

והשתא דתקון רבנן שבועת היסט כולי -

And now that the *Rabonon* Instituted a שבועת היסט, etc. -

Overview

The גמרא concludes (regarding whether the שלוחים for the payment of a loan can be the עדים that the loan was paid up) that after the תקנה of היסט שבועת היסט,¹ the שלוחים/עדים are required to swear that they paid the money to the מלוה (as they claim [otherwise the need to pay it back either to the מלוה or the לווה]),² and the מלוה swears that he did not receive the money (from anyone),³ and the לווה pays the מלוה.⁴ Our תוספות discusses this case.

תוספות asks:

ואם תאמר מכל מקום למה לא יהיו העדים נאמנים לאחר שנשבעו לומר פרענום -

And if you will say; notwithstanding that there is a שבועת היסט (which [seemingly] make the witnesses בעדות (נוגע בעדות), why should the עדים not be believed to say, 'we paid the מלוה', after they swore -

שהרי שוב אינם נוגעים בעדות⁵ -

For after they swore they are no longer נוגע בעדות; they have no vested interest in their testimony?!

תוספות answers:

ואומר רבינו יצחק דלכך אין נאמנים לאחר שנשבעו -

And the ר"י answers; the reason they are not believed after they swore that they paid the מלוה -

¹ The תקנה of היסט שבועת היסט was that any defendant to a monetary claim against him, must swear that he does not owe the money (even if he is a כופר הכל).

² The לווה has a claim against the שלוחים for the money which he gave them (since the מלוה claims [and swears] that he did not receive it). Therefore they have to swear a שבועת היסט that they indeed gave the money to the מלוה. Once they swear the שבועת היסט they are exempt from payment since they are כופר הכל.

³ The מלוה needs to swear a שבועת המשנה to collect from the לווה, since the שלוחים claim and swear that they paid him.

⁴ The לווה is required to pay, because he admits that he borrowed the money and does not know with certainty that the שלוחים paid the מלוה.

⁵ Before the תקנה of היסט שבועת היסט, the שלוחים were believed to say we paid the מלוה (if we maintain א"צ (לפורעו בעדם), for they are not נוגע בעדות, they could have just as easily said, 'we returned the money to the לווה', in either case they would not have to swear (so it makes no difference to them what they claim). Similarly after the תקנה of היסט שבועת היסט, and the שלוחים swore they paid the מלוה, they should be believed because they could have just as well claimed we returned it to the לווה and are willing to swear. There is no difference to the עדים whether they swear we paid the מלוה or we returned it to the לווה (if we are concerned that the עדים are lying), either claim would exempt them from paying if they swear.

משום דרחמנא אמר (דברים יט) על פי שנים עדים יקום דבר דמשמע הנאמנים בדיבור⁷ בלבד -
Is because The Merciful One said, 'by the word of two will the fact be established', which indicates by two witnesses who are believed just by their word alone -

אבל העדים הטעונים לישיבע קודם שיאמנו דבריהם⁸ אין ממש בעדותם -
However, witnesses which are required to swear, before their words will be believed, there is no substance in their testimony.

(רבה אמר ר"נ asks (on the original ruling of תוספות

ויש מקשים היאך אמרינן⁹ מגו דיכלי למימר אהדרינהו ללוה כיון דשנים הם -
And there are those who ask; since there are two שלוחים/עדים, how can we say
that they could have said we returned the money to the לווה, therefore they are believed to say we paid the מלוה -

הא אמר בפרק האשה שנתארמלה¹⁰ (כתובות דף יח,ב) -
But - פרק האשה שנתארמלה said in רמי בר חמא

לא שנו אלא דאמרי אנוסים היינו מחמת נפשות אבל אמרו אנוסים מחמת ממון אין נאמנים¹¹ -
The only, אנוסים היינו are believed to claim עדים are believed to claim did not teach the rule that the משנה
if the עדים said we were forced because of death threats (for then they are permitted to sign [falsely]), however if they said we were forced because of monetary threats they are not believed (for in that case they are not permitted to sign [falsely]). This concludes the citation of the גמרא there.

ומקשה התם¹² רבינו יצחק אמאי לא יהו נאמנים לומר אנוסים היינו מחמת ממון -
And the ר"י asked there, why should they not be believed to say מחמת

⁶ שופטים פסוק טו.

⁷ Others amend this to בדיבור (as opposed to בדיבור).

⁸ These witnesses are not believed to say that they paid the מלוה (unless they swear), because they are נוגע בעדות. They do not want to say otherwise, for the לווה will make them (either pay him back the money, or) swear that they paid the מלוה (which they would rather not do). Since the only way to believe them is if they swear, they are not considered עדים. [We do not believe them to the extent that the לווה is exempt from paying the מלוה, for they have no status as עדים, however they are exempt from paying the לווה since they are כופר הכל and swore (a שבועת היסט) that they do not owe him the money,

⁹ רבה אמר ר"נ is referring to the ruling of תוספות (before the תקנה of היסט) that the שלוחים are believed to testify that they paid the מלוה and are not נוגע בעדות, since they could have just as easily said we returned the money to the לווה. See 'Thinking it over # 1'.

