

מפני מה אמרה תורה מודה במקצת הטענה ישבע -

Why does the תורה rule that one who partially admits to a claim is obligated to swear?

OVERVIEW

רבה asks why the תורה obligates a מודה במקצת to take an oath. Seemingly this is an unusual question. Ordinarily we do not question the rulings of the תורה. Why is this different than many other rulings, where no one asks 'Why'?!

אפילו לרבנן דרבי שמעון דלא דרשי טעמא דקרא קא בעי רבה שפיר -

רבה has a valid question even according to the רבנן who disagree with ר"ש, and do not analyze the reasons of the פסוקים. ר"ש maintains that it is proper to analyze the reasons of various מצוות. This analysis may subsequently limit the scope of the מצוה. The רבנן, however, maintain that the מצוה is applicable in all instances even when the seeming rational of the מצוה does not apply.¹ It would initially seem that the question of רבה would apply only according to ר"ש. If we were to understand the reason behind the חיוב שבועה of a מודה במקצת, we would know when to apply it; and when not to apply it. However, according to the רבנן who are not דרשי טעמא דקרא, there is seemingly no relevance to the question אמרה תורה. Whatever the reason may (or may not be) the rule will always be that a מודה במקצת is מחוייב שבועה. תוספות is stating that it is not so. Rather the question applies to the רבנן as well. The question of רבה is –

מפני מה אמרה תורה כולי דאמאי לא מהימן בלא שבועה במגו דאי בעי כפר הכל -

How² can the תורה rule, etc. that an oath is required by a מודה במקצת; why is the לזה not believed (even) without an oath, since he has a מגו that he could have denied everything. If the לזה would be a כופר הכל he would be פטור from payment (and a שבועה); why is he not believed that he owes only a partial payment, with the מגו of הכל כופר? He should not be obligated to swear.

¹ The 'classic' case is (in ב"מ קטו, א) concerning the rule of (כד, יז) [תצא] דברים (דברים) בגד אלמנה; that one is not permitted to take a garment from a widow as collateral for a loan. ר"ש maintains that this applies only to a poor widow; not to a rich widow. He is דרשי טעמא דקרא. The reason one should not be בגד אלמנה is because since there is a requirement to return a משכון to a poor owner if he requires it (for bedding or clothing), therefore if the מלוה would be continually visiting the home of the widow (to return the משכון [at night]) it would create unsavory rumors about the widow. However from a rich widow, who does not require that her משכון be returned, one may take a משכון from her. However ר"י (the רבנן) disagrees and maintains that in all cases (whether a rich or poor widow) one may not take a משכון from an אלמנה; as the תורה states. We do not read any reasons into the law; we accept it as is.

² It seems that תוספות is interpreting the words מפני מה to mean 'how' (to include the רבנן) instead of 'why' (which would limit it to ר"ש). רבה is not looking (so much) for an explanation of the law, but rather is searching to resolve a contradiction.

anticipates an obvious question; perhaps this is a מגו that is not effective (by a במקצת) -

או נילף מהכא דלא אמרינן מגו³ -

Or on the other hand if the ruling by מוב"מ is that a מגו is ineffective, then instead of saying that it is a גזירת הכתוב (which applies only to מוב"מ), **let us rather derive from this ruling** (that a מ"מ is חייב a שבועה), **that there is no law of מגו**. It seems that the תורה is teaching us that a מגו is not effective.

ומשני דאין זה מגו דאין אדם מעיז לכפור -

And רבה answers that there is no מגו by a מ"מ, **for a person is not sufficiently brazen to deny** the claim entirely. This resolves the apparent conflict. Generally a מגו is effective; however by a מ"מ there is no מגו. A person who owes money to another does not have the העזה to deny it entirely; as רבה goes on to explain.

anticipates a difficulty:

ואף על גב דבפרק שבועת הדיינין (שם דף מ, ב) אמרינן בכופר הכל -

And even though that in פרק שבועת הדיינין the גמרא rules concerning one who denies the entire claim, that the כופר הכל -

משביעין אותו שבועת היסת⁴ משום דחזקה אין אדם תובע אלא אם כן יש לו -

is required to swear a oath, because there is a presumption that a person does not make a claim unless it is due to him. It is therefore assumable that the מלוה who is a כופר הכל does indeed owe money to the מלוה. Otherwise the מלוה would have never made such a claim.

