

And he wants to admit to all

ובכולי בעי דלודי –

OVERVIEW

תוספות asked why is a מודה במקצת required to take an oath. [According to others; why is a כוה not required to take an oath.] רבה answers that אין אדם מעיז פניו בפני בע"ח (תוספות); or the כוה is saying the truth (according to others)]. This would seem to satisfactorily answer s'רבה's original question. רבה, however, continues with an analysis of the מוב"מ and concludes that he is מישתמט. The question is; why did רבה find it necessary to continue explaining that the מוב"מ is מישתמט? רש"י and תוספות offer different explanations.

פירש בקונטרס בבבא מציעא¹ (דף ג,ב ושם) דאתא לפרש אמאי נשבע -

מודה רבה is continuing to explain why the מ"מ מסכת ב"מ explained in רש"י that מודה is required to swear, for seemingly –

נימא מגו דחשיד אממונא חשיד נמי אשבועתא -

Let us argue that since this מוב"מ is suspect of dishonesty in monetary issues (that is why the oath is being administered to him), he should also be suspect concerning the oath; he may swear falsely. If the מוב"מ is suspect of being willing to steal he should equally be suspect of willing to swear falsely. What then is the purpose of the oath?!

ולהכי קאמר ובכולי בעי דלודי ליה ולא חשיד אממונא -

And therefore רבה continued and said that this מוב"מ really wanted to admit to owing everything (he has every intention of ultimately repaying the loan, however presently he is מישתמט); therefore he is not suspect in monetary matters, and an oath may be administered. This concludes רש"י's interpretation of וכולי וכי.

תוספות has a difficulty with רש"י's explanation:

וקשה לרבינו יצחק דהא אמר בפרק קמא דבבא מציעא (דף ה,ב) -

And the גמרא states in רש"י's explanation, for the מ"מ מסכת ב"מ of פרק first –

דלא אמרינן מגו דחשיד אממונא חשיד נמי אשבועתא -

That we do not presume that since one is suspect in monetary matters he

¹ (ד"ה ובכולי there תוס' see) בד"ה והאי

is suspect as well concerning oaths; but rather the assumption is that even one who is חשוד אממונא is not חשוד אשבעתא. How could רש"י interpret that the reason רבה says 'מגו דחשוד אממונא חשוד נמי אשבעתא' is to remove the problem of 'ובכולי בעי דלודי ליה'?

רש"י anticipates (and rejects) a possible solution to his question on תוספות:

ואין לומר דמן התורה חשוד נמי אשבעתא ומדרבנן הוא דאמרינן דלא חשוד -

And one cannot answer that according to law, a חשוד אממונא is also חשוד אשבעתא, and that which the גמרא states that a חשוד אממונא **is not חשוד אשבעתא**, and that which the גמרא states that a חשוד אממונא **is not חשוד אשבעתא** that is only **מדרבנן**. The reason why a חשוד אממונא **is not חשוד אשבעתא** is –

לפי שראו שהיו מקילין בממון יותר מבשבעה ותקנו שבועה על החשודים -

For the חכמים realized that people are more lenient in allowing themselves to lie in monetary matters more than they would lie by oaths; and therefore they instituted an oath (even) on suspected liars –

כל זמן שלא נודע שהוא גזולן שכשר מן התורה עדיין² -

As long as it is not known that he is a robber; and therefore he is still fit for an oath מן התורה -

אבל גזולן ידוע שפסול מן התורה לא תקנו -

However for a known גזולן who is unfit מן התורה to take an oath, in those cases the חכמים did not institute that an oath be administered to a גזולן. This would seemingly answer תוספות question on רש"י.

continues to resolve certain issues if we were to accept this answer:

