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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

**Shiur #12: The S*hevu’a* that Accompanies *Yachaloku* Distribution**

A previous *shiur* discussed different strategies for understanding the verdict of *yachaloku* in which a disputed item that is jointly held by the two litigants is divided. The first *mishna* in *Bava Metzia* presents this famous case and issues the verdict of *yachaloku* accompanied by a *shevu’a*. According to one approach, neither party is recognized as a *muchzak*; the verdict of *yachaloku* is a court-administered compromise. Alternatively, each party is considered in possession as the *muchzak* of half the disputed item, and the verdict is merely an application of the principle of *ha-motzi mei-chaveiro* to each party.

An interesting offshoot of this question is the nature of the *shevu’a* in this case. Typically, *ha-motzi mei-chaveiro* verdicts do not require an accompanying *shevu’a*. The defendant retains possession and he is not required to take an oath. If partial *yachaloku* reflects a dual allocation based on the fact that each party is considered a *muchzak*, the *shevu’a* would seem unnecessary. This, in fact, appears to be the *gemara*’s logic when it twice (3a, 5b) questions the need for *shevu’a*. In each instance, the *gemara* invokes the view of R. Yochanan, who attributes this tacked-on *shevu’a* to a completely unrelated function. The *shevu’a* does not service the currentdispute; the *tallit* can, in fact, be split without a *shevu’a* because each is considered in exclusive possession of the entire *tallit*, and as a *muchzak*, each is entitled to half the garment even without an oath. The oath is necessary as a social policy and is meant to deter future aggressors from unilaterally seizing an article and asserting a false claim of ownership, knowing that they will be rewarded half of their claim. The threat of a *shevu’a* will discourage aggressors from unilateral seizure; the current verdict of *yachaloku* itself however, can be implemented without a reinforcement of a *shevu’a*.

Alternatively, if the two disputants over the *tallit* ARE NOT considered *muchzakim* of their separate halves and the *yachaloku* verdict is purely a court imposed compromise, the *shevu’a* may be intrinsically necessary; the *shevu’a* solidifies their “hold” upon the *tallit*.

To summarize, the NATURE of the *yachaloku* division described in the first *mishna* of *Bava Metzia* may affect the FUNCTION of the SHEVU’A If the *yachaloku* solution reflects each party being a *muchzak* of half the *tallit*, the *shevu’a* must play an ancillary and extrinsic role. If the disputants are not considered *muchzakim*, the court imposed distribution may be dependent upon a *shevu’a* to solidify the respective claims.

There are several applications of the *mishna*’s *shevu’a* that may help determine whether this *shevu’a* is an **intrinsic** part of the litigation meant to solidify the claims or merely a **tacked-on** *shevu’a* meant to discourage future aggression. For example, the *gemara* applies the *yachaloku* division to a purchased item that is disputed. Two litigants each claim that they purchased the same item from a third party. *Yachaloku* mandates that they split the item. The *gemara* (2b) suggests consulting with the seller about whom he sold it to, thereby exonerating that party from a *shevu’a*. Many *Rishonim* (Rabbenu Tam in particular) view this statement as global; ANY *shevu’a* can be forgone if a lone witness supports the position of the litigant who otherwise would take an oath. This principle – known as *eid mesayei’a* – can be applied broadly. By contrast, the Ba’al Ha-Ma’or claims that only the *mishna*’s *shevu’a* – in a case of a *yachaloku* – can be eliminated when a lone witness supports the claim.

Presumably, Rabbenu Tam and the Ba’al Ha-Ma’or dispure the nature of the *mishna*’s *shevu’a*. Rabbenu Tam views it as intrinsic; thus, the *gemara’s* assertion of an *eid echad* exemption, it applies broadly to ALL similar intrinsic *shevuot*. The Ba’al Ha-Maor views the *shevu’a* as a tacked-on *shevu’a*. Since in THIS case the *shevu’a* is not an intrinsic element of the litigation, it can be waived. The fact that THIS *shevu’a* is exempted when there is an *eid echad* does not imply that ALL *shevuot* may be similarly exempted.

An interesting statement of the Rambam in *Hilkhot To’en Ve-Nit’an* (*perek* 9) applies an interesting *halakha* to the *mishna*’s *shevu’a*. Once the litigants take their respective oaths, they can be asked to “stretch” their oaths and swear about other cases that they would not otherwise be obligated to swear about. This stretching – known as *gilgul shevu’a* – is a well-known apparatus, but it is typically applied to classic litigational *shevuot*. Does the Rambam’s willingness to apply *gilgul* to the *mishna*’s *shevu’a* indicate that he viewed this *shevu’a* as intrinsic? Presumably, if the *shevu’a* were not litigational but rather “social” – intended to prevent future aggression – it might not serve as the baseline for *shevu’a* extensions through *gilgul*.

