**מפני מה אמרה תורה מודה מקצת 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’?!

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**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 מצות. 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]](#footnote-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 מפני מה אמרה תורה. Whatever the reason may (or may not be) the rule will always be that a מודה במקצת is מחוייב a 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 -**

**How[[2]](#footnote-2) can the תורה rule, etc.** that an oath is required by a מודה במקצת; **why is** the לוה **not believed** (even) **without an oath,** since he has **a מגו that he could have denied everything.** If the לוה 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 כופר הכל? He should not be obligated to swear.

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

**או נילף מהכא דלא אמרינן מגו[[3]](#footnote-3) -**

**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 מב"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 מב"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 מב"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.

תוספות 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 היסת[[4]](#footnote-4) משום דחזקה אין אדם תובע אלא אם כן יש לו -**

**is required to swear a היסת 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 לוה 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 פניו בפני בעל חובו -**

**And** the גמרא **challenges** this assumption (that the לוה 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 לוה will not have the העזה to deny it. The fact that the לוה denies this claim indicates that indeed the לוה owes no money.

**ומשני דאשתמוטי קא משתמיט[[5]](#footnote-5) אלמא בכופר בכל נמי אדם מעיז לכפור -**

**And** the גמרא **answers** this challenge; that indeed a person is not מעיז פניו בפני בעל חובו, however here, the לוה intends to ultimately repay the מלוה, 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 מודה במקצת is משתמיט, then why does the מודה במקצת not have the מגו that he could have been כופר בכל?! It seems that the גמרא in שבועות contradicts the explanation of רבה!

תוספות answers:

**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 כך[[6]](#footnote-6) -**

**For he is more willing to be a מודה במקצת** than a כופר הכל, **for he cannot be so brazen.** It is easier (if one owes money) to be a מודה במקצת than a כופר הכל. Therefore the מודה במקצת 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 היסת was instituted.]

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

**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 מודה במקצת is not believed with a מגו of כופר הכל. According to this proposed 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.

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 לוה **can be מעיז, even if he is a כופר הכל**, the לוה should be **obligated** to swear. The reason (according to this interpretation) that a כופר הכל is פטור משבועה is on account of the חזקה אא"מ; where this חזקה does not apply (in a case where it is possible for the לוה 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[[7]](#footnote-7) מודה מקצת הטענה -**

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

**משום דמשיב אבידה הוא מגו דאי בעי כפר הכל[[8]](#footnote-8) -**

**Because** the לוה is considered **a משיב אבידה** since he has the **מגו that he could have been כופר הכל.** 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 מחוייב שבועה where he could be מעיז; how can the רבנן maintain that a מודה במקצת against 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 מודה במקצת 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?![[9]](#footnote-9)

תוספות anticipates a possible solution, but rejects it:

**וליכא למימר מדאיצטרך קרא לחייב שבועה בעד אחד[[10]](#footnote-10) 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,** this implies that this 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 כופר הכל is required to swear (even) without the ע"א. This seemingly answers תוספות 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 מחוייב 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 שמעידים[[11]](#footnote-11) 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.[[12]](#footnote-12) A כופר הכל can be obligated to swear (according to this הוה 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 פסוק of ע"א may be coming to teach us. In conclusion there is no proof from חיוב שבועה דע"א that a כופר הכל is פטור משובעה. 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 שבועת מודה במקצת)[[13]](#footnote-13) **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 מודה 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 -**

**ועל ידי כך מגלגל עליו שבועה כעין גלגול[[14]](#footnote-14) -**

**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 רבה מפני מה וכו' is, why is a מוב"מ not פטור from a שבועה, since he has a מגו of כופר הכל. The question cannot be why is a כופר הכל פטור from a שבועה; for then the answer would be since א"א מעיז פניו וכו'. However this is contradicted by the רבנן who maintain that a כופר הכל is פטור even when he is מעיז. A כופר הכל is פטור from a שבועה either because כי הוא זה is a גזירת הכתוב 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. תוספות asks from where we know that a כופר הכל is פטור משבועה.[[15]](#footnote-15) Seemingly it 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 infer[[16]](#footnote-16) 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?

1. The ‘classic’ case is (in ב"מ קטו,א) concerning the rule of לא תחבול בגד אלמנה (דברים [תצא] כד, יז); 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 דריש טעמא דקרא. The reason one should not be תחבול 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. [↑](#footnote-ref-1)
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. [↑](#footnote-ref-2)
3. See מהר"ם שי"ף. [↑](#footnote-ref-3)
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 לוה to admit); or ‘an equitable oath’ (it is equitable for the מלוה to collect since א"א תובע אא"כ יש לו). [↑](#footnote-ref-4)
5. It would seem that in a case where there can be no אשתמוטי then there would be no חיוב שבועת היסת; for א"א מעיז פניו בפני בע"ח. (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 בעין. The שומר should be believed on account of א"א מעיז פניו בפני בע"ח [see following תוספות ד"ה חזקה]). [↑](#footnote-ref-5)
6. The fact is this מוב"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). [↑](#footnote-ref-6)
7. The word 'אף' here means that not only is the פטור of שבועה by a כה"כ applicable (even) when he can be מעיז; it is applicable even to the extent that it can be used as a מיגו to exempt a מודה במקצת from swearing. [↑](#footnote-ref-7)
8. See ‘Thinking it over’ # 2. [↑](#footnote-ref-8)
9. 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. [↑](#footnote-ref-9)
10. The תורה states (דברים [שופטים] יט,טו) that לא יקום עד אחד באיש לכל עון ולכל חטאת; we interpret it to mean that לכל עון ולכל חטאת לא קם אבל לשבועה קם. [↑](#footnote-ref-10)
11. The רש"ש amends this to שמעיד (instead of שמעידים).. [↑](#footnote-ref-11)
12. See תוספות יב,ב ד"ה רב הונא where תוספות there also maintains that an ע"א can be מחייב a שבועה בטענת שמא (however, there the תובע and the נתבע were both שמא). [↑](#footnote-ref-12)
13. The פסוק in שמות (משפטים) כב,ח 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. [↑](#footnote-ref-13)
14. 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. [↑](#footnote-ref-14)
15. See footnote # 9. See ח"ב מ"ת אות רכג. [↑](#footnote-ref-15)
16. See footnote # 8. [↑](#footnote-ref-16)