ולפי זה שבועה שלא שלחתי בה יד³ היא מדרבנן -

And according to this explanation, the oath that a watchman swears, that 'I did not use the deposited object' is (merely) a שבועה מדרבנן; for according to the law אשבעתא חשוד אממונא חשוד אשבעתא. If we suspect the שומר that he was יד שולח in the פקדון, that makes the שומר חשוד אממונא (he is using something that does not belong to him [so there is no מישתמט]), and חשוד אשבעתא חשוד אממונא מן התורה, and cannot

² Even though that he is a חשוד, and אשבעתא נמי אשבעתא; nevertheless a חשוד אממונא is not חשוד אשבעתא מן התורה. It is merely that there is no point in giving him the שבועה. If he is saying the truth there is no need for a שבועה and if he is lying; he will swear falsely anyway. The חכמים however realized that there is a point in requiring him to swear. For in the times of the חכמים חשוד אממונא was not חשוד אשבעתא as long as he is not a גזולן ידוע. He is merely חשוד אשבעתא of being a גזולן (that is why we administer the oath) but he is not a גזולן ידוע. However by a גזולן ידוע who is חשוד אממונא אשבעתא, the חכמים were not inclined to make him swear (even though אשבעתא חשוד אממונא חשוד אשבעתא), since he is a גזולן ידוע. See later in this Tosfos the difference between a חשוד and a גזולן.

³ states (ב"מ ו,א) that a שומר who claims that a mishap happened to the פקדון and wants to exempt himself from payment is required to make three oaths; 1) that I was not negligent, 2) that I did not use the פקדון, and 3) that it is not in my possession.

swear.

[ולא הוה דאורייתא אלא שבועה שלא פשעתי בה] -

[And the only oath that a watchman must swear **מן התורה**, is the oath that I **was not negligent** in watching the פקדון; for even if the שומר was negligent, we cannot consider him a חשיד אממונא (even though that if he was פושע he is חייב for the פקדון), therefore he may swear **מן התורה** that לא פשעתי בה]⁴

continues to anticipate and resolve another issue (with this assumption):

והא דכתיב אם לא שלח לא שנשבע שלא שלח אלא הכי קאמר קרא נשבע שלא פשע -
And that which is written in the תורה 'if he did not send his hand in (use) his neighbors deposit',⁵ it does not mean that he swears that he was not יד (for if we suspect him of שליחות יד he is אשבועתא); but rather this is what the verse is stating: the שומר swears שלא פשע (for even if he was פושע he is not חשיד אממונא and לשבועה); however the פסוק states that there is a restriction to taking this oath –

אימתי בזמן שלא שלח בו יד דאם שלח בו יד חייב אפילו שלא פשע דנתחייב באונסים -
When can the שומר take the oath of פשעתי, only in a situation where the שומר was not יד (only then can he swear that פשעתי and be exempt from paying for the missing object); for if he was יד then the שומר is obligated to pay for the missing פקדון even if he was not פושע, for since he was יד he becomes obligated to pay for the פקדון even if it was missing due to unforeseen (and unavoidable) accidents.⁶ There is therefore no purpose in swearing פשעתי if he was יד.⁷ This concludes the (attempted) answer on רש"י (with additional resolutions).

חשיד is מדאורייתא חשיד אממונא We cannot say that however תוספות אשבועתא:

דהא גבי נסכא דרבי אבא (שבועות דף לב,ב) משמע דאי אמר לא חטפי -

⁴ It is not clear from תוספות whether the שבועה שאינה ברשותי is מה"ת or not. See משכנות הרועים אות קלה.

⁵ The פסוק in כב,ז reads שמות במלאכת רעהו (משפטים) כב,ז. This refers to the oath (ונקרב בעה"ב אל האלקים) that the שומר must take. The simple reading of the פסוק indicates that the oath is אלא שלח ידו במלאכת רעהו. However according to the present understanding there can be no תורה oath if we suspect the שומר of שליחות יד; for then he is a חשיד אממונא.

⁶ When the שומר is יד (without permission), he is קונה the פקדון to be responsible for all אונסים.

