

לעולם קסבר המלוה את חבירו בעדים אין צריך לפורעו בעדים כולי –

Really he maintains, one who lends his friend with witnesses is not required to repay him with witnesses, etc.

Overview

גמרא The ¹ דיני ממונות (even) by עדים can be ruled that the two שלוחים אמר רב נחמן asks that if we maintain ² the המלוה את חבירו בעדים צריך לפורעו בעדים, these שלוחים have a vested interest in testifying that the loan was paid, since otherwise (if they would not say the loan was paid), the ליה will ask them to return the money to him. ³ The גמרא therefore concludes that we must say that ר"נ אמר רב maintains המלוה את חבירו בעדים רבא אמר ר"נ Our ⁴ א"צ explores whether we can still say that ר"נ אמר רב maintains המלוה את חבירו בעדים לפורעו בעדים.

asks: תוספות

תימה דמשמע דאי הוה אמרינן דצריך לפורעו בעדים לא ניחא שפיר -

It is astounding! For it seems that if we maintain that המלוה את חבירו בעדים צריך -
the ruling of ר"נ, רבא, would not be properly understood -

וליתא דאפילו למאן דאמר דצריך לפורעו בעדים ניחא שפיר דמהמני -

But it is not so! For even according to the one who maintains המלוה את חבירו בעדים, nevertheless the ruling of ר"נ, רבא, that the שלוחים are believed is properly understood -

דהא קיימא לן (שבועות דף מה,ב) דאפילו למאן דאמר המלוה לחבירו בעדים צריך לפורעו בעדים -
For we have established that even according to the מ"ד that המלוה את חבירו בעדים -
nevertheless, צריך לפורעו בעדים -

המפקיד לחבירו בעדים אין צריך להחזירו בעדים -

One who deposits anything (not a loan) by his friend with עדים, it is not necessary

¹ If the ליה made them שלוחים to pay the מלוה, they may testify that the loan was paid.

² Generally (before the תקנה of היסט) if the ליה claims he paid up the loan (and there was no שטר), the ליה is exempt from paying. There is a dispute what the ruling is if there are witnesses to the loan, but the ליה (while agreeing there was a loan) claimed פרעתי; some say he is believed while others maintain he is not believed and must pay.

³ Presumably ר"נ אמר רב is also discussing a case where there were witnesses that the ליה gave money to the שלוחים to pay the מלוה. Therefore, the שלוחים have an interest in testifying that they paid the מלוה (instead of keeping the money for themselves), for otherwise the ליה would demand his money back, and according to the מ"ד that המלוה את חבירו בעדים they would have no recourse but to pay back the ליה.

⁴ If we maintain that המלוה את חבירו בעדים א"צ לפורעו בעדים, the שלוחים have no vested interest in saying the loan was paid, for the שלוחים could just as easily say we did not pay the מלוה, but we returned the money to you and they would be exempt from paying or swearing (before the תקנה of היסט)

⁵ The הגהות הב"ח refers us to מה,ב (ב"ב) פרק חזקת הבתים.

to return it with **עדים**; the reason there is a difference by פקדון -

דנאמן הוא לומר החזרתו לך במיגו דאי בעי אמר נאנסו⁶ -

For he is believed to say, 'I returned it to you' with a מיגו that he could have said, 'they were destroyed accidentally' -

והכא איירי בפקדון דהא פקדון נינהו אצל העדים שהלוה מסר להני כדי להוליכו⁷ -

And here (regarding the issue between the שלוחים and the ליה), we are discussing a פקדון (not a loan), for regarding the witnesses (the שלוחים) the money is by them a deposit (not a loan), for the ליה gave them over the money in order they deliver it to the מלוה (the שלוחים had no right to use this money for anything else) -

ואם כן נאמנים לומר פרענום מגו דיכולים לומר החזרנום ללוה⁸ -

So therefore the שלוחים/עדים are believed to say we paid up the money to the מלוה, with a מיגו that they could have said we returned the money to the ליה.

In summation: תוספות asks that רבא אר"נ can maintain בעדים צריך לפורעו בעדים (not as the גמרא concludes) since even that מ"ד agrees that by פקדון he need not return it בעדים, for he has a מיגו of נאנסו; the same מיגו applies to the שלוחים/עדים since by them it is a פקדון not a מלוה.

answers: תוספות

ויש לומר דמכל מקום אפילו גבי פקדון אין נאמנים אלא בשבועה -

And one can say; that nevertheless even by a פקדון they are only believed with an oath -

