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ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

**Shiur #11: *Shenayim Ochazin Be-Tallit*: Splitting a Disputed *Tallit***

A well-known dispute between the *Chakhamim* and Sumchus surrounds the classic scenario of a litigation without ANY form of evidence. A *tovei’a* claims money which the *nitva* flatly denies, and there is no evidence supporting either party. The generally held opinion of the *Chakhamim* asserts that the defendant retains possession based on the principle of “*ha-motzi mei-chaveiro alav ha-re’aya*.” Sumchus disagreed and claimed that disputed monies are divided equally between the two litigants - “*yachaloku*.” Although several *gemarot* qualify this *yachaloku* solution, it is generally viewed as a COMPROMISE verdict. Since no evidence was garnered, the two parties split the monies as a settlement.

As stated above, we generally rule like the *Chakhamim*. This ruling makes the first *mishna* in *Bava Metzia* a bit surprising. The *mishna* describes the well-known scenario in which two people are jointly clutching a disputed article of clothing, and the *mishna* rules that the two parties split the clothing - *yachaloku*. At first glance, this ruling seems at odds with the general *pesak* of *ha*-*motzi* *mei-chaveiro alav ha-re’aya*.

The simple solution is to assert that since BOTH people are clutching the garment, NO ONE is viewed as the halakhic *muchzak*; *ha-motzi mei-chaveiro alav ha-re’aya* is not applicable. In the absence of this option, even the *Chakhamim* default to the *yachaloku* compromise that Sumchus applied more universally.

A different approach is to assume that the *yachaloku* of the contested garment is, in fact, a DERIVATION of *ha-motzi mei-chaveiro alav ha-re’aya*. Since they are EACH holding on to the *tallit*, they are each considered in halakhic possession of half the *tallit*. The principle of *ha-motzi mei-chaveiro alav ha-re’aya* awards default ownership to the possessor - the *muchzak*; since each is considered in possession of half the *tallit*, they each merit half the *tallit* based on the principle of *ha-motzi* *mei-chaveiro*. The *yachaloku* of the *mishna* is thus not similar to Sumchus’s compromise option. Rather, it is an independent *pesak* based upon viewing the two parties as in halakhic possession of exactly half the garment.

The larger question upon which this question rests is how Halakha views a “double hold.” Do we consider these two litigants as equally possessing half the garment, in which case *yachaloku* is indeed a *ha-motzi* *mei-chaveiro* derivative? Or do we consider their jointly contested hold as if NO ONE is in possession of the garment, in which case the *yachaloku* must be viewed as parallel to Sumchus’s compromise *yachaloku*? This question strikes at the very heart of how Halakha defines possession. The question of whether joint possession yields mutual half possession or NO possession is a reflection of how to fundamentally define possession.

An interesting consequence of this question about the nature of *yachaloku* relates to the parameters in when *yachaloku* is applied. A different *gemara* in *Bava Batra* (34b-35a) also discusses a situation in which there is no clear-cut *muchzak*, but it reaches a different solution. The case involves a contested boat. *beit* *din* effectively withdraws and allows the two litigants to wrestle it out without official judicial intervention – “*kol de-alim gavar*.” Why isn’t that solution applied to the contested *tallit* in *Bava Metzia*?

If the *tallit* is considered halakhically possessed by each litigant and the *yachaloku* is a derivative of *ha-motzi mei-chaveiro*, the solution is obvious. The splitting of the *tallit* is based on viewing each litigant as a partial possessor and applying *ha-motzi meichaveiro* to both halves. In contrast, since a boat floats on the open water, it is not “possessed” by either party, and *yachaloku* – which is a product of joint halakhic possession – is thus unsuitable. This seems to be the approach of Tosafot (*Bava Metzia* 2a), as well as that of the Ramban.

