YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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Sponsored by Aaron and Tzipora Ross and family
in honor of the *yahrtzeits* of our esteemed grandparents:
Neil Fredman (Shmuel Nachamu ben Shlomo Moshe HaKohen, 10 Tevet),
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**Shiur #10: The *Shevua* for Those Who “Hurry” Their Confessions (*Ma’arim*)**

An interesting *gemara* in *Massekhet Shavuot* describes a litigation that, although resembling *modeh be-miktzat*, does not yield a *shevu’a.* Typical *modeh be-miktzat* entails a partially confessed-to claim. The confessed part is paid, whereas the denied part must be defended with an oath. The *mishna* (38b) discusses a situation in which the *tovei’a* demands a monetary value and specifies that he is owed wheat. The *nitva* responds that he owes part of the monetary value, but he owes barley. Since the original claim was for wheat and the partial confession is for barley, this is not considered a case of *modeh be-miktzat*; the confession is not in response to the claim. It is as if two different litigations have unfolded – a claim for wheat was flatly denied, while an independent confession of barley was offered. The *mishna* cites Rabban Gamliel, who obligates an oath in this case, but the generally held opinion of the *Chakhamim* is to exempt an oath.

The *gemara* issues an interesting caveat: if the defendant appears to be misleading or deceptive (*ke-ma’arim*), he is still obligated to pay. For example, if the defendant hurries to make his confession about barley before the *tovei’a* has an opportunity to claim that **as well**, the defendant is obligated to take a *shevu’a*. This is an odd *halakha*, as the structure of *modeh be-miktzat* does not exist at all.

The Ramban comments that a hurried confession of barley **implies** an intended claim of barley. The primary reason that the *nitva* hurried his confession was to preempt the *tovei’a* and thereby avoid a *shevu’a*. In effect, the *tovei’a* claimed BOTH wheat and barley and the *nitva* confessed to part (barley) of the claim, thereby establishing a classic case of *modeh be-miktzat*. Even though the claim for barley was never actually voiced by the *tovei’a*, the accelerated response of the *nitva* renders the original claim as inclusive of barley.

A different approach would suggest that by hurrying his claim, the *nitva* raises **suspicion** and generates a *chiyuv of shevu’a*. The entire **basis** of the oath in cases of *modeh* *be-miktzat* is the suspicion that a partially confessed-to claim generates. Absolute rejection -or *kofer bakot* of a claim typically raises no undue suspicion, and the *nitva* is therefore acquitted without a *shevu’a* obligation. Partial confession, in contrast, arouses suspicion about the denied part of the claim, mandating a *shevu’a* about this denial. Even if the classic *modeh be-miktzat* structure does not emerge, a *shevu’a* can be mandated if the response of the *nitva* similarly raises suspicion. By hurrying his defense before the *tovei’a* could complete his claim, the *nitva* raises suspicion, thereby **mimicking** the situation of *modeh be-miktzat* even though the classic structure of *modeh be-miktzat* does not exist. The *modeh be-miktzat* structure creates suspicion and obligates a *shevu’a*; if suspicion exists independent of *modeh* *be-miktzat*, an oath can be obligated.

One interesting *nafka mina* would surround the scope of this “imposed *shevu’a*” upon the defendant who hurries his oath. The Rif claims that the **honesty** of the defendant must be gauged in determining if a *shevu’a* is necessary. If we sense an honest reply, the defendant is excused from a *shevu’a*, even if he preempts the *tovei’a*. Essentially, in an instance without a classic *modeh be-miktzat* setup, the necessity of a *shevu’a* will be entirely dependent upon the level of suspicion that the defendant generates. This may reflect the fact that the *shevu’a* is a byproduct of suspicious counterclaims. When suspicion exists even without the *modeh* *be-miktzat* structure, an oath is mandated. If, however, the defendant seems honest no oath is imposed.

