

אבל העדאת עדים דליכא למימר –

But by the testimony of witnesses where we cannot say, etc.

OVERVIEW

כופר הכל the taught (a ברייתא¹) that if עדים partially contradicted a מודה במקצת. We derive this from a ק"ו from (וע"א) מוב"מ. The גמרא asked why it is necessary to invoke a ק"ו? It would seem obvious that just as the מוב"מ has to swear, similarly if the עדים create a הודאה במקצת he should also swear. The גמרא then cited the explanation of רבה why a מוב"מ swears, and concludes that since this reasoning of מוב"מ does not apply to העדאת עדים (so I would think that there is no חיוב שבועה by עדים), therefore the ק"ו teaches us that there is a חיוב שבועה even by עדים. Our תוספות explains what specifically applies to a מוב"מ (that causes the שבועה) and seemingly does not apply to עדים (and therefore we should not administer a שבועה), and why indeed there is a חיוב שבועה by עדים.

The גמרא states that by העדאת עדים, one cannot say -

כל כך משתמיט כיון שכפר הכל² –

So readily that he is merely evasive (as by מודה במקצת); since he denied everything, therefore -

אימא כיון דחשוד הוא לגזול³ חשוד נמי אשבועתא –

I would assume that since he is suspect to steal (by his claim against the testimony of עדים), he is also suspect to swear falsely, and we should not administer an oath to him, therefore -

קא משמע לן קל וחומר דלא הוי גזולן בהכי⁴ דאשתמוטי קא משתמיט⁵ –

The ק"ו teaches us that by being a כופר against עדים, he is not considered a גזולן (or a חשוד אממונא), for the reason he lied is because אשתמוטי קא משתמיט.

¹ See later תוד"ה רבי.

² A person who intends to repay the loan, but is merely stalling would usually rather be a מוב"מ and not a כופר. See previous בכוליה ד"ה (at the end). The fact that he was כופר indicates he has no intention of paying back the loan. This, coupled with the fact that עדים testify (contrary to his claim) that he owes the money (and he has no intention of repaying it [for he is כופר]), should make him a גזולן.

³ He claimed that he owed nothing and the עדים testified that he does owe (at least) partially.

⁴ See 'Thinking it over' # 1.

⁵ The discussion whether a חשוד אממונא is חשוד אשבועתא or not, is only where we cannot say אשתמוטי (for then he is indeed a חשוד אממונא); however whenever it is possible to say אשתמוטי, then he is not even a חשוד אממונא and certainly not אשבועתא. See end of previous בכוליה ד"ה תוס' that by a כופר there is אשתמוטי.

גזלן proves that even if one contradicts עדים he is not considered a

דהכופר במלוה כשר לעדות –

For one who denies taking a loan, even though עדים contradict him, nevertheless **he is still כשר לעדות** (and not considered a רשע), since we say אשתמוטי, and he really intends to pay back when he will have the money.

anticipates an [obvious] question:

ואף על גב דאמרינן לקמן (דף ו,א) דלא אמרינן מגו דחשיד⁶ כולי⁷ –

And even though that the גמרא rules later that we do not maintain that since he is חשיד, etc. אממונא he is also אשבועתא חשיד, but rather we maintain that חשיד אשבועתא is not חשיד אממונא. Why therefore was it necessary for the תנא to teach us through the ק"ו that in the case of רבי חייא he is required to swear (even though he may be a חשיד אממונא), for he is not a חשוד אממונא; even if he were a חשיד אממונא he would still be required to swear since חאלה"א?!

replies:

מכל מקום גם התנא אשמעינן⁸ דלא אמרינן⁹ מקל וחומר מפיו ועד אחד –

Notwithstanding the above, the תנא (of ר"ה) also wanted to teach us that we derive via a ק"ו from ר"ה וע"א that we do not maintain that he is a חשיד,¹⁰ but rather אשתמוטי קא משתמיט.¹¹

⁶ This was the reason תוספות refused to accept פירש"י in וכו' ובכוליה (תוס' ד"ה) ובכוליה וכו'.

⁷ See 'Thinking it over' # 3.

⁸ In the previous תוספות ד"ה ובכוליה the question on רש"י is how can you say that by מוב"מ it is necessary to forewarn that he is not a חשיד אממונא (for otherwise he would not be permitted to swear), when we know that חאלה"א. Here תוספות is not bothered by this. There we were discussing the חיוב שבועה of the תורה. The rule is that חאלה"א, therefore how can רש"י explain that it is necessary to say מישתמט in order to explain why the תורה tells him to swear, when no explanation is necessary since חאלה"א. However here we are merely discussing why רבי חייא mentions the ק"ו when we already know that חאלה"א (or אשתמוטי). That is not so difficult to understand, for even though the גמרא later tells us these rules, there is nothing wrong with the תנא establishing these rules as well (since they are never clearly spelled out in a משנה).