כדאמר התם (בבא בתרא דף ע, ב) אטו כי אמר נאנסו מי לא שבועה בעי⁹ -

As the גמרא states there;¹⁰ 'is it not so that when he claims 'נאנסו', is he not

⁶ There are basic differences between a מלוה (a loan) and a פקדון (a deposit). A מלוה belongs to the ליה and he may do with it as he pleases (obviously he must return the loan at some time in the future). A פקדון belongs to the מפקיד; the custodian (holding the פקדון) has no right to use it at all (and must obviously return it to the owner at the designated time). Regarding a מלוה the ליה must always pay it back, even if he lost it or it was stolen from him before he even had a chance to use it. However by פקדון if there was an unavoidable mishap and the פקדון is gone he is exempt from payment (even if he is a שכר שומר). Therefore even the one who maintains בעדים צריך לפורעו בעדים agrees that by פקדון, where the נפקד (the custodian) has the מיגו of saying נאנסו, so even if he claims החזרתי he is believed (as opposed to a מלוה where the ליה cannot claim נאנסו and must always repay the loan).

⁷ In the relationship between the ליה and the מלוה we are discussing a loan, however in the relationship between the ליה and the שלוחים the money was not given to them as a loan, but rather they were entrusted with the money to deliver it to the מלוה; by the שלוחים the money was a פקדון, not a מלוה, so they can always claim נאנסו and be פטור from paying.

⁸ See 'Thinking it over'.

⁹ The rule is if the שומר (the custodian of the פקדון) claims נאנסו, he must swear that it was נאנסו (he was not negligent, etc.), otherwise he is not believed and is required to pay. Similarly when he claims החזרתי (according to the מ"ד צריך), for which he is believed only because of the מיגו of נאנסו, he must also swear (that he returned the פקדון), for the claim of החזרתי cannot be 'stronger' than the claim of 'נאנסו', which is the basis for believing him.

¹⁰ The case there is where the מפקיד had a שטר that he deposited the פקדון by the נפקד, and nevertheless the נפקד is believed to claim דנאנסו במגו החזרת, provided that he swears החזרתי.

required to swear, similarly when he claims **החזרת** (for which he is believed **במגיד דנאנסו**), he is also required to swear, and therefore, since the **עדים/שלוחים** are required to swear if they would have said, ‘we returned it to you’ -

וכל¹¹ עד שאינו נאמן בלא שבועה¹² אין ממש בעדותו כמו שאפרש¹³ בסמוך:

So any witness who is not believed without a שבויעה, there is no substance to his testimony as I will shortly explain.¹⁴

Summary

המפקיד are not believed if they require a שבועה to certify their עדות. All agree that המלוה את חבירו (he will need a שבועה if we maintain את חבירו בעדים (בעדים צריך לפורעו בעדים).

Thinking it over

1. תוספות writes that (seemingly) the שלוהים should be believed to testify that they paid the מלוה with a מגו that they could have said we returned it to the לוה.¹⁵ Why did not תוספות write that they are believed with the מגו of נאנסו (since that is the reason they are believed to say להחזירנו ללוה)?¹⁶

2. 'לעולם קסבר המלוה וכו' א"צ that גמרא מסקנא asks his question on the תוס' who stated: 'אי קסבר'; why did not תוס' ask the same question on the 'לפורעו וכו' המלוה וכו' צריך לפורעו וכו' הני גוועים בעדותם נינהו וכו' it is seemingly the same question?!¹⁷

¹¹ This conclusion of תוספות is necessary only if the עדים agreed to swear (or swore) that they paid the מלוה. However if they are not willing to swear, then obviously they are not believed, because there still remains a vested interest. The עדים would rather say we paid the מלוה (where there is no requirement to swear), than to say we returned it to the ליה where there is a requirement to swear (see footnote # 9), therefore, since they have a vested interest, they are not believed. תוספות is adding that even if they swear that they paid the מלוה (so there is no difference which claim they make), nevertheless they are not believed since we needed an oath to believe them, and עדות need to be believed without an oath. See following תוס' ד"ה והשתא.

¹² In actuality the עדים here are testifying that they paid the מלוה. However in order to remove their vested interest, we say that they could have just as easily said we returned it to the לווה, and they would be believed. However they would only be believed if they swore, [either that we paid the מלוה or 'we returned it to the לווה' (for the acceptance of their claim the החזרתו ללווה is based on the מגו of נאנסו, which requires a שבועה) see footnote # 11], and an עד which requires a שבועה to be believed is not considered an עד at all!

¹³ See following תוס' ד"ה והשתא.

¹⁴ However if we maintain בעדים א"צ לפרועו בעדים, the עדים are believed to claim פרענום with a מגו of חזקת פיקדון. The חזקת פיקדון is based on the fact that the שוכר has no obligation to return the money immediately (חזקת השוכר). The חזקת פיקדון is based on the fact that the שוכר has no obligation to return the money immediately (חזקת השוכר).

¹⁵ See footnote # 8.

¹⁶ See מהרש"א, עצמות יוסף, ופני יהושע.

¹⁷ See עצמות יוסף (and footnote # 3).