**אי אליבא דרבנן הא אמרי משיב אבידה הוי[[1]](#footnote-1) -**

**If** it is **according** to the view of **the רבנן, they claim that it is** comparable to **returning a lost** article

Overview

The גמרא asked that רבי יהושע should teach us the דין of הפה שאסר וכו' in a case where a לוה said to the son of the (deceased) מלוה, I owed your father a מנה, but I paid him back half; that the לוה is believed without taking the oath of a מודה במקצת.[[2]](#footnote-2) The גמרא counters that this cannot be; for if ר"י follows the opinion of the רבנן then the לוה would be considered a משיב אבידה,[[3]](#footnote-3) etc. It is not clear why this presents a difficulty.[[4]](#footnote-4) Seemingly this is what ר"י is teaching that if he has a פה שאסר he is believed.[[5]](#footnote-5)

-------------------

תוספות explains why it is considered as a משיב אבידה[[6]](#footnote-6), and what is therefore the difficulty:

**כדמסיק[[7]](#footnote-7) דבבנו מעיז ומעיז -**

**As** the גמרא **concludes that** concerning the **son** of the מלוה, the לוה **can indeed be brazen** and deny any loans that he actually owed the father.[[8]](#footnote-8)

**ואם כן לא מצי למיתני ואם יש עדים אינו נאמן -**

**And since that is true;** that בבנו he is מעיז ומעיז, then **the משנה could not have stated that if there were witnesses** to the (entire) loan, then the לוה **is not believed** to claim that he paid half –

**דלעולם נאמן במגו דאי בעי אמר פרעתי הכל דבבנו מעיז ומעיז -**

**For in fact** the לוה **will always be believed** to claim I paid your father half **since** he has **a מגו, for if** the לוה **wanted** he could have **said I paid** your father **everything, since** a לוה is **indeed מעיז** against **the son** of the מלוה; therefore it is a proper מגו. ר"י could not have taught his דין of הפה שאסר in the case of והאכלתיו פרס for the לוה would be believed without a שבועה even if there were עדים that he owed him the entire sum.

Summary

If ר"י would agree to the חכמים, there would be a difficulty with the סיפא where he is אינו נאמן (but not with the נאמןof the רישא).

Thinking it over

תוספות explains that the question 'משיב אבידה הוי', is on the סיפא of ואם יש עדים אינו נאמן. Seemingly the סיפא is not understood in any event. What effect can עדי הלואה have on a מלוה ע"פ; as the גמרא previously stated, since המלוה את חבירו בעדים א"צ לפרעו בעדים?!

1. When one returns a lost article; a wallet for instance, where the loser claims that there was money in the wallet, and the finder denies it, the law is that the finder is exempt from the usual oath of a מודה במקצת (the finder is a מודה במקצת he admits to finding the wallet but denies that there was any money there). The reason he is exempt from שבועת מודה במקצת is because of a תקנת חכמים; otherwise people would be hesitant to return אבידות out of concern that this may obligate them to take a שבועה דאורייתא. [↑](#footnote-ref-1)
2. A לוה who admits partially to a claim of a מלוה is obligated to swear a שבועת מודה במקצת that he does not owe the rest of the debt which the מלוה claims. [↑](#footnote-ref-2)
3. See following תוספות ד"ה ורבי אליעזר, where it seems that this term משיב אבידה (in the case of והאכלתיו פרס) refers to a מגו; that he could have been a כופר הכל and claimed that he paid everything. See following footnote # 5. [↑](#footnote-ref-3)
4. According to רש"י (ד"ה אליבא) who maintains that the ruling of ר"י is in a case of אין הלה תובעו, the question is directed to the רישא (that he would be believed even in a case of הלה תובעו), however according to תוספות that ר"י is also discussing a case of הלה תובעו, the sגמרא' question is not readily understood. [↑](#footnote-ref-4)
5. The terms הפה שאסר and משיב אבידה are identical in this instance of והאכלתיו פרס. See previous footnote # 3. [↑](#footnote-ref-5)
6. Every מודה במקצת (seemingly) has a מגו of כופר הכל and nevertheless is required to swear (as רבה will shortly explain in the גמרא). Why is this מודה במקצת of והאכלתי פרס any different?! [↑](#footnote-ref-6)
7. יח,ב. [↑](#footnote-ref-7)
8. This is why by והאכלתיו פרס the לוה is considered a משיב אבידה and is פטור from a שבועה since he has the מגו of being a כופר הכל. The rule of אין אדם מעיז פניו כו' does not apply here. However this itself is no contradiction to ר"י; on the contrary this conforms to the ruling of ר"י. The difficulty stems from the purported 'סיפא', as תוספות concludes. [↑](#footnote-ref-8)