⁷ The פסוק would be understood as follows ונקרב בעה"ב אל האלקים to administer the oath of פשעתי to the שומר; when is this oath administered (and subsequently exempting the שומר from paying), only if לא שלח ידו. במלאכת רעהו. The words אלא שלח וגו' is not part of the oath; but rather refer to the circumstances that allow the oath to be administered.

For concerning the case of a piece of silver that רבי אבא ruled on,⁸ it seems that if the defendant would have claimed 'I did not grab the silver from the plaintiff' -

היה נשבע להכחיש את העד אף על גב דחשיד אממונא -

He would be obligated to swear that he did not seize the silver, in order to contradict the testimony of the witness who claims that he did seize the silver from the plaintiff; even though that in that case the defendant is a חשיד אממונא (seizing from someone is an act of גניבה [unless it can be proven that the object seized belongs to the seizer]).⁹ We can derive that an oath is administered מן התורה even by a חשיד אממונא. This contradicts the previous answer.

anticipates (and rejects) a possible answer. Perhaps the חיוב שבועה there is only מגו דחשיד אממונא וכו'¹⁰ and not מדרבנן, and מדאורייתא there is no תוספות rejects this:

והתם היא שבועה דאורייתא -

And there by the case of נסכא דרבי אבא it was a שבועה that the seizer would have been required to swear, not a שבועה דרבנן. תוספות proves it:

דבשבועה דרבנן לא אמרינן מתוך שאינו יכול לישבע משלם -

For by a שבועה מדרבנן we do not say 'that since he cannot swear he is obligated to pay'¹¹ -

כדמשמע בפרק קמא דבבא מציעא (שם) גבי ההוא רעיא -

As is indicated in the first פרק of ב"מ; מסכת ב"מ concerning the case of 'there was a shepherd, etc'¹². Since we see that by נסכא דר"א there is a ruling of מתוך

⁸ The case there is of a plaintiff who claims (and has a single supporting witness) that the defendant seized from him a piece of silver. The defendant admitted to seizing the silver; however he claims that the silver belongs to him and not to the plaintiff. There are no other witnesses (as to who is the original owner of the נסכא). רב אבא ruled that the defendant is obligated to swear (if he would have claimed חטפי); however since he cannot swear (for he is not contradicting the ע"א) he is a משלם יכול לישבע משלם and therefore he is obligated to return the נסכא.

⁹ There is no אשתמוטי when he claims לא חטפי and is lying; as opposed to other שבועות of an ע"א, even by a כוה"כ, where there is the אשתמוטי סברא (see מהר"ם ש"ף).

¹⁰ The שבועה in the case of נסכא דרבי אבא is a שבועת ע"א, which is a שבועה דאורייתא. However, if we maintain that חשיד אממונא is חשיד אשבועתא, then מה"ת we would not allow the חוטף to swear (for he is חשיד אממונא). The חיוב שבועה against the ע"א is (in this case) a שבועה דרבנן. This is what תוספות is referring to when he discusses whether the שבועה of נסכא דר"א is a שבועה דאורייתא or a שבועה דרבנן.

¹¹ רבי אבא ruled that the חוטף is a מחוייב שבועה to deny the testimony of the ע"א. However since he is אינו יכול therefore he is obligated to pay.

¹² The shepherd counterclaimed that on this particular day he was not given any sheep to watch. עדים testified that they saw him eat two (of the owners') sheep on that day. The גמרא there says that if the ruling of רבי חייא is correct (according to ר"ה the testimony of the עדים make it similar to a במקצת), the shepherd would be obligated in a שבועה דאורייתא. However since he is a גזול (on account of the two sheep) he cannot swear the מוב"מ; rather the claimants would swear how many sheep they gave him on that day and he would be obligated to pay. The גמרא asks that even without the ruling of ר"ה (which makes him

that proves that the שבועה דאורייתא is a נסכא דר"א by שבועה, even though that the מגו is a חוטף. We may conclude that even by a שבועה דאורייתא we do not say מגו חוטף. This contradicts the proposed explanation of רש"י which distinguishes between a שבועה דאורייתא and a שבועה דרבנן concerning the issue of חשד אמונה. The original question remains how can רש"י state that when רבה said מגו he was addressing the issue of חשד אמונה, when it is known that מגו is both by a שבועה דאורייתא and a שבועה דרבנן.

