

אי אליבא דרבנן הא אמרי משיב אבידה הוי¹ -

If it is according to the view of the רבנן, they claim that it is comparable to returning a lost article

OVERVIEW

The גמרא asked that רבי יהושע וכו' of דין should teach us the הפה שאסר וכו' in a case where a מלוה said to the son of the (deceased) מלוה, I owed your father a מנה, but I paid him back half; that the מלוה is believed without taking the oath of a מודה במקצת.² The גמרא counters that this cannot be; for if ר"י follows the opinion of the רבנן then the מלוה would be considered a משיב אבידה,³ etc. It is not clear why this presents a difficulty.⁴ Seemingly this is what ר"י is teaching that if he has a פה שאסר he is believed.⁵

Tosfos explains why it is considered as a משיב אבידה⁶, and what is therefore the difficulty:
כדמסיק⁷ דבבנו מעיז ומעיז -

As the גמרא concludes that concerning the son of the מלוה, the מלוה can indeed be brazen and deny any loans that he actually owed the father.⁸

ואם כן לא מצי למיתני ואם יש עדים אינו נאמן -

And since that is true; that בבנו he is מעיז ומעיז, then the משנה could not have stated that if there were witnesses to the (entire) loan, then the מלוה is

¹ When one returns a lost article; a wallet for instance, where the loser claims that there was money in the wallet, and the finder denies it, the law is that the finder is exempt from the usual oath of a מודה במקצת (the finder is a מודה במקצת he admits to finding the wallet but denies that there was any money there). The reason he is exempt from שבועת מודה במקצת is because of a תקנת חכמים; otherwise people would be hesitant to return אבידות out of concern that this may obligate them to take a דאורייתא שבועה.

² A מלוה who admits partially to a claim of a מלוה is obligated to swear a שבועת מודה במקצת that he does not owe the rest of the debt which the מלוה claims.

³ See following אליעזר, תוספות ד"ה ורבי אליעזר, where it seems that this term משיב אבידה (in the case of פרס) refers to a מגו; that he could have been a כופר הכל and claimed that he paid everything. See following footnote # 5.

⁴ According to (ד"ה אליבא) רש"י who maintains that the ruling of ר"י is in a case of הלה תובעו, the question is directed to the רישא (that he would be believed even in a case of הלה תובעו), however according to תוספות (הלה תובעו), the גמרא's question is not readily understood.

⁵ The terms הפה שאסר and משיב אבידה are identical in this instance of פרס. See previous footnote # 3.

⁶ Every מודה במקצת (seemingly) has a מגו of כופר הכל and nevertheless is required to swear (as רבה will shortly explain in the גמרא). Why is this מודה במקצת of פרס any different?!

⁷ יח,ב.

⁸ This is why by הלה תובעו the מלוה is considered a משיב אבידה and is פטור from a שבועה since he has the מגו of being a כופר הכל. The rule of אין אדם מעיז פניו כו' does not apply here. However this itself is no contradiction to ר"י; on the contrary this conforms to the ruling of ר"י. The difficulty stems from the purported 'סיפא', as תוספות concludes.

not believed to claim that he paid half –

דלעולם נאמן במגו דאי בעי אמר פרעתי הכל דבבנו מעיז ומעיז -

For in fact the לוח **will always be believed** to claim I paid your father half **since** he has a **מגו** **that if** the לוח **wanted** he could have **said I paid** your father **everything, for** a לוח is **indeed מעיז** against **the son** of the מלוח; therefore it is a proper מגו ר"י. could not have taught his דין of הפה שאסר in the case of והאכלתיו פרס for the לוח would be believed without a שבועה even if there were עדים that he owed him the entire sum.

SUMMARY

If ר"י would agree to the חכמים, there would be a difficulty with the סיפא where he is אינו נאמן (not with the נאמן of the רישא).

THINKING IT OVER

ואם יש עדים of סיפא, 'משיב אבידה הוי', explains that the question is on the סיפא. Seemingly the סיפא is not understood in any event. What effect can the מלוח את have on a ע"פ; as the גמרא previously stated, since חבירו בעדים א"צ לפרעו בעדים?!