

לעולם שתיים פטור והילך חייב –

Really, two is exempt and הילך is liable

OVERVIEW

The שבועה concluded that we can maintain that generally הילך is חייב a שבועה and שתיים (in the ברייתא) is nevertheless פטור from a שבועה either because אין נשבעין על כפירת שעבוד קרקעות or השטר מסייעו. Our תוספות explains the view of רשב"א that even though שתיים is פטור, nevertheless שלש is חייב a שבועה.

תוספות asks:

ואם תאמר כיון דהילך חייב¹ כי אמר נמי שתיים אינו כופר הכל –

And if you will say; since הילך is חייב a שבועה, then even if he claims שתיים, he is not a כוה"כ, but rather a מוב"מ, so therefore –

וכי אמר שלש יהא נאמן במיגו דאי בעי אמר שתיים² –

When he admits to שלש he should be believed with a מיגו that he could have claimed שתיים –

ומאי טעמא דרבי שמעון בן אלעזר –

So what is the reason of רשב"א who maintains that he is required to swear?!

תוספות answers:

ויש לומר דסבירא ליה דמה שהשטר מסייעו אינו טוען ברצון –

And one can say; that רשב"א maintains that he will not claim willingly that which the שטר supports him (i.e. שתיים) –

לפי שנראה שמחמת השטר מודה³ ואם לא היה השטר היה כופר הכל⁴:

For it appears (if he claims שתיים) that he is admitting only שתיים because the שטר does not allow otherwise, and if there would be no שטר

¹ If we assume הילך is חייב then the entire claim (including the admission of הילך and the denial of the rest) is considered as one claim, where he is a מוב"מ. See תוספות ד' ד"ה וש"מ (footnote # 4).

² When he claims שתיים he is still considered a מוב"מ. There is no העזה to be a מוב"מ only to be a כוה"כ. Therefore since he could have claimed שתיים and would have been פטור משבועה (because מסייעו), he should now also be פטור משבועה on account of the מיגו.

³ A מוב"מ shows that he is willing to pay (and the rest is אישתמוטי), however a כוה"כ shows his defiance in refusing to pay at all. The שתיים of טענה indicates that he is admitting only what he is forced into admitting, but otherwise he is not yielding.

⁴ His admittance of שתיים (should he have chosen to have claimed so) is not a real admittance that he should be considered a מוב"מ. Rather it is evident that he is essentially a כוה"כ; however in this circumstance he cannot be a כוה"כ, so he admits whatever the שטר requires him to admit, but not more than that. A person who is a מוב"מ (as he is since he claimed שלש), does not have a מיגו of having the העזה of being (the equivalent of) a כוה"כ (which he would be considered as such had he claimed he owes only שתיים).

he would be כוה"כ. It is not a claim which he would make willingly, therefore there is no מיגו.

SUMMARY

The שטר מסייעו (according to רשב"א) makes the admission of שתים to (still) be considered a העזה as a כוה"כ is, and therefore there is no מיגו by שלש that he could have claimed שתים.

THINKING IT OVER

Is the שטר מסייעו of סברא a cause to exempt him from a שבועה or to be מחייב him a שבועה?