YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**GEMARA BAVA METZIA**

**Shiur #15: Chashud al Ha-shevu'a**

**by Rav David Brofsky**

**Sources for this week's shiur:**

1. 5a "Hahu raya" until 6a "bechazaka.”
2. Shavuot 44b "Chashud ... yachloku.”
3. Tosafot Bava Metzia 5b S.V. "De-chashud"; Tosafot Bava Kama 108a s.v. "U-Trei.”
4. Tosafot B.M. 5a s.v. "She-kenegdo.”
5. Ketzot 92:2

**Questions:**

1. What is the reason that a "chashud al ha-shevua" may not take an oath?

2. Are there situations in which he may take an oath?

3. Does this question impact our understanding of other halakhot, such as "mitoch she-eino yakhol lishava meshalem" and "shekenegdo nishba v-notel"?

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The gemara in Bava Metzia (5a) discusses a case in which a shepherd, not in the presence of witnesses, was entrusted with a number of sheep. The shepherd then denied that he had ever been given these sheep. To his dismay, however, two witnesses appear and testify that he had eaten two of the sheep. The gemara states that even according to the first statement of R. Chiyya (see [shiur #6](http://etzion.org.il/en/r-chiya-kamayta)), that two witnesses can also obligate one to take a "shevu'at modeh be-miktzat" (a shevu'a taken in a situation in which one admits to part of claim, and denies the other part), here, the shepherd would be UNABLE to take an oath, as he has been proven to be a thief, and one who has been established as a thief by two witnesses may not take a shevu'a.

This week we will take a closer look at the principle of "chashud al ha-shevu'a," that one who has been proven to be a thief, or one who has previously taken a false oath, is disqualified from taking a shevu'a.

**1. The Nature of "Chashud al Ha-shevu'a"**

The source for this halakha is a mishna in Shevu'ot (44b):

.”.. Once who is suspect regarding a shevu'a, whether it be a shevu'a relating to one's testimony, or a shevu'a relating to a borrowed object, or even a false oath, or if one of them gambled, or lent money with interest ... the other party may take a shevu'a in his place, and then collect what he has claimed..."

In order to achieve a fuller and deeper understanding of this halakha we must ask the following questions. What is the nature of the disqualification of a chashud from taking a shevu'a, and what are its consequences? Does this question relate to a larger question concerning the nature and role of a shevu'a in general? Is it possible to distinguish between different situations, and possibly even different shevu'ot?

As for our first question, regarding the nature of this halakha, it would seem that this halakha, which disqualifies a thief or one who has taken a false oath from taking a shevu'a, can be understood in two ways:

1. We may understand that beit din, for a number of possible reasons, will not administer an oath to such a person. This may be because beit din does not really believe what this person will say even under oath, therefore, they prefer that he not take an oath at all. Or, we may understand, as the Ritva asserts on 5b, that beit din will not allow this person to take a shevu'a because they fear that he will violate the prohibition against swearing falsely, and therefore beit din must not give him this option, so that beit din don't transgress the prohibition of "before a blind person do not place a stumbling block.” Or, beit din may not administer the oath because they refuse to cause, even indirectly, a chillul Hashem.

2. We may suggest that this halakha refers not only to the policy of beit din, but rather to the actual obligation to take a shevu'a. Even in a situation in which one witness testifies that this person owes money to another, or a situation in which the person partially admitted to the claim, fundamentally, the halakha excluded one who is suspect from the shevu'a obligation itself.

**2. The Disqualification of a Chashud - Mi-de'oraita or Mi-derabbanan**

There is room for debate whether the above halakha is of Biblical or Rabbinic origin.

On the one hand, Tosafot (5b s.v. de-chashid) assert that according to the position that "migo d'chashid amamona lav chashid ashevuata,” the halakha which prevents a thief from taking a shevu'a is only of Rabbinic origin. This seems to indicate that the conflicting opinion "migo d'chashid amamona chashid ashevuata,” could consider the exemption of the a chashud to be of Torah origin. Moreover, Tosafot then cite the opinion of Rabbi Yehuda He-chasid, who can be interpreted considering the halakha to be of Torah origin even according to the position of "migo d'chashid amamona lav chashid ashevuata.”

It is unclear whether Tosafot maintain that one who swears falsely is ALSO disqualified from taking a shevu'a ONLY on a Rabbinic level, or whether Tosafot would agree that one who swears falsely is disqualified from taking a shevu'a mi-de'oraita, while a gazlan in only disqualified mi-derabbanan. Tosafot in Bava Kama (108a s.v. ve-trei), however, explicitly say that one who swears falsely is able to take a shevu'a mi-de'oraita, and is only disqualified mi-derabbanan.

If so, we have two viable possibilities as to whether the halakha of "chashud al ha-shevu'a" is mi-de'oraita, or mi-derabbanan. Does this debate shed any light on our discussion?

We may suggest that if the halakha of "chashud al ha-shevu'a" is only of rabbinic origin, then it is reasonable that it would reflect a policy of beit din, and not a categorical exclusion of a chashud from the obligation of shevu'a. However, if this halakha is mi-de'oraita, then we may suggest that the Torah completely excluded a chashud from the obligation of shevu'a.

If, as suggested above, Tosafot in Bava Metzia really distinguish between a gazlan and one who has sworn falsely, then we may suggest that one who has sworn falsely has completely excluded himself from the entire framework of shevu'ot. A thief, however, who had once taken money that didn't belong to him, may still, on a Biblical level, be permitted to take an oath. It is only beit din that refuse to administer a shevu'a to a gazlan.

**3. Mitokh She-eino Yakhol Lishava Meshalem:**

Based on the above understandings of the halakha of chashud, we may now suggest an alternative understanding of a Tosafot which was discussed in last week's [shiur](http://etzion.org.il/en/mitokh-she-eino-yakhol-lehishava-mishalem).

Tosafot (5a s.v. She-kenegdo) note that when a defendant who is obligated to swear but cannot do so because he is chashud, the