ופריך אדרבה חזקה דאין אדם מעיז בפני בעל חובו -

And the גמרא challenges this assumption (that the לווה owes money); **on the contrary; there is a presumption that a person is not brazen in the presence of his creditor.** If monies are owed to the מלוה, then the לווה will not have the העזה to deny it. The fact that the לווה denies this claim indicates that indeed the לווה owes no money.

ומשני דאשתמוטי קא משתמיט⁵ אלמא בכופר בכל נמי אדם מעיז לכפור -

And the גמרא answers this challenge; that indeed a person is not מעיז בפני בעל חובו

³ מהר"ם שי"ף.

⁴ The שבועת היסת was instituted during the period of the אמוראים (after the משנה). שבועת היסת may be translated as 'an inducement oath' (the חכמים are inducing the לווה to admit); or 'an equitable oath' (it is equitable for the מלוה to collect since יש לו תובע א"א).

⁵ It would seem that in a case where there can be no אשתמוטי then there would be no שבועת היסת; for א"א מעיז בפני בע"ה. (In a case where the מפקיד is claiming the פקדון which is present and the שומר claims that he bought it from the מפקיד. There is no אשתמוטי here, for the פקדון is בע"ה. The שומר should be believed on account of [see following ד"ה חזקה]).

ללוה, however here, the לווה intends to ultimately repay the לווה, it is just that for the immediate present he is **evading** making the payment, for he has no money. This concludes the citing of that גמרא. **It is evident** from that גמרא **that even by a כופר בכל a person is sufficiently brazen to deny everything –**

דאשתמוטי קא משתמיט כמו במודה מקצת -

for he is evasive, just as we say here concerning **a partial admittance**. The question is, if a כופר הכל can be מעיז on account of אשתמוטי just as a מקצת במודה is משתמיט, then why does the מקצת במודה not have the מגו that he could have been כופר בכל?! It seems that the גמרא in שבועות contradicts the explanation of רבה!

answers: תוספות

מכל מקום קאמר הכא שפיר חזקה דאין אדם מעיז לכפור הכל כל כך ולא הוי מגו -

Nevertheless the גמרא here correctly states that there is the presumption that a person is not wont to be מעיז so much, to deny everything; and therefore there is no מגו –

דיותר ברצון הוא מודה במקצת הטענה דאינו מעיז כל כך⁶ -

For he is more willing to be a מקצת במודה than a כופר הכל, for he cannot be so brazen. It is easier (if one owes money) to be a מקצת במודה than a כופר הכל. Therefore the מקצת במודה has no מגו. [On the other hand there are those people who are sufficiently brazen to even be a כופר הכל (when they owe money) on account of אשתמוטי; therefore the שבועת היסט was instituted.]

anticipates an alternate interpretation of רבה's query, and rejects it: תוספות

אבל אין לפרש דרבה אתא לפרושי מפני מה אמרה תורה מודה מקצת ולא כופר הכל -

However, we cannot interpret that רבה is coming to explain why the תורה requires only a מודה במקצת to swear and not a כופר הכל. The original explanation of תוספות is that רבה asks why the מקצת במודה is not believed with a מגו of כופר הכל. According to this interpretation רבה is asking; why should not a כופר הכל also be required to take an oath.

וקאמר חזקה דאין אדם מעיז לכך נאמן כשכופר הכל -

And רבה continues (according to this proposed interpretation) and states that since a person is not מעיז, therefore he is believed without a שבועה, when he is כופר הכל. For if he had indeed owed money he could not have denied it completely. This is the proposed interpretation.