ובכולי בעי וכו' רבה continues with his own interpretation of תוספות:

ונראה דאתא לפרש דלא תקשי כיון דאין אדם מעיז יהא נאמן במה שכפר מקצת -

And it seems that רבה is coming to forewarn that you should not ask, that since we just concluded that אא"מ, therefore the מוב"מ should be believed in his partial denial (without an oath) for he must be telling the truth (since אא"מ)¹³ -

וכיון דמחייבין שבועה אם כן מחשבו עזות פנים -

And since nevertheless we do obligate the מוב"מ to swear, this indicates that we consider this מוב"מ as an עזות פנים; for if he was not an עזות פנים then we would have to believe him since אא"מ, and -

אם כן יהא נאמן במגו דאי בעי כפר הכל -

If this is true that the מוב"מ is an עזות פנים then he should be believed (without a שבועה) for he has a מגו **that he could have been a כוה"כ**. The only reason that a מוב"מ is not believed with the מגו of כוה"כ is because אא"מ therefore he has no מגו since he could not be מעיז and be a כוה"כ. However now that we are saying that the מוב"מ is מעיז פנים (that it why we do not believe him), then he should have the מגו of כוה"כ and be פטור משבועה.¹⁴

ובכולי בעי וכו' רבה that continues with the answer of תוספות:

(שבועה דאורייתא מחייב), the shepherd is still obligated in a שבועת היסת (which is a שבועה דרבנן whenever there is a claim) and therefore the claimants should also be allowed to swear and collect. The גמרא answers that since שבועת היסת is a חכמים we do not make an additional תקנה (that שכנגדו נשבע ונוטל) on a תקנה חכמים. The גמרא however did not suggest that the דין should be מתוך שאיל"מ. This proves that by a שבועה דרבנן there is no law of וכו' (See תוספות there שכנגדו ד"ה why we do not say מתוך by the שבועה דאורייתא.) See 'Thinking it over' # 1.

¹³ However this is not that strong of a question, since it is possible that it is a גזירת הכתוב that a מוב"מ is חייב אמונה, despite the fact that אא"מ. Therefore תוספות continues that he has a מגו, etc. See following footnote # 14.

¹⁴ And if we do not accept the מגו of כוה"כ let us derive from here that we do not accept the concept of מגו. See previous footnote # 13; see מהר"ם שי"ף. [Alternately; it would seem that תוספות is asking that ממה נפשך תוספות is asking that ממה נפשך. If he is not an עזות פנים, then he should be believed with his טענה. If we do consider him an עזות פנים then he should be פטור משבועה on account of the מגו of כוה"כ. (See גב אות סוכ"ד ב"מ ג,ב אות מה.))]

וקאמר דאין זה עזות מה שכופר קצת -

And states that this partial denial on part of the מוב"מ is not considered עזות, therefore he is not believed (neither based on his own claim, and not [even] with a מגו of כוה"כ which requires עזות).

asks: תוספות

ואם תאמר כיון דלא חשיד אשבועתא למה גזלן פסול לשבועה -

And if you will say since that a person who is חשיד אממונא is not חשיד אשבועתא, then **why is a robber disqualified to take an oath**. What is the difference between a חשיד אממונא and a גזלן? They both are willing to take someone else's money illegally. Nevertheless we administer a שבועה to a חשיד אממונא because a שבועה is a more serious offence. Even someone who is willing to steal will not swear falsely. The same should apply to a גזלן. Even though he steals, nevertheless he will not swear falsely.

answers: תוספות

ותירץ הרב יהודה חסיד דדוקא כשהוא חשוד על אותו ממון שבא לישבע -

And the חסיד answered that only specifically when he is suspect on the money for which he is required to swear; only then –