By contrast, others (see Tosafot, *Bava Batra* 34b, citing the Riva) assert a completely different factor that determines the application of *kol de-alim gavar* as opposed to *yachaloku*. *Yachaloku* can only be administered if *beit din* is not directly assisting a fraud. The contested *tallit* MAY be owned jointly, as the parties may have simultaneously discovered and seized the *tallit*. Since it is POSSIBLE that neither is lying, *beit din* can resolve the situation by directly facilitating a compromise of *yachaloku*. Regarding the disputed boat, however, one of the parties is clearly lying, and *beit din* refuses to enable this fraud by participating in *yachaloku*. They withdraw and allow the two litigants to spar over the boat – *kol de-alim gavar*. According to this view, POSSESSION was never the determining factor compelling *yachaloku*.

In fact, many *Rishonim* (Rashi and the Rambam) apply *yachaloku* EVEN in situations in which NEITHER party is in possession, as long as they may not be lying (*leka vadai ramai*). Evidently, these *Rishonim* view *yachaloku* as a JUDICIAL COMPROMISE, rather than a product of viewing each party as being in halakhic possession of the *tallit*.

Another interesting consequence of the question regarding the nature of *yachaloku* relates to the “post *yachaloku*” state of the item. What would happen if one of the disputants unilaterally seizes the *tallit* (*tefisa*)? Typically, unilateral seizures of disputed items do not succeed once the defendant has been awarded possession through the principle of *ha-motzi mei-chaveiro alav ha-re’aya*. Thus, if the two combatants over the *tallit* are considered to be in halakhic possession of half the *tallit* and the *yachaloku* ruling merely reflects this condition, neither can seize the entire *tallit*. If, however, neither is considered a *muchzak* – neither is in possession of half the *tallit* – perhaps subsequent “adjustments” through unilateral seizure would be effective. The Ramban (*Bava Metzia* 6a) claims that *tefisa* would NOT be effective, whereas the Ran claims that the *gemara* itself probes this question (and leaves it unanswered).

Furthermore, this question as to whether they are each in possession of half or if neither is considered in possession of any part of the *tallit* would dictate further “litigational management” of this scenario. The second part of the *mishna* describes a situation in which one party claims the ENTIRE *tallit* and one claims HALF the *tallit*. The *mishna* awards 75% to the party who claimed the entire *tallit* and 25% to the party who claimed only half the *tallit*. Tosafot (*Bava Metzia* 2a) wonder why the person who claimed 50% only receives 25%. If he had claimed the entire *tallit*, he would have secured 50%; the principle of *migu* dictates that he should therefore be believed when he actually claims 50%.

Many *Rishonim* view this *migu* as flawed and reject it for a range of different reasons. However, Tosafot cite the Rivam, who disqualifies this as a *migu le-hotzi* – a *migu* employed to extract money (which, according to the Riva, cannot be implemented). Presumably, the Riva did not view each party as in complete possession of half of the *tallit*. If they were each in possession, neither party would be attempting to extract money; each would be reinforcing his hold upon half of the *tallit*, and *migu* would thus be a suitable application. Evidently, each party is considered “in halakhic possession” of the ENTIRE *tallit*, and *beit din* imposes a compromise to distribute half the *tallit* to each party. The process of securing half for each party is an extraction (*le-hotzi*), for which *migu* is unsuited.

There may be certain situations of *yachaloku* that are treated differently from the *mishna*’s classic 50/50 *yachaloku*. The *gemara* (*Bava Metzia* 7a) claims that the *mishna* was referring to a unique situation in which the two parties were clutching the edges of the *tallit*. If they are grasping the actual *tallit*, the division is not applied proportionately, but rather based upon the comparative clutches. For example, if one party is clutching 70% of the garment, he receives that amount, while the other party receives 30%. In theory, each party may receive the segment he is grasping, while the middle “untouched” portion of the garment is split evenly. Perhaps a *tallit* that is clutched at the edges and which is split equally is not considered “uniquely in the halakhic possession” of each party, and that division is a court-imposed compromise. However, in a situation in which a *tallit* is ACTUALLY grasped, unique halakhic “possession” is recognized, at least over the part of the *tallit* that is actually clutched. The distribution of those segments of the *tallit* is not a product of a court-imposed compromise. Rather, each party is considered in exclusive possession of the parts that he is clutching and is awarded that segment of the *tallit*.