

## **אלא לאו דליכא עדים – Rather, is it not where there are no witnesses**

### **OVERVIEW**<sup>1</sup>

<sup>2</sup>ליכא עדים is attempting to prove that [the רישא of] the ברייתא is in a case of רבא. Therefore the entire ברייתא is even the cases of לו נתנה. Our תוספות explains why there is no contradiction from another גמרא.

asks: תוספות

**הקשה רבינו יצחק בן מאיר דהיכי מצי לאורויי בדליכא עדים -**

**The ברייתא in a case of ריב"ב had a difficulty; for how is it possible to understand the case of עדים (and we say that by נתנה לו בזמנו is אומן) -**

**אם כן אמאי בזמנו נשבע ונוטל הא אמרינן בריש כל הנשבעין (שבועות דף מה,ב ושם) -**

For if indeed this is so (that it was given בעדים), why is the ruling that if the אומן claimed his payment בזמנו, the rule is נשבע ונוטל is אומן, but the גמרא taught in the beginning of כל הנשבעין -

**דאם שכרו שלא בעדים<sup>3</sup> מתוך שיכול לומר לא שכרתיך מעולם -**

**That if the ב"ב hired the אומן without עדים, the rule is that since the ב"ב can claim, 'I never hired you' so I do not owe you anything -**

**יכול לומר לו שכרתיך ונתתי לך שכרך<sup>4</sup> -**

The ב"ב can also tell the אומן, 'I hired you and I paid you!'

answers: תוספות

**ואומר רבינו יצחק דלא קשה מידי דחדא דפלוגתא היא התם<sup>5</sup> -**

**And the ר"י says that there is no difficulty at all; firstly that this ruling is in dispute there in שבועות where others (may) disagree -**

**ועוד דהכא<sup>6</sup> ליכא האי מיגו כיון שמודה במקצת<sup>7</sup> -**

**And additionally here this מיגו (of לא שכרתיך) does not apply, since the ב"ב admits partially -**

<sup>1</sup> See 'Overview' to the two previous תוס' on אי נתנה וד"ה אי תוס'.

<sup>2</sup> ליכא עדים means that there are no witnesses who saw the ב"ב give the item to the אומן (to repair).

<sup>3</sup> This is in a case where the שכיר demands payment and the ב"ב claims that he paid him. The rule generally is that the שכיר is נשבע ונוטל (since the ב"ב is בפועליו so he is confused).

<sup>4</sup> Seemingly here too the ב"ב should be believed that the price was one (not two as the אומן claims), since he has a מיגו that he never hired him and he owes him nothing.

<sup>5</sup> The גמרא there states, (עיי"ש) לקיש ריש דפליג ריש (עיי"ש). See (also) משה.

<sup>6</sup> In our case here they are arguing how much was the price, as opposed to the גמרא in שבועות where they are arguing whether the שכיר was paid or not; only there is there this מיגו of להד"ם, but not here as תוספות explains.

<sup>7</sup> The אומן claims, 'you owe me two', and the ב"ב admits partially that he owes only one. This is the classic case of שבועה דאורייתא a חייב is מודה במקצת where the rule is that the מודה במקצת.

ואי אמר לא שכרתיך מעולם הוי כופר בכל וחזקה<sup>8</sup> דאין אדם מעיז פניו בפני בעל חובו:  
And if the בעה"ב would claim, 'I never hired you', he would be considered a כופר הכל (a complete denier), and there is the חזקה (presumption) that a person is not brazen (enough to deny completely) in the presence of his creditor.

### SUMMARY

Not everyone (necessarily) agrees that a בעה"ב has the מיגו of לא שכרתיך, and certainly not in our case where he is a מודה במקצת.

### THINKING IT OVER

The idea that a מוב"מ has no מיגו of כוה"כ is very well known. What was תוספות question in the first place, and why was it necessary for תוספות to offer another answer [first]?!

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<sup>8</sup> See ב"מ ג, א. Every מודה במקצת (seemingly) has a מיגו of being a כופר הכל, who is פטור from a שבועה, so why is a מוב"מ obligated to swear; let us believe him with a מיגו that he could have been כופר הכל. The answer is that there is no מיגו, for a person who is a מוב"מ is not brazen enough to be כופר הכל in the presence of his creditor. Here too the בעה"ב is a מוב"מ (see footnote # 7), he does not have the מיגו of claiming I never hired you, for that makes him a כופר הכל, and we just said that every מוב"מ does not have the העזה to be כוה"כ; therefore there is no מיגו! See 'Thinking it over'. However in מס' שבועות, where the owner claims 'I paid you' (meaning he is a כופר הכל), is he believed with the מיגו of לא שכרתיך, for both in his claim and in his מיגו he is a כוה"כ (he is מעיז in either case). It is only a מוב"מ (who is not מעיז כ"כ) that is not believed with a מיגו of כוה"כ (where he is כ"כ מעיז).