⁹ The expression of תוספות that אמרינן דלא אשמעינן דלא אמרינן⁹ would indicate that אמרינן דלא אשמעינן means that we do not say דלא אשמעינן. However this would (seemingly) contradict what תוספות said previously דאשתמוטי 'קמ"ל ק"ו וכו' דאשתמוטי'. Therefore many מפרשים explain that the אשמעינן דלא אמרינן means that he is not a חשיד. See following footnotes #'s 10 & 11.

¹⁰ Others (see אמ"ה # 84) explain that דלא אמרינן means that we do not say דלא אשמעינן. This does not necessarily contradict what תוספות stated previously דאשתמוטי קמ"ל ק"ו וכו' indicating that the קמ"ל is referring to אשתמוטי and not to חאלה"א. The resolution is that in the case of ר"ה the ליה is not merely a חשיד but actually a possible גזלן, therefore it is possible that even if we maintain חאלה"א by a חשיד, this would not apply to a גזלן ודאי (see גזלן ודאי (תוספות ה,ב ד"ה דחשיד בת"י ה')). Therefore תוספות states previously that he is not a גזלן ודאי since there is the סברא of אשתמוטי. [However the אשתמוטי in this case is not so probable (as תוספות stated initially), therefore he may still retain the status of a חשיד, and the קמ"ל from ר"ה וע"א is that חאלה"א.]

¹¹ The תנא is teaching that even if we would maintain דלא אשמעינן, nevertheless he would swear by העדאת since there is אשתמוטי. See מהר"ם שי"ף.

asks: תוספות

– ואם תאמר אמאי אצטריך לטעמא דאשתמוטי¹² –

And if you will say; why is the explanation of אישתמוטי necessary in order to explain why we need a ק"ו -

– לימא אי לאו קל וחומר הוה אמינא הודאת פיו גדולה מהעדאת עדים –

Let us say that if not for the ק"ו I would have thought that his own admission (of owing half) **is greater** (in making him liable to swear) **than the testimony of witnesses** (that he owes half), and therefore only פיו swears and not העדאת עדים. The superiority of פיו הודאת over העדאת עדים is -

– משום שכן אינו בהכחשה¹³ ובהזמה¹⁴ כדפריך לקמן¹⁵ –

Because by פיו הודאת there is no הכחשה והזמה (to nullify his admission);¹⁶ however by עדים הודאת there can be הכחשה והזמה to nullify the עדים, **as the גמרא asks later**. Therefore only פיו swears and not העדאת עדים.

On the other hand asks: תוספות

– ולקמן נמי הוה ליה למפרך מה לפיו שכן משתמיט¹⁷ –

Later also the גמרא should have challenged the ק"ו from פיו by stating **why** is there a חיוב שבועה **by פיו because** by פיו there is the justification of משתמיט, however by העדאת עדים there is no משתמיט.

In summation: There are two advantages of פיו הודאת over העדאת עדים. One is that by פיו he is משתמיט (and not [so much] by העדאת עדים), the other is that by פיו he cannot be contradicted (through הכחשה והזמה) and עדים can be contradicted. The גמרא uses אישתמוטי to explain why if there was no ק"ו we would not compare עדים to פיו; and it uses הכחשה והזמה to explain why the ק"ו is not valid. תוספות asks that why did the גמרא not use them in

¹² The גמרא explained that if not for the ק"ו we may have assumed that only פיו swears since he is מישתמט, but העדאת עדים would not swear since there is no אישתמוטי. The question תוספות is asking is that we could have found another reason (which the גמרא uses later to differentiate between פיו and עדים) to explain why the ק"ו is necessary. תוספות may be unhappy with the explanation of מישתמיט for since we maintain א"א, the concept of מישתמיט is not that relevant, as תוספות previously asked וכו' דלא אמרינן מיגו דחשיד וכו'.

¹³ הכחשה (which means denial) is in a case where a second group of עדים come and claim that it cannot be (as the first עדים testified) that the ליה borrowed money from the מלוה at this time and place, when we know that at this time the ליה (or the מלוה) was with us in a different place altogether. In the case of הכחשה neither testimony is accepted.

¹⁴ הזמה is when the second group of עדים claim that the first group could not have seen the loan at the time and place indicated; for at that time the first group of עדים were with the second group in a different place. In the case of הזמה the second group of עדים are believed and the first group become לעדות and (in this case) are required to pay the ליה whatever their testimony would have made him liable for.

