YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

**Shiur #09:**

**The Nature of the *Shevua* Accompanying *Yachaloku***

The first *mishna* in *Bava Metzia* describes the division of a contested garment jointly clutched by two disputants. Is this a court-imposed division as a compromise? Unable to determine ownership, the *beit* *din* orchestrates a settlement? Or, perhaps this division is a derivative of the classic resolution known as *ha-motzi mei-chaveiro alav ha-ra’aya*, which typically reinforces the position of the lone possessor against the claims of the prosecutor. When **two**peopleclutch the garment, they are **each** considered in legal possession of half, and each is awarded half based on the principle of *ha-motzi mei-chaveiro alav ha-ra’aya*. The division of the garment is not a procedural compromise, but rather an application of a fundamental principle awarding the possessor; in this instance, each possessor receives the part that he is in possession of.

This question greatly impacts the nature of the *shevua* that each party must take to facilitate the division. If this is a court-administered division, it is reasonable to expect the two parties to swear to support their claims/holds on the disputed garment. If, however, they receive their portions based on the application of the principle of *ha-motzi mei-chaveiro alav ha-ra’aya*, no oath should be necessary. When a defendant triumphs based on his *chezkat mammon* (a different term for *ha-motzi mei-chaveiro alav ha-ra’aya*), no oath is necessary.

The *gemara* (*Bava Metzia* 2b) appears to pose this question: Why should the parties swear if the *yachaloku* division is merely an application of *chezkat mammon*? The *gemara*’s answer is unclear: Is this division a procedural compromise, and not a derivative of *ha-motzi mei-chaveiro*, so that the *shevua* is justifiable? Or can a *shevua* be levied even if the *yachaloku* is merely a double application of the principle of *ha-motzi mei-chaveiro*?

It appears that R. Yochanan wrestled with this question, as the *gemara* twice cites his rationale for the *shevua* (3a and 5b). According to R. Yochanan, the *shevua* is only necessary for broader social concerns. If disputed items were immediately divided among disputants, unsavory people would grab onto already owned items and lodge untrue claims, hoping to receive a share. By requiring an oath prior to division, we are discouraging aggressive and exploitative behavior. Evidently, the oath is not necessary to strengthen the respective positions and claims of the current disputants to enable a *beit* *din* administered *yachaloku*. In theory, the actualdivision can be processed based on *chezkat mammon* without any oath. The oath stems from extrinsic social concerns: They take an oath in the current litigation to discourage future aggression. Evidently, R. Yochanan did not discern inherent function for the oath.

Other *gemarot*, however, speak in very different terminology, suggesting that not everyone agrees with the aforementioned logic. Even R. Yochanan may only be presenting only the immediate **motive**for instituting the *shevua*. Were it not for broader social concerns, *Chazal* would not have interfered and added arbitrary oaths. Once a social agenda existed, however, *Chazal* felt comfortable mandating an oath that reinforces their claims and respective possessions and allows a *beit* *din* imposed compromise known as *yachaloku*.

This question can dramatically influence the scope of the *shevua*. The original *mishna*’s scenario concerns a garment that was disputed and jointly held **on the edges***.* In this instance, each party receives 50% after taking an oath. The *gemara* (7a) asserts that if the two disputants are actually holding on to the garment proper, they receive the percentage that they are clutching (which may not be equal), while the remaining part, which is disputed but not clutched, is divided equally. The Rambam (*To’en ve-nit’an* (9:7)) claims that the percentage that is actually physically grasped is divided without an oath, while the middle part” of the garment can only be divided equally in the wake of a *shevua*. The Rambam’s position is clear: The part of the garment that is actually grasped is divided based on applying *chezkat mammon*, and **that** division does not require an oath. By contrast, the disputed part, which is not physically grasped, is divided based on a court-administered compromised, and this requires an oath. The original Mishna described a scenario in which no part of the disputed garment was actually clutched and the **entire** division is a court-sanctioned compromise; a *shevua* is therefore required upon the entire garment.

Tosafot (7a) s.v. *Machavi* disagrees, requiring an oath on the entire garment, even the sections that are physically grasped by the two parties. It appears that Tosafot view the oath as purely extrinsic. Thus, even when allocating percentages of the garment based upon *chezkat mammon* (for the portions actually physically held), a *shevua* is necessary. To summarize the nature of the *shevua* preceding *yachaloku* will affect its scope. If the *shevua* is merely extrinsic to protect against future aggression, it would be broadly applied to any *yachaloku* and to any part of the garment being divided. If, however, the *shevua* reinforces claims and possessions in advance of a court imposed *yachaloku*, it may not be applied when *yachaloku* emerges from an application of *ha-motzi mei-chaveiro* *alav ha-ra’aya*.

This question would also influence the scope of an interesting exemption presented by the *gemara*. The *mishna* (2a) describes disputes about purchased items, with each disputant claiming that he is the rightful purchaser. The *gemara* proposes asking the seller who the rightful purchaser is. Why should each party take an oath if the seller can clarify the situation? Based on this interjection, Rabbenu Tam inferred that a lone *eid* – though not potent enough to sway the actual monetary verdict – would be sufficient to absolve litigants from taking oaths. Thus, the *gemara* sought the testimony of a single witness to acquit one of the parties from their oath.

