

## ושמע מינה דהילך פטור – פטור is הילך And we derive from this that

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

The גמרא cites a ברייתא which says that if a שטר states that the לווה owes the lender סלעים (but it did not enumerate how many סלעים); the מלוה claims the loan was for five סלעים and the לווה claims it was three סלעים, there is a dispute between רשב"א and ר"ע. While רשב"א claims that the לווה is a מוב"מ and is required to swear, ר"ע maintains that the לווה is a משיב אבידה (for he could have claimed two סלעים) and is פטור משבועה. The גמרא assumes (based on the text of the ברייתא) that the מחלוקת is only if the לווה claimed שלש; however if the לווה claimed שתים he would be פטור according to everyone. The reason he is פטור if he claimed שתים is because his admission of שתים is written in the שטר (for סלעים means [at least] two), and we consider the amount written in the שטר to be הילך<sup>2</sup>, and that is the reason he is פטור משבועה if he admits to שתים. This proves that הילך is פטור from מוב"מ. Our שבועת מוב"מ reviews the מחלוקת of רשב"א ור"ע in light of this proof.

תוספות asks:

ואם תאמר יהא נאמן בשלש דמיגו דבעי אמר שתים<sup>3</sup> –

**And if you will say; the לווה should be believed (without a שבועה) when he admits to שלש (even according to רשב"א), on account of the מיגו that he could have claimed שתים, and he would have been believed (as the גמרא is presently stating); therefore he should also be believed by שלש.**

תוספות answers:

ויש לומר כיון דהילך פטור<sup>4</sup> אם יאמר שתים הוה ליה כופר הכל ואין אדם מעיז –

**And one can say; since הילך is פטור משבועה, if he claims שתים he is a כוה"כ, and a person is not מעיז to be a כוה"כ.**

<sup>1</sup> This עמוד ב' references the גמרא on the תוספות.

<sup>2</sup> See רש"י on the טעמא ב' ד"ה עמוד, that a שטר is considered הילך since it implies שעבוד קרקעות.

<sup>3</sup> In the case of a regular מוב"מ he does not have the מיגו of כוה"כ because מעיז א"א; however here we have a unique case where even a מוב"מ is פטור משבועה (the case of שתים); we should therefore say that when he claims שלש he has the מיגו of שתים (which is not a כוה"כ and is not subject to the rule of מעיז א"א).

<sup>4</sup> The reason הילך is פטור is because in a case of הילך, we divide the loan into two parts. The part of הילך which he admits to is considered paid to the מלוה. The remainder of the claim is a regular כוה"כ situation where the מלוה claims and the לווה denies everything. In this case of שטר the same applies. Two of the three סלעים which the לווה admits to is written in the שטר and is considered הילך and paid. Concerning the remaining three סלעים which the מלוה claims; the לווה (who is admitting to one) is a מוב"מ, but he would be a כוה"כ had he claimed שתים instead of the שלש which he is currently admitting. A מוב"מ is not believed with a כוה"כ since מעיז א"א. Therefore he has no מיגו. See 'Thinking it over' # 1.

responds to an anticipated difficulty. We are now saying that שתיים is considered a כוה"כ and there is no מיגו; how therefore does ר"ע maintain that by שלש he is פטור since he is a משיב אבידה for he could have claimed שתיים; according to תוספות answer, שתיים is a כוה"כ and there is never a מיגו of כוה"כ since מעיז א"א?!

responds: תוספות

**ולרבי עקיבא לא הוי עזות דמסייע ליה שטרא<sup>5</sup>:**

**However, according to ר"ע, claiming שתיים is not brazenness; for the שטר supports him;** as opposed to a regular מוב"מ who cannot be a כוה"כ since that would be a העזה, for nothing would be supporting his claim as a כוה"כ.

### SUMMARY

According to רשב"א there is no מיגו of שתיים (even if שתיים is פטור because it is (הילך), for שתיים is considered a כוה"כ (on account of הילך); however ר"ע maintains that the כוה"כ in this case is not a מעיז since the שטר supports him.

### THINKING IT OVER

1. It appears from תוספות<sup>6</sup> that if there is a partial admittance [and no immediate payment], then there is no העזה in denying the balance (for we say (אשתמוטי); however if there is a partial admittance and immediate payment (הילך), then denying the remainder is a העזה! Where is the logic in this?<sup>7</sup>

2. חבירו מכיר taught previously<sup>8</sup> that the reason א"א מעיז is because מכיר. Why then is there a difference (according to ר"ע) whether the שטר is מסייע or not?! If הילך is considered מעיז then it should always be considered a העזה!

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<sup>5</sup> The שטר states merely סלעים; indicating that the loan was only for two סלעים (the rule is שנים); if it would have been more the שטר would have specified it. Therefore although when one owes money he does not have the העזה to deny everything; in our case even if he owes three he is very comfortable to say two and deny the extra three because the שטר supports his claim (of כוה"כ on the remaining three).

<sup>6</sup> See footnote # 4.

<sup>7</sup> See # 47. אמ"ה and נחלת דוד, סוכ"ד אות מד.

<sup>8</sup> ג, א ד"ה מפני.