

Really, two is liable

לעולם שתיים חייב –

OVERVIEW

The גמרא initially assumed since the ברייתא states that the dispute between ר"ע and רשב"א is in a case where the לוח admitted to owing three; this should indicate that if he admitted to owing (only) two he would be פטור from a שבועה, presumably because admitting two is considered הילך; proving that הילך is פטור. The גמרא negated this argument and stated we can assume that by two all agree that he is חייב a שבועה, since הילך is חייב. The issue is if שתיים is חייב than how can ר"ע maintain that שלש is פטור. Our תוספות explains this.

anticipates and responds to the following question:

ואף על גב דשתיים חייב –

And even though the גמרא is presently assuming **that שתיים is חייב** a שבועה, nevertheless -

חשיב ליה רבי עקיבא משיב אבידה¹ –

ר"ע considers him to be a משיב אבידה when he admits to שלש, even though he has no מיגו that he could have said שתיים, for שתיים is also חייב a שבועה. The reason he is considered a משיב אבידה is because -

דכשומר שתיים נראה יותר נאמן לפי שהשטר מסייעו:

When he would say שתיים, he would appear to בי"ד more believable since the שטר supports him, and nevertheless he claimed שלש that makes him a משיב אבידה and he is פטור משבועה.²

SUMMARY

ר"ע considers שלש a משיב אבידה, even if שתיים is חייב, since by שתיים it is a more believable claim.

¹ Usually by a משיב אבידה (or מיגו) we accord him the rights he would have if he was not משיב the אבידה (or he claimed the מיגו); however here (ר"ע considers him a משיב אבידה since he could have admitted only to שתיים; however) even if he would have claimed שתיים he would have to swear, why therefore should he be פטור משבועה when he admitted to שלש?! [Alternately; תוספות may be asking if שתיים is חייב (and ר"ע considers שלש to be a משיב אבידה because he could have said שתיים), then why is this case (of לוח אומר שלש) different than any other case of במקצת מודה, where we could equally argue, why should he swear; he should be considered a משיב אבידה, since he could have admitted (slightly) less than he is currently admitting. תוספות answer would be that here there is an advantage in claiming שתיים because מסייעו; however by a regular במקצת מודה there is no difference in the level of his נאמנות regardless of how much he admits.]

² According to the הנ"מ later in the גמרא however, if שתיים would be חייב, then שלש would not be פטור משבועה (even according to ר"ע), because of the concern that מערים קא מערים. See 'Appendix' for an tentative alternate explanation

THINKING IT OVER

claims that by שתיים he is נאמן יותר. Why did not תוספות say that by שתיים he is saving a סלע?³

APPENDIX

In the case of a מיגו there is the actual טענה and what he could have claimed – the מיגו. The טענה, if it were believed, would afford this טוען all the benefits that the מיגו would have afforded; for instance in the מיגו of דמזויף or פרעתי במיגו דמזויף, the טענה of פרעתי and החזרתי would acquit him (if believed) as much as מזויף and נאנסו. It is therefore presumed that the טענה cannot afford the טוען more protection that the מיגו. In the case of פרעתי במיגו דמזויף, the מלוה will collect with קיום against the טענה of פרעתי (just as he would collect with קיום by the מיגו of מזויף); the טענה of החזרתי would require a שבועה, just as the מיגו of נאנסו requires a שבועה.

However by משיב אבידה the actual טענה obligates the משיב אבידה more than the 'מיגו' would have. Let us take the classical case of משיב אבידה; the case of המוצא מציאה לא ישבע מפני תיקון העולם. The מ"א is returning the wallet; the owner claims there was money in the wallet. If we were to apply the traditional מיגו concept here, the טענה of the מ"א is, 'here is the wallet (but no more)', and the 'מיגו' would be 'there is no wallet at all'. The מ"א in his טענה is offering more to the owner (the wallet) than the מיגו (which is nothing).