אמרינן דלא חשיד אשבועתא דעל ידי השבועה יפרוש -

Do we say that (even though he is חשיד on this money nevertheless) **he is not חשיד אשבועתא**, for the obligation of taking an oath will cause that he separate himself from the act of stealing. He will not take the oath and swear falsely, but rather he will admit and return the monies owed –

אבל אותו ממון שכבר גזל לא יפרוש על ידי השבועה -

However that money which he already stole; he will not separate himself from that wrongdoing through the oath that he is now obligated to swear on a different issue. When a חשיד אממונא is given an oath for the monies we suspect he may be attempting to steal, the שבועה will prevent him from stealing, for since he is not חשיד אשבועתא he will return the monies owed and will cease to be a חשיד אממונא (and therefore he is not a חשיד אשבועתא). However by a confirmed גזלן, even if he refuses to take the oath he will still remain a גזלן. We cannot administer an oath to a confirmed גזלן.¹⁵

¹⁵ Some commentaries explain this as follows. A regular person is not willing to transgress for both stealing and to swear falsely; therefore when he is confronted with a שבועה he will refrain from swearing falsely since, if he swears falsely he will be transgressing ממון and שבועה. However a גזלן, who already stole, is certainly not willing to return that which he already stole. When he is confronted with a שבועה for this current case he will not desist from swearing falsely; he is not concerned about transgressing two עבירות, because in his mind he already transgressed on ממון by his first גזילה (which he will not return). The גזלן does not see himself doing a halfway תשובה; returning the new money but not the old money. Therefore he remains חשיד אשבועתא (see אות נט ב"מ ה,ב אות נט).

anticipates a question: תוספות

וגבי ההוא רעיא דחשיב ליה גזלן משום דאכל תרי מינייהו -

And concerning the case of 'that shepherd', where the גמרא considers the shepherd to be a גזלן since he ate two of the sheep that were allegedly given to him for safekeeping and therefore לשבועה -

אף על פי שצריך לפרוע הני תרי דאכל -

Even though that the shepherd is required to pay for these two sheep that he ate. Seemingly he is not a גזלן; he will pay for the two sheep that he ate (since there are witnesses that he ate them). Concerning the rest of the sheep that the owners claim they gave him for safekeeping, which he denies, the שבועה will cause him to admit. On those sheep he is merely a אמונא; not a גזלן and even on the two sheep that he ate he is also no גזלן for he is paying for them. Why then do we not administer an oath to this 'רעיא'?

answers: תוספות

מכל מקום לא יפרוש מן השאר משום שבועה -

Nevertheless he will not be פורש from denying owing the rest of the sheep on account of the oath that we will administer -

דמה שמשלם בעל כרחו אין זה השבה מעליא -

For the payment for the two sheep which he is paying against his will is not considered a proper return of a stolen item. The shepherd is still considered a גזלן even after he pays for the two sheep; since he is not paying of his own accord. If a גזלן admits to owing and repays he is no longer a גזלן and is permitted to swear. However the shepherd did not admit; it is the עדים who are forcing him to pay for the two sheep. The shepherd remains a גזלן and is לשבועה.

offers an additional explanation why a אמונא is כשר לשבועה and a גזלן is פסול לשבועה: תוספות

ויש מפרשים דגזלן כשר לשבועה מן התורה דלא חשיד אשבועתא -

And others explain that a גזלן is (also) כשר לשבועה מן התורה (just as a חשיד is not אשבועתא, so too a גזלן) -

אלא דמדרבנן פסלוהו כשהוא גזלן¹⁶ -

But rather the רבנן disqualified him from taking an oath when he is a גזלן.

has a question on this opinion that a גזלן is פסול לשבועה only: תוספות

ואם תאמר ומאי שנא דלעדות פסול כדכתיב¹⁷ אל תשת ידך עם רשע וגומר -

¹⁶ See who states that by a גזלן ודאי it is גנאי to administer him an oath. תוספות גיטין נא,ב ד"ה ובכולי

¹⁷ See. שמואל (משפטים) כג,א. סנהדרין כה,ב.