⁶ The fact is this מ"מ owes money, he was not כופר הכל. Obviously (if we suspect him of lying) he did not have the העזה to be כופר הכל and therefore no מגו. One who is כופר הכל, however, may be of a stronger temperament and can be 'מעיז' even to the extent of כוה"כ (since he is משתמט).

– תוספות, however rejects it –

דאם כן במקום שיכול להעיז אפילו כופר הכל חייב -

For if this were so (that a כופר הכל is פטור משבועה, since אא"מ), then it would follow, **that in a situation where the לוח can be מעיז, even if he is a כופר הכל**, the לוח should be **obligated** to swear. The reason (according to this interpretation) that a כופר הכל is פטור משבועה is on account of the אא"מ; where this חזקה does not apply (in a case where it is possible for the לוח to be מעיז), the ruling should be that a כופר הכל is obligated to swear. This conclusion, however, is contradicted –

ובסמוך אמרינן איפכא לרבנן דבבנו מעיז ופטור אף מודה מקצת הטענה -

For shortly the גמרא **will states the opposite; according to the רבנן** who maintain that the לוח **is מעיז against the son** the מלוה and therefore the רבנן maintain **that even a מודה בקצת הטענה** against the son of the מלוה **is exempt** from the במקצת מודה. The reason for this is –

משום דמשיב אבידה הוא מגו דאי בעי כפר הכל⁷ -

Because the לוח is considered **a משיב אבידה** since he has the **מגו that he could have been הכל כופר**. This proves that a כופר הכל is פטור from a שבועה even if he can be מעיז. If the ruling would be that a כופר הכל is פטור משבועה where he could be מעיז; how can the רבנן maintain that a מודה במקצת בנו is פטור משבועה for he could have been a כופר הכל?! This כופר הכל is able to be מעיז according to the רבנן (that בבנו מעיז ומעיז); he should therefore be obligated to swear even when he is a כופר הכל (according to this interpretation). There would obviously be no מגו to exempt the במקצת מודה by בנו. Therefore we must conclude that a כופר הכל is always פטור from a שבועה, regardless whether he can be מעיז or not.

Following this conclusion, תוספות deals with the obvious question:

ואם תאמר ומנלן דכופר הכל פטור -

And if you will ask; how indeed do we derive that a כופר הכל is פטור from a שבועה. We have rejected the previous proposition that a כופר הכל is פטור since אא"מ; what then is the reason that every כופר הכל is פטור משבועה?!⁸

תוספות anticipates a possible solution, but rejects it:

ולכא למימר מדאיצטרך קרא לחייב שבועה בעד אחד מכלל דכופר הכל פטור -

And one cannot say that since a פסוק is required to teach that a single witness obligates the opposing litigant to swear,⁹ this implies that this

⁷ See 'Thinking it over' # 2.

⁸ It would seem that תוספות is asking that we should derive a חיוב שבועה by כופר הכל from מוב"מ. See 'Thinking it over' # 1.

⁹ The תורה states (דברים [שופטים] יט, טו) that לכל עון ולכל חטאת; we interpret it to mean that לכל עון ולכל חטאת לא קם אבל לשבועה קם.

litigant **who is a כופר הכל is exempt** from taking an oath. If a כופר הכל is חייב a שבועה, then why is there a necessity for the תורה to teach that a ע"א is מחייב a שבועה, the תוספות answers. This seemingly answers the question. We derive that a כופר הכל is פטור משבועה from the חיוב שבועה of an ע"א.