It is clear that there was one *Amora* who viewed the *shevu’a* as litigational. R. Chiya asserts two *halakhot* about a classic *modeh* *be-miktzat shevu’a* that the *gemara* attempts to extrapolate from the *mishna* obligating a *shevu’a* as part of the *yachaloku* compromise. One *halakha* (known as his first extrapolation, or *Rav Chiya kamaita*) suggests that a classic *shevu’a* is obligated in the case of *modeh be-miktzat* even if a claim was partially ratified by witnesses (see [previous shiur)](http://etzion.org.il/en/shenayim-ochazin-be-tallit-splitting-disputed-tallit). Our *mishna* presents a case in which each litigant claimed the entire *tallit* and ownership over HALF the *tallit* was corroborated by the respective physical hold over half the *TALLIT.* This is equivalent to a claim being partially ratified by witnesses. Since the *mishna*’s case yields a *shevu’a*, evidently ANYsituation of partially corroborated claims will yield a *shevu’a*.

This extrapolation certainly implies that the *mishna*’s *yachaloku shevu’a* is not merely an extrinsic *shevu’a*, but rather stems from the partially corroborated claim, and suggests an extension of *modeh be-miktzat*.

Although the *gemara* accepts this halakhic extension, it rejects the extrapolation from the *mishna*. However, it introduces a second extrapolation (known as *Rav Chiya batraita*) that does stem from the *mishna*. A classic *modeh* *be-miktzat* setup obligates a *shevu’a* for the denied portion of a partially confessed-to claim. However, many assert that if the confession is followed by instant payment, no *shevu’a* is obligated. (This scenario is known as *heilakh* and was discussed more extensively in a [previous shiur](http://etzion.org.il/en/exemption-helakh).) R. Chiya inferred from our *mishna* that *heilakh* is NOT exempt from the *shevu’a*. Our *mishna*’s scenario of *yachaloku* mimics *heilakh* in that half of the claim is IMMEDIATELY awarded to the litigant because it is already in his possession. The obligation of a *shevu’a* despite this condition convinces R. Chiya that *heilakh* situations similarly demand a *shevu’a*, in opposition to the commonly held view.

Again, comparing the *mishna*’s *shevu’a* to a classic *modeh be-miktzat* setup – and deriving a general *halakha* about *modeh be-miktzat* from it – implies that R. Chiya viewed the *shevu’a* of the *mishna* as INTRINSIC to the litigation and not merely as an extrinsic *shevu’a* intended to prevent future aggression.

Additionally, the syntax of the *shevu’a* may indicate its function. The *gemara* (5b) supplies a very peculiar language; each disputant swears that he owns “some of the *tallit* and at least half of the *tallit*.” The *gemara* immediately probes this strange language. Why doesn’t each *ba’al davar* swear that he owns the ENTIRE *tallit*, as he claimed?! The *gemara* responds that since each party only receives half the disputed *tallit*, they cannot swear to owning the entirety. Apparently, the *shevu’a* functions to reinforce their hold on the disputed *tallit* and facilitate the division of that *tallit* through *yachaloku*. Since they each walk away with 50%, the *shevu’a* must mirror that. Had the *shevu’a* been merely extrinsic, perhaps the oath would assert a claim that is not reflected in the ultimate allocation of the *tallit*.

Finally, the question of the function of the *shevu’a* may have determined the SCOPE of the *shevu’a*. As discussed in a previous *shiur*, the *yachaloku* case of the *mishna* splits in to two derivative cases. If the two parties are actually grasping the physical *tallit*, they each receive the part they are clutching and only divide the middle, unpossessed part of the *tallit*; if they are merely holding the fringes of the *tallit*, they enjoy an even split. In a situation in which they are actually grasping the *tallit*, should they swear about the ENTIRE *tallit*, or only the unclutched middle section, which they divide equally? For example if Reuven is clutching 40% and Shimon is holding 20%, Reuven is awarded 40%+20%=60% of the *tallit*, while Shimon is awarded 20%+20% = 40%. Should Reuven swear about the entire 60% that he is awarded, or only about the 20% he is awarded despite not physically clutching that part? Tosafot (7a) maintain that he swears about the entire award, while the Rambam (*Hilkhot To’en Ve-Nitan*, *perek* 9) rules that items that are physically possessed and subsequently awarded do not generate a *shevu’a*.

Perhaps the debate surrounds the natureof the *shevu’a* accompanying *yachaloku* settlements. The Rambam believes that the *shevu’a* establishes and reinforces possession over disputed parts of the *tallit* to facilitate the allocation of *yachaloku*. The percentage of the *tallit* HELD by each party does not require reinforcement and can be allocated without a *shevu’a*. By contrast, Tosafot may have determined that the *shevu’a* is purely extrinsic, imposed upon *yachaloku* beneficiaries to prevent future aggression, and it should thus apply to the entire *tallit* that is allocated through *yachaloku*. Indeed, Tosafot’s language initially suggests the view that the *shevu’a* as extrinsic as the basis for its broad application. Tosafot’s concluding remarks may indicate a retreat from this position, instead viewing the *shevu’a* as part of the actual litigation.