרא asks there; how do רב ושמואל (who do not maintain interpret this פסוק of 'שבועת ה', etc. since they do not interpret it to teach יורשין פטור. However according to תוספות explanation that the פסוק merely teaches us that the יורשין are פטור (but it does not teach us the rule of משאיל"מ); what is the question on רב ושמואל?

replies: תוספות

הכי קאמר כיון דבאב בכהאי גוונא פטרי אמאי איצטריך קרא למיפטר יורשין –

This is what the גמרא asks; since רב ושמואל will exempt the father from paying in such a case of ידענא וחמשין לא ידענא, why is a פסוק necessary to exempt the יורשין from paying, if even the father is פטור!

In Summation: (according to the ריב"ם) the גמרא in שבועות derives from שניהם that יורשים are פטור from a שבועה (and that דרשה is understood if we assume משאיל"מ); however the rule of פטור is derived from a סברא בעלמא, but not (necessarily) from that פסוק.

responds to an anticipated difficulty (if we assume that a מיגו is ineffective against an ע"א): תוספות

וצריך לומר דהא דאמרינן בהכותב (כתובות דף פה, א ושם) גבי אבימי בריה דרבי אבהו –

And it is necessary to say regarding that which the גמרא states in הכותב פרק concerning אבימי the son of אבהו - ר' אבהו

דהו מסקי ביה זוזי בי חוזאי כולי²⁵ –

Where he owed money to the people of חוזאי, etc. ר' אבהו ruled that if there were no witnesses that חמא paid the חוזאי, they are believed –

מתוך דיכלי למימר לא היו דברים מעולם יכלי למימר סיטראי²⁶ –

²⁴ The ברייתא merely states that by ידענא וחמשין לא ידענא the יורשין are פטור. The ברייתא does not derive the rule of משאיל"מ from this פסוק. Similarly ר"א maintains משאיל"מ is derived from a סברא. We may have thought that this rule applies to the יורשים as well (if the שבועת מוב"מ would apply to them by ידענא), the פסוק teaches us that the שבועה does not apply to them. The גמרא there merely says that this פטור for the יורשים is understandable if we maintain משאיל"מ, but not necessarily that we derive it from this פסוק.

²⁵ The story there is that אבימי sent the money to the חוזאי בי חוזאי with חמא. After חמא paid them, he asked them that they should return the שטר חוב to him, they answered him that the monies you paid was for a different loan that אבימי owed us, and he still owes us other monies for the שטר חוב.

For since they can say nothing even happened (you never paid us) they can claim, the money you paid was for **another** loan. This concludes the citation from that גמרא continues, that it is necessary to assume that the story there -

– **איירי בתר דתקון רבנן שבועת היסט²⁷ דלא הוי השליח עד** –

Occurred after the רבנן instituted a שבועת היסט, so that the שליח (חמא) is not considered a witness (that מיגו אבימי paid them money, thereby destroying their מיגו). The reason the שליח cannot be considered an עד after the רבנן were שבועת היסט is -

– **דנוגע בעדות הוא כיון דחייב שבועת היסט²⁸** –

Because he is a biased witness since he is חייב a שבועת היסט –

– **דאי קודם דתקינן רבנן שבועת היסט הוי השליח עד גמור** –

For if that occurrence took place before the חכמים instituted a שבועת היסט (whereby a כופר הכל is exempt from any שבועה), **the שליח would be a proper עד** –

– **דנאמן לומר למלוה פרעתי מיגו²⁹ דאי בעי אמר אהדרתינהו ללוה** –

For he will be believed to testify, 'I paid the מלוה' with a מיגו that he could have said, 'I returned the money to the לווה' –

– **כדאמר בריש האיש מקדש (קדושין דף מג, ב)** –

As the גמרא states in the beginning of מקדש האיש –

– **וכיון דאיכא עד היכי מהימניה במיגו דלא היו דברים מעולם** –

So since there is a credible עד testifying against the חוזאי, how can they be believed that סיטראי נינהו with a מיגו of להד"ם, for if they claimed להד"ם –

– **דהוה ליה מחויב שבועה ומתוך שאין יכול לישבע משלם כדאמרינן הכא:**

It would be a case of מחויב לישבע (since the עד testifies that there was a payment) and since they cannot swear to contradict the עד for they claim סיטראי and not

²⁶ It seems that the claim of סיטראי is a frivolous claim and would not be credible on its own merits (similar to the claim of חטפי). It is acceptable only because of the מיגו of להד"ם.

²⁷ (רב נחמן by) גמרא, the אמוראים instituted that every כופר הכל must swear. This שבועה is called a שבועת היסט, meaning that the חכמים induced the כופר הכל to swear in order to reveal the truth.

²⁸ The testimony of the שליח that he paid the money is a biased testimony, for if he would not claim that he paid the money to the מלוה, the לווה would demand the money from the שליח, and even if the שליח will claim that he never received money or that he already returned it to the לווה (which makes him a כופר הכל), nevertheless he will have to swear a שבועת היסט. Therefore it is in his biased interest to claim that he paid the מלוה. This biased testimony makes the שליח unacceptable as an עד against the חוזאי.

²⁹ The מיגו here is slightly different from a regular מיגו. The שליח does not need a מיגו to be believed that למלוה, but rather the מיגו is to remove any bias the שליח may have. We cannot say that the שליח must say that he paid the מלוה for otherwise the לווה will demand the money from him, because even if the לווה will demand the money from him the שליח can say, 'I returned it to you'. It makes no difference to the שליח whether he says פרעתי למלוה or אהדרתינהו ללוה in both cases he has no liability, therefore he is a credible witness. (This is not the case after the רבנן were שבועת היסט for then if the לווה would say אהדרתינהו ללוה he would be מחויב a שבועת היסט therefore he has a bias to say פרעתי למלוה and is not a credible עד.)

ם), they have **to pay, as ר"א ruled here!** Therefore we must say that the story there took place after the רבנן were מתקן a היסת שבועת, so the שליה is not a credible ע"א, therefore the מיגו have a valid חוזאי.

SUMMARY

The חוטף is not believed with a מיגו of חטפי (even with a שבועה of חטפי) either because he cannot be מעיז to contradict the עד with a שבועה (ר"י) or because once there is a שבועה of an ע"א it cannot be overridden by a מיגו.

THINKING IT OVER

1. תוספות asks that the חוטף should be believed with a שבועה of חטפי for he has a מיגו of חטפי.³⁰ How will this מיגו remove the מתוך שאיל"מ? He is not swearing the שבועה which the ע"א is מחייב him, therefore he has to pay!³¹

2. תוספות suggests that חוטף may not want to claim לא חטפי because he is concerned that the ע"א will be פוסל him לעדות.³² Seemingly now also, even though he claims דידי חטפי, nevertheless they will be פוסל him בגזלנותא (as is the case by any עדים who say someone grabbed that he is פסול and cannot claim דידי חטפי)!³³

3. תוספות asks (according to the ר"י) that if there is no מיגו here why do רב ושמואל argue with ר' אבא.³⁴ Why cannot we answer that רב ושמואל maintain that it is a מיגו (and as תוספות says later according to the ריב"ם that the מיגו of חטפי is a valid מיגו (and the מחלוקת between ר"א and רב ושמואל is whether לא חטפי is a מיגו or not)?³⁵

³⁰ See footnote # 3.

³¹ See בל"י אות ריב and סוכ"ד אות טו.

³² See footnote # 7.

³³ See בל"י אות רי"ג.

³⁴ See footnote # 13.

³⁵ See נח"מ.