By contrast, the Ritva asserts that **any** interjected defensive claim will yield a *shevu’a*, presumably even if the interjection does not appear to be suspicious. Perhaps the Ritva agrees with the Ramban that the basis of this oath is not merely suspicious litigation, but an actual *modeh be-miktzat* structure. Since the *nitva* interjected, we assume that he anticipated being charged for the barley as well, and the original claim is therefore considered to have included both barley and wheat. Since the *nitva* confessed to the barley and denied the wheat, a classic *modeh be-miktzat* case emerges. The determining factor is therefore not our assessment of the *nitva’s* honesty as much as the **timing**of his response. An interjected confession of barley **suggests** an intended claim of barley, rendering a classic *modeh be-miktzat* structure. **Any** interjection would render a situation of a claim for barley, even if the interjection were natural and “honest.”

What about a situation in which absolutely no classic *modeh be-miktzat* can be structured by the *nitva*’s hasty response, but suspicions are aroused? Would Halakha mandate a *shevu’a* simply because hasty responses appear suspicious? The Tur cites a scenario in which the *nitva* offers a partial barley confession ($50.-) BEFORE the *tovei’a* even began his litigation, and subsequently the *tovei’a* demanded ($100.-) wheat. Since the *modeh be-miktzat* structure has not evolved, no *shevu’a* is obligated. The Sema claims that even if the partial barley confession of the *nitva* is hurried, no *shevu’a* evolves, presumably because this scenario exhibits no *modeh be-miktzat* structure. The *mishna*’s case concerned a *tovei’a* who BEGAN his wheat claim and was preempted by a partial barley confession, and the Ramban instructs us to envision the case as if barley were demanded as well. In the Tur’s case, however, the *tovei’a* has not even commenced a claim, and it is less possible to imagine “as if” the *tovei’a* has rendered a barley claim as well.

By contrast, the Shach claims that even in this instance, a hurried confession would yield a *shevu’a*. Perhaps he viewed the *shevu’a* of a hurried confession as **purely** based on suspicious behavior. Even if the litigation bears little resemblance to *modeh be-miktzat*, a *shevu’a* is obligated.

A second instance in which the structure of *modeh be-miktzat* does not exist but hurried confessions may trigger a *shevu’a* is the situation of *helakh*. As discussed in a [previous *shiur*](http://etzion.org.il/en/exemption-helakh), a confession followed by IMMEDIATE payment wrecks the *modeh be-miktzat* setup and no *shevu’a* is yielded. Since immediate payment is rendered, the litigation is split into two separate proceedings. It is as if the *tovei’a* claimed $50.-, which was completely confessed to, and a separate litigation of $50.- was completely rejected. The *Sefer Ha-Terumot* (7:2:6) claims that if *beit din* detects that the defendant is choreographing *helakh* to circumvent a *shevu’a*, he is obligated to swear. The Bach disputes this point, claiming that *helakh* completely deconstructs *modeh be-miktzat* and no *shev’ua* can be mandated. Perhaps the *Terumot* (and the Tur and Shulchan Arukh, who cite his opinion) maintains that ANY suspicious response generates an oath. *Modeh be-mikzat* is merely the Torah’s device for establishing the paradigm of suspicious defensive claims.

Of course, the larger issue implied by this discussion is the nature of the *modeh be-miktzat* obligation. If indeed the obligation stems from suspicious claims, it is possible to impose the *shevu’a* even without the classic *modeh be-miktzat* structure. If, however, the *modeh be-miktzat shevu’a* is based on the formal confession partially reinforcing the legal strength of the *tovei’a*‘*s* demand, it would be less likely to impose a *shevu’a* without this classic structure. Instead, the presence of a *shevu’a* for *ma’arim* (hurried confessions) would be attributed to the Ramban’s reasoning: a hurried defense creates a virtual *modeh be-miktzat* structure. Even though the *tovei’a* never actually requested barley, the hurried confession suggests that this claim was also intended, and legally we consider it as though wheat and barley were demanded. Since barley was partially confessed to, a classic *modeh be-miktzat* case emerges.