

According to the one – למאן דאמר הילך פטור קרא אמאי איצטריך כולי – who maintains that הילך is פטור. Why is a פסוק necessary, etc.

OVERVIEW

The שבועת מוב"מ asks that according to the מ"ד that הילך is פטור from מוב"מ, why is it necessary for a מיעוט to exclude קרקע from מוב"מ, since all קרקע is הילך. Our תוספות explains why a similar question is not directed also to the מ"ד that הילך is חייב.

תוספות asks:

תימה גם למאן דאמר הילך חייב אמאי איצטריך קרא למעוטי –

It is astounding! Even according to the one who maintains that הילך is חייב a שבועת מוב"מ, nevertheless why is a פסוק necessary to exclude קרקע from מוב"מ –

הא בקרקע לא שייך משתמיט¹ וכן [פירש רבינו יצחק²] לקמן³ –

Since by קרקע the concept of משתמיט does not apply; and the ר"י also explains later that there is no משתמיט by קרקע –

דכי⁴ כופר במקצת קרקע פטור הוא –

So when he partially denies קרקע he should be פטור from a שבועה –

דנאמן הוא מטעם דאין אדם מעיז כיון דלא שייך הכא אשתמוטי קא משתמיט⁵ –

Since he is believed because of the reason that א"א מעיז, for here by קרקע the concept of אשתמוטי קא משתמיט does not apply.

תוספות replies:

ושמא גם בקרקע שייך קצת אשתמוטי קא משתמיט⁶ –

¹ We are now discussing קרקע where he did not dig it up and it is available to be returned to its owner.

² The מהרש"א amends this to read פריך instead of 'פרי', (עיי"ש).

³ This is referring to ד"ה אלא תוס' ד"ה תוס' (which is usually considered as being authored by the ר"י) states in the name of רב האי גאון that by קרקע there is no אשתמוטי. [Alternately, according to the גירסא of the מהרש"א (footnote # 2), this is referring to תוספות question there (on רה"ג) since there is no אישתמוטי why is there a שבועת היסט by קרקע (since a שבועת היסט was instituted specifically because of אשתמוטי).]

⁴ This is amended by the מהרש"א to read 'וכי'.

⁵ See בכוליה ג,ב ד"ה בכוליה, that the reason a מוב"מ swears and we do not believe him (even though מעיז, so seemingly he should be believed), is because a מוב"מ is not a מעיז, but rather he is משתמיט since he does not have the money. It is evident therefore that when there is no סברא of אשתמוטי (as here in the case of קרקע; for if he indeed owes him the קרקע, why is he not returning it to him), he should be believed (with a מינו since כה"כ מעיז א"א (see תוספות there [TIE] footnote # 11). The question is why a פסוק is necessary to exclude קרקע from מוב"מ שבועת מוב"מ?

⁶ This is not in conflict with רה"ג that by קרקע there is no אשתמוטי, because there we are discussing a case where it is known that he did not offer this field for collateral. [According to the מהרש"א (see footnote # 3), in our גמרא where there is an established מוב"מ שבועת מוב"מ we cannot exempt קרקע from this שבועה since there is

And perhaps קרקע applies somewhat even by משתמיט קא משתמיט -
כי שמא משכנה⁷ וסבר עד דהוה לי זוזי ופרענא ליה:

For perhaps this מוב"מ offered this field (which was not his) as collateral
for a loan, to someone else, **and** this ליה **thinks** I will deny owing this land
(to the real owner) **until I will have money and pay** the מלוה and retrieve the
collateral and then I will return it to the rightful owner.

SUMMARY

The concept of משתמיט applies to קרקע (even without 'וכו' בורות וכו').

THINKING IT OVER

1. תוספות asks that there is a question even according to the מ"ד that הילך is
גמרא the answer of the 'אי נמי' on the תוספות should have asked that a פסוק
is necessary in a case of בקרקעות וכפר וכלים הודה (so it is not הילך);
however (questions should be that) even in this case we do not need a
פסוק that he is משבועה, since there is no משתמיט by קרקע!⁸

2. תוספות explains that there is משתמיט by קרקע in a case where he was ממשכן
the קרקע.⁹ However this person who was ממשכן קרקע that does not belong to
him is a מעיז, there is no justification for being ממשכן a קרקע which does not
belong to him; how can we consider this person as a משתמיט?!¹⁰

שבועת a however there the question of תוספות is that we should not have established initially a
[קרקע by משתמיט since generally there is no משתמיט by קרקע]. See אות טו.

⁷ See 'Thinking it over' # 2.

⁸ See רש"ש (this is seemingly a better question for it is on the מסקנא [and not merely on the ה"א]).

⁹ See footnote # 7.

¹⁰ See בל"י אות קה.