The rule concerning מ"א is that the מ"א does not swear the מוב"מ שבועה because of תיקון העולם (and not necessarily because of a מיגו). It seems that according to תוספות a מ"א is פטור משבועה even if there were עדים (and/or the owner) that saw him pick up the wallet, where he does not have the מיגו of being כוה"כ. He is nevertheless פטור מפני תיקון העולם.⁴ For if the מ"א would be obligated to swear, no one will pick up אבידות because of the complications that may ensue. The משיב אבידה is פטור משבועה (even if there is no מיגו) because he is giving to the claimant more than he is actually required to give. He could have walked right past the אבידה, and there would be no monetary claim against him. He obligated himself where it was not required. In our case where the מלוה claims חמש and the לווה admits to שלש, there is no מיגו of שתיים if we assume that שתיים is חייב, for a טענה has no more strength

³ See # 59 אמ"ה and מהר"ם, מהר"ם שי"ף, סוכ"ד אות מה.

⁴ If there are no עדים that he picked up the אבידה, then he is פטור מדאורייתא from a שבועה since he has a מיגו of ג,א תוס' ד"ה מפני (העזה) אין חבירו מכיר בשקרו (since כוה"כ) and not merely because of תיקון העולם. See footnote # 4 and TIE ד"ה ורבי יח,א בתוס' ד"ה רבי יח,א footnote # 8.

than the מיגו. If the מיגו is חייב a שבועה (as we maintain now that חייב is שתים) then the טענה (of שלש) is also חייב שבועה. However תוספות argues that ר"ע considers him a משיב אבידה for he is paying an extra סלע which he was not obligated to, therefore he is a משיב אבידה and משבועה.

The question however arises how can we consider him a משיב אבידה? By a regular משיב אבידה he had the option of not picking up the item; however here there was a claim against him; the מלוה claimed חמש and had a שטר; why should he be considered a משיב אבידה for the extra סלע. He seemingly could not ignore the claim of the מלוה; especially that we now see that he indeed owes him שלש. Can that be considered a משיב אבידה?!

תוספות explains that since השטר מסייעו and if he would claim שתים he would be נאמן, therefore anything above שתים is a משיב אבידה. There is no claim against him above שתים. He is giving more than he is required. No מיגו is necessary; he is פטור because he is a משיב אבידה.⁵

The גמרא later in the גמרא disagrees and claims that משיב אבידה is only פטור when there are no ulterior motives. In the case of משיב אבידה he is gaining nothing by returning the wallet (over not returning it at all). However here it is not a pure משיב אבידה for he may have an ulterior motive; he does not want to swear.⁶ ובאם שגיתי ה' הטוב יכפר בעדי.

⁵ This is included in the תיקון העולם; people will refuse to be honest and pay what they owe if we require them to swear. They would rather pay less.

⁶ The גמרא says he is not a משיב אבידה since מערים קא מערים (he has an ulterior motive). However the גמרא does not say that he is not a משיב אבידה since there is no מיגו (if שתים swears then שלש swears). The reason is because if indeed he is a משיב אבידה then a מיגו is not necessary!

See the גמרא concerning the suggested פטור from a שבועה by the טענה of חציה שלי, which the גמרא refers to as a משיב אבידה (not מיגו). He is considered a משיב אבידה because he is giving the other person half, where it was not required. There is no מיגו (of כולה שלי) to exempt him from שבועה since כולה שלי is also required to swear. The argument was that he is a משיב אבידה. The refutation is the same as here; he is מערים קא מערים (he has an ulterior motive).

However there is a difference between the גמרא there (חציה שלי) where everyone agrees that he is not a משיב אבידה (for מערים קא מערים) and our גמרא here (סלעים דינרים) where it is not so evident that all agree that he is not a משיב אבידה. In our גמרא here the extra סלע is considered (by ר"ע) as a משיב אבידה since the טענה of חציה שלי is not יותר נאמן; however there the טענה of חציה שלי (over חציה שלי) is not יותר נאמן and in addition there is an ulterior motive, therefore there he is definitely not a משיב אבידה.

In summation; in the category of משיב אבידה (where one gives more than he is required to, and can attempt to give less), there are three levels discussed here. a) The regular משיב אבידה who did not have to give anything and has no ulterior motive for giving. He is פטור משבועה מפני תיקון העולם even if there is no מיגו.

b) The משיב אבידה of טענת שלש (by סלעים דינרים), where he had the option of offering only שתים (where he would be יותר נאמן) and nevertheless gave שלש, he is (perhaps) considered a משיב אבידה according to ר"ע even though he may have an ulterior motive. c) In the case of חציה שלי where he is giving more; however both claims (חציה שלי or כולה שלי) are equal, and there is an ulterior motive, this is definitely not a משיב אבידה and is בשבועה.