However תוספות rejects this solution. It is possible that a כופר הכל is מחייב a שבועה, and nevertheless a פסוק is required to teach us that an ע"א is also מחייב a שבועה in special circumstances:

דהא איצטרך להיכא שמעידים¹⁰ שגנב לו והוא אינו יודע -

For it is necessary to teach that an ע"א is מחייב a שבועה in cases **where they** (the various ע"א) **testify that** an individual **stole from him**; however the victim **is not aware** who stole it.¹¹ A כופר הכל can be obligated to swear (according to this אמינא), when there is a definite claim against him (as in a loan, etc.) however in a case where the victim is not personally aware who the thief is, and cannot claim with certainty that he is the thief, then the alleged thief would not be required to swear. However if there is an ע"א who testifies the he is the thief, that alleged thief would be required to swear, even if the victim cannot indentify him as the thief. This is what the חיוב שבועה of ע"א may be coming to teach us. In conclusion there is no proof from חיוב שבועה that a כופר הכל is פטור משבועה. The original question remains; from where do we derive that a כופר הכל is always פטור משבועה?

תוספות answers:

אלא יש לומר דגזירת הכתוב היא דכי הוא זה משמע דבעינן כפירה והודאה -

But rather we can say that it is a decree of the תורה for the words **כי הוא זה** (from where we derive the obligation of במקצת) ¹² **indicates that a denial and an admission are required** to obligate an oath. A כופר הכל is therefore exempt from a חיוב שבועה.

תוספות offers an alternate explanation (that we cannot derive חיוב שבועה by a כופר הכל from the חיוב שבועה by a במקצת):

ועוד מודה במקצת יש להשביעו שחייב לו ממון שהודה -

And furthermore by a מודה במקצת it is proper to have him swear; for since he owes him the monies which he admitted -

¹⁰ The ש"ש amends this to שמעיד (instead of שמעידים)..

¹¹ See תוספות יב,ב ד"ה רב הונא where תוספות also maintains that an ע"א can be מחייב a שבועה שמה בטענת שמה (however, there the תובע and the נתבע were both שמה).

¹² The פסוק in כב,ה is referring to a שבועה. The translation of 'כי הוא זה' would be 'It is only this' that I owe. This implies that he is both partially admitting and partially denying the claim.

ועל ידי כך מגלגל עליו שבועה כעין גלגול¹³ -

And through this (monetary admission and obligation) **we 'roll' upon him an oath** as well, **similar** to the ruling of גלגול שבועה -

אבל כופר הכל נסתלק לגמרי ממנו:

However, one who is **כופר הכל**, **has removed himself completely from** the plaintiff; and there is nothing by which he can retain him and make him swear.

SUMMARY

The question of 'וכו' רבה מפני מה is, why is a מוב"מ not פטור from a שבועה, since he has a מגו of הכל כופר. The question cannot be why is a כופר הכל פטור from a שבועה; for then the answer would be since 'וכו' מעיז פניו. However this is contradicted by the רבנן who maintain that a כופר הכל is פטור even when he is גזירת הכתוב כי הוא זה is a פטור from a שבועה either because מוב"מ is a limiting a חיוב שבועה to a מוב"מ; or there is no גלגול by a כופר הכל as there is by a מוב"מ.

THINKING IT OVER

1. פטור משבועה¹⁴ is כופר הכל asks from where we know that a כופר הכל is פטור משבועה, since the תורה never states that he is מחוייב שבועה. [It seemingly cannot be derived from מוב"מ, because by מוב"מ there is ample reason to suspect the מודה and believe the תובע.]

2. Can we infer¹⁵ from our תוספות whether a (prospective) liar would prefer to pay nothing and swear falsely, or whether he would prefer to pay partially and be exempt from a שבועה?

¹³ We derive (from פרשת סוטה, from the words אמן אמן) that if one is obligated to swear against his plaintiff, then the plaintiff has the right to coerce the defendant to swear (his denial) on additional disputes between them, where (on their own) no שבועה could have been administrated. This is known as גלגול שבועה. Similarly here once there is a חיוב ממון from the נתבע to the תובע, the תובע can be מגלגל a שבועה on the נתבע.

¹⁴ See footnote # 8. See ח"ב מ"ת אות רכג.

¹⁵ See footnote # 7.