And if you will say; and why is there a difference, by a גזלן, between taking an oath and giving testimony? When it comes to עדות, a גזלן is פסול as it is written in the תורה 'do not place your hand (associate yourself) with a wicked person, etc. We derive from this פסוק that a גזלן (who is a רשע) is disqualified to testify -

ולשבועה כשר -

However concerning a שבועה (according to the מפרשים) a גזלן is כשר. Why is there a difference between a שבועה and העדאת עדות?¹⁸

answers: תוספות

ויש לומר דבשבועת שקר יש בה עונש גדול דכתיב¹⁹ בה לא ינקה -

And one can say that concerning a false oath there is a severe punishment, for concerning a שקר it is written in the תורה that ה' 'will not cleanse' the sin of one who swears falsely –

וכדאמר בשבועת הדיינין (שבועות דף לט,א) שכל העולם נזדעזע -

And as the גמרא states in פרק שבועת הדיינין that the entire world trembled – כשאמר הקדוש ברוך הוא (לא תשבעו) לא תשא -

When the Holy One blessed be He said (do not swear and) do not mention my name in vain. Therefore even a גזלן whom we do not permit to testify, out of concern that he may testify falsely, nevertheless concerning an oath, we are not concerned (מן התורה) that he will swear falsely since the punishment is a severe one.

הגדה עדות gives another reason why a שבועה is different than תוספות

ועוד דבעדות שקר ליכא אלא לא תענה²⁰ -

And furthermore concerning bearing false testimony there is only but one transgression, namely 'thou shalt not bear false witness', however -

ובשבועת שקר איכא לא תגזול²¹ ולא תשבע²² לשקר:

Concerning a false oath there are two transgressions; namely 'do not steal' and 'do not swear falsely in my name'. Therefore since there are two transgressions by שבועה, people are more concerned not to violate them and will not swear falsely. However by עדות שקר there is only one לאו, therefore the גזלן will not be that concerned and may testify falsely.

¹⁸ פסול גזלן לעדות is seemingly asking that we should derive the לשבועה from the פסול גזלן לעדות.

¹⁹ שמות (יתרו) כ,ז

²⁰ שמות (יתרו) כ,יג

²¹ ויקרא (קדושים) יט, יג

²² The בשמי לשקר (ויקרא [קדושים] יט,יב) in the margin corrects this to read יעב"ץ

SUMMARY

maintains that the 'ובכולי בעי דלודי ליה' is coming to explain why there is no concern of תוספות rejects this (and proves that) we do not say either by a דאורייתא or a שבועה שבועה דאורייתא. מגו דחשיד אממונא חשיד נמי אשבועתא. דרבנן maintains that רבה is explaining why the אא"מ does not allow us to believe the מוב"מ without a שבועה. There is a dispute in תוספות whether a גזלן is פסול לשבועה מה"ת or only מדרבנן.

THINKING IT OVER

1. derives from the case of רעיא that by a שבועה דרבנן we do not say שבועה דאורייתא. ²³ Seemingly, there even if it were a שבועה דאורייתא we merely say שבע נשבע and not מתוך (as תוספות explains in ²⁴מ"ב). What proof can we bring from רעיא that by a שבועה דרבנן we do not say מתוך?! שאיל"מ

2. From where do we derive that a גזלן is התורה מן לשבועה ²⁵?

²³ See footnote # 12.

²⁴ In fact תוספות (ה,ב ד"ה ותקנתא) states clearly that the option of מתוך does not exist; (seemingly) for the same reasons that they do not exist if it were a דאורייתא! See ח"ב אות ריח. See also ה,ב אות סוכ"ד ב"מ ה,ב אות ט.

²⁵ See footnote # 18. See משכנות הרועים אות קמה.