¹⁵ See later on this עמוד.

¹⁶ Even if עדים would come and contradict his admission (whether through הכחשה or הזמה), his admission would be sustained and he would be liable to pay (and swear).

¹⁷ See 'Thinking it over' # 4.

reverse. We cannot derive עדים from פיו because of החכשה והזמה and it is not a valid ק"ו since פיו is משתמיט and not עדים.

answers: תוספות

ויש לומר דהכא דאתא לפרושי דהודאת פיו גדולה מהעדאת עדים –

And one can say; that here where he is coming to explain that הודאת פיו is greater than העדאת עדים (in the sense that only פיו should swear), the גמרא –
ניחא ליה למינקט טעמא דמשתמיט –

Would rather mention the reason of משתמט –

דסברא הוא דמטעם זה ישבע בהודאת פיו ולא בהעדאת עדים¹⁸ –

For it is logical that on account of this reason of משתמט that he should swear by פיו הודאת פיו and not by העדאת עדים¹⁹. That is why he mentions אישתמוטי concerning גדולה הודאת פיו מהעדאת עדים –

וחומר שאינו בהכחשה ובהזמה ניחא ליה למנקט לקמן לסתור קל וחומר –

And the stringency that פיו possesses that it is not בהכחשה ובהזמה, that is more appropriate to mention later in order to refute the ק"ו –

שכן דרך הגמרא למפרך פירכא על קל וחומר ולא מסברא²⁰ –

For this is the manner of the גמרא to refute a ק"ו from a פירכא of law and not merely from logic –

לכך לא מייתי לקמן סברא דמשתמיט:

Therefore later the גמרא does not mention the reason of משתמט (which is [merely] logic), but rather the חומרא of החכשה והזמה which is a law.

SUMMARY

We could not derive a שבועה מוב"מ from the העדאת עדים by פיו, since פיו by שבועת מוב"מ there is the סברא of אישתמוטי but not by עדים therefore we would be concerned that he is a חשיד אשבועתא, and the ק"ו teaches us that (even) by עדים he is not a חשיד since there is אישתמוטי there as well. The respective responses of אישתמוטי and החכשה והזמה are appropriate for their respective roles of negating a שבועה and refuting a ק"ו.

¹⁸ Where there is the סברא of משתמיט (by פיו) he swears, and where there is no סברא of משתמיט (by העדאת עדים) he does not swear since we can possibly maintain אשבועתא חשיד אממונא חשיד.

¹⁹ However the difference of החכשה והזמה would seem to have no bearing on why פיו should swear and עדים should not swear.

²⁰ A ק"ו teaches that if a law applies in a weaker situation it should certainly apply in a stronger situation. We establish the ק"ו by showing (in this case) that פיו is weaker in the הלכה sense than עדים (it cannot be מחייב). To refute the ק"ו we have to show that the so called weaker situation (פיו) is in reality (from some perspective) stronger in the הלכה than the strong situation (עדים). If it is merely stronger in סברא it would not refute the ק"ו. See (הא) שכן (הא) [footnote # 5]. See [however] נפש חיה.

THINKING IT OVER

1. מישתמיט writes that the ק"ו teaches us that he is not a גזלן for he is ²¹.
How can the ק"ו teach us that a כוה"כ is משתמיט?!²²

2. Is the flow of the גמרא from אמר רבה until אבל בהעדאת עדים וכו' easier understood according to רש"י or according to תוספות?²³

3. תוספות asks²⁴ that why is it necessary for the ק"ו need to teach us that (even) by העדאת עדים he is משתמיט; even if he were not משתמיט he would still have to swear since we maintain אשבועתא לא חשיד אממונא לא חשיד אשבועתא. Seemingly this is not understood. We indeed maintain that אשבועתא לא חשיד אממונא, however here he is not merely a חשיד, he is liar (and if not for אשתמוטי he would be הוחזק גזלן), so therefore the argument of האלח"א is insufficient and we must say אשתמוטי. What therefore is תוספות question?!²⁵

4. תוספות asks that later when the גמרא is attempting to refute the ק"ו (from (הכחשה והזמה) the גמרא should have refuted it with the concept of משתמיט.²⁶
How can תוספות entertain such a question?! The סברא of משתמיט is seemingly not valid to differentiate between עדים and פיו, because there is אשתמוטי even by העדאת עדים as תוספות just stated!

²¹ See footnote # 4.

²² נח"מ בגמ' ד"ה אבל (and חי' הריטב"א החדשים).

²³ נח"ד.

²⁴ See footnote # 7.

²⁵ See footnote # 77. אמ"ה.

²⁶ See footnote # 17.