¹⁰ The משנה there states if עדים testified on a שטר that it is their signatures, however they were coerced (אנוסים היינו) to sign the שטר; they are believed (and the שטר is invalid) provided that their signatures cannot be corroborated by other means, only through them.

¹¹ Signing on a שטר falsely by being coerced ממון מחמת is forbidden. One who does so is called a רשע. The עדים are testifying that they are רשעים. We cannot accept a testimony which makes oneself a רשע, since a person is related to himself he cannot testify regarding himself. See there רש"י רשע.

¹² See there מחמת (it does not mention the ר"י there).

- ממון

במיגו דאי בעי אמרו אנוסים היינו מחמת נפשות -

With a מגו, for they could have said we were אנוסים מחמת נפשות (where they are believed to invalidate the שטר) -

ומתרץ רבינו יצחק דבשני עדים לא שייך לומר מגו¹³ שיהו נאמנים במגו -

And the ר"י answered there that by two עדים it is inapplicable to utilize a מגו, meaning that they should be believed with a מגו -

לפי שאין האחד יודע מה בדעת חבירו לטעון¹⁴ אם כן הכא אמאי נאמנים במגו -

Since one witness does not know what his friend (that other witness) has in mind to claim. This concludes the citation of תוספות in כתובות. Now תוספות concludes his question; if indeed it is so (that there is no מגו by two people), why do we say here that the עדים/שלוהים are believed to claim we paid the מלוה with a מגו that they could have said we returned the money to the לווה; how is there a מגו by two people?!

answers: תוספות

ואומר הרב רבינו יעקב מקוצי דבטענה שנפטרים בה מממון כי הכא¹⁵ -

And ה"ר יעקב מקוצי answered that by a claim which will exempt them from paying money, like in this case here -

בטוחים הם זה על זה שיאמרו דבר אחד ולכך אמרינן הכא דנאמנים במגו -

They are trusting each other that they will say the same thing, so therefore here (regarding the עדים/שלוהים) we say that they are believed with a מגו -

אבל בההיא דפרק האשה שנתארמלה (שם) דליכא דררא דממונא לגבי העדים¹⁶ -

However in that case of פרק האשה שנתארמלה where there is no monetary issue regarding the עדים -

התם ודאי אין נאמנים במגו כי אין עד אחד יודע מה בדעת חבירו לטעון:

They are certainly not believed there with a מגו, for one עד does not know what his friend (the other עד) plans to claim.

Summary

עדים that require a שבועה to validate their עדות are not considered עדים. We say a מגו by two people if they stand to lose monetarily.

¹³ See also there אין אין תוס' ד"ה אין.

¹⁴ See 'Thinking it over' # 3

¹⁵ The עדים here are affected monetarily by their testimony, for if they do not testify properly (that they paid the מלוה, or returned the money to the לווה) they stand to lose money, for the לווה will demand his money back. When it comes to protecting one's money we are sure they will present the best argument.

¹⁶ Regarding the witnesses in that case there is no difference to them monetarily wise if their testimony is accepted or not; they will not gain or lose money either way.

Thinking it over

1. Why does תוספות ask his second question here?¹⁷ He should have asked it previously when the גמרא was discussing that law before תקנת שבועת היסט?¹⁸

2. Seemingly the two cases (of אנוסים היינו and פרענו למלוה) are different, regarding what we wish the מגו to accomplish. In the case of אנוסים היינו מחמת ממון, there is a difficulty accepting their testimony, for it makes them רשעים,¹⁹ and they are contradicting a שטר. The מגו in that case is necessary to build up their testimony to make it believable, where without the מגו we cannot believe them. However in our case (of פרענו למלוה) the only difficulty is our concern that they are נוגע בעדות. However when we realize that they are not נוגע בעדות (on account of the מגו), we accept their testimony. We do not believe them on account of the מגו, rather the מגו option removes the נגיעה.²⁰ This would seem to answer תוספות question!²¹

3. Some further clarification is necessary regarding the explanation of the ר"י that by two people there is no מגו because אין האחד יודע מה בדעת חברו לטעון.²² Seemingly we need a מגו to prove that what they are saying is true. The מגו proves it, for if they are liars (they concocted their testimony) they could have come up with a better lie. How can we say they do not know what the other will claim, if we suspect them of concocting a story; of course they can agree on a better story if they are liars!!²³

¹⁷ See footnote # 9.

¹⁸ See עצמות יוסף לפני יהושע.

¹⁹ Others ask, even if we would say a מגו there, what would it accomplish can a רשע testify even with a מגו (see נחלת משה).

²⁰ By אנוסים היינו it is a 'regular' מגו; meaning that what they are saying must be true, for if they were liars they could have said a 'better' lie. The מגו proves the truthfulness of their statement, which otherwise would be questionable. However here the מגו does not 'prove' that they are saying the truth, rather it merely eliminates the נגיעה concern.

²¹ See אוצר מפרשי התלמוד # 113.

²² See footnote # 14.

²³ See נחלת משה.