From this interjection (which is only rejected technically), the Maharam Mi-Rotenberg inferred that an *eid echad* or lone *eid* can acquit **any** *shevua* based on the principle of *eid mesayei’a* (see *shiur* link for an amplification of this concept [<http://etzion.org.il/en/eid-mesayeia>]). Arguing against this extrapolation, the Ramban in the *Milchamot Hashem* claims that a lone *eid* cannot excuse litigants from *shevuot* in general, but he **can** exempt from the *shevua* of the *mishna*, since it functions only to prevent suspicious behavior.

The Ramban and the Maharam are essentially disputing the nature of the *mishna’s shevua*. Is this *shevua* an essential component of the litigation leading to *yachaloku*, or is it merely a “tack-on” oath to prevent future hostilities? The Maharam viewed it as an essential *shevua*. Thus, if one *eid* can acquit this *shevua*, he can similarly acquit any *shevua*. By contrast, the Ramban viewed this oath as merely extrinsic and hence weaker than typical litigation-related *shevuot* (*shevu’ot to’an ve-nit’an*). Thus, the possibility of exonerating this *shevua* through the testimony of a lone witness cannot be extrapolated to the broad exoneration of **actual** litigational oaths through the testimony of a lone witness. The clause of *eid mesayei’a* limited to this very unique oath of the *mishna*.

Additionally, the nature of the *shevua* preceding *yachaloku* may dictate its **syntax**. If the *shevua* is not intended to reinforce the distribution of the disputed items, the language of the oath does not necessarily have to reflect the **actual** portions that they **receive**. Based on a range of broader factors, the syntax of the *shevua* may not actually correspond to their respective “takes” of the disputed garment. However, if the oath is inherent and intended to strengthen their respective awards, the language may have to reflect the quantities that are awarded.

The *gemara* (5b) investigates the syntax of the oath and initially suggests that they each swear to **fully** owning the garment. This is the boldest possible oath and would clearly serve as a deterrent to unilateral and dishonest aggression. The *gemara* responds, however, that they cannot swear to full ownership, since they only receive an award of half the garment. Taken literally, the *gemara* demands a correspondence between the amount awarded and the actual text of the oath. This would suggest that the oath is not merely an extrinsic tack-on to prevent future aggression. Instead, it is meant to strengthen the halakhic hold upon the respective possessions of half the garment, so as to enable a court- imposed division. As such, the oath must reflect that award, and the option of swearing to full ownership is unacceptable.

Interestingly, Rashi offers a technical reason for disqualifying an oath to 100% ownership – it may lead to scoffing at *beit* *din*. Spectators will hear two oaths attesting to full ownership, followed by a court monitored allocation of only 50% to each party. As this would lead to the ridiculing of *beit* *din*, the option is rejected. Rashi was not troubled by an inherent discrepancy between the language of the oath and the actual award; the only reason that the *gemara* rejects this is the protection of the integrity of *beit* *din*. Perhaps Rashi implies that the purpose of the oath is merely extrinsic and, in the absence of external technical concerns, the language of the oath does not necessarily have to match the awards.

It appears that this very question was disputed by R. Chiya and R. Oshia in the gemara *Bava Metzia* (4a). Typically, a person who partially admits to a monetary claim must pay the confessed quantity (*hoda’a*) and swear about the denied quantity (*kefira*). This situation is known as *modeh be-mikzat ha-ta’ana* and entails one of three cases of a *shevua d’oraita*. Would the *shevua* entail if the defendant confessed to part of the claim and immediately rendered payment? This scenario is referred to as *heilech* and comprises a *machloket* between these two *Amoraim*.

R. Sheshet claims that *heilech* would hamper the classic *modeh be-mikzat* structure and no *shevua* would entail (see link for an elaboration upon the logic of this exemption [<http://etzion.org.il/en/exemption-helakh>]). R. Chiya argues with this conclusion, citing our *mishna* as an example of *heilech* in which an oath is still required: In the original *mishna* each disputant demands the entire garment and – as he is actually in possession of part of the garment – each receives half of his claim in an immediate fashion. Nevertheless, the *mishna* levies a *shevua*. Evidently, then, immediate payment in the case of a partially-confessed claim does not suspend a *shevua*.

R. Sheshet retorts that the *shevua* in the *mishna* cannot serve as a model for general *shevuot*. Just because a situation of *heilech* does not hamper the *shevua* in the *mishna* does not mean that it won’t hamper a classic *shevua* of *modeh be-miktzat*. Evidently, R. Sheshet maintains that the *mishna*’s *shevua* is completely extrinsic and is therefore not vulnerable to the effects of *heilech* in the manner that a classic *shevua* would be.

R. Chiya disagrees. The *shevua* of the *mishna* – though Rabbinic in origin – is modeled after a classic litigation-related *shevua*. The fact that it is not effected by *heilech* indicates that in general *heilech* has no impact upon all *shevuot*. If *heilech* were to affect general *shevuot*, it would have also hampered the *shevua* of the *mishna*, which is modeled upon classic *shevuot*.

R. Chiya and R. Sheshet thus debate whether the *mishna*’s *shevua* is purely extrinsic or acts as a litigation *shevua* to reinforce the respective awards. The sustainability of this *shevua* even under conditions of *heilech* may prove the general imperviousness of *shevua* to the effects of *heilech* assuming that the *mishna*’s *shevua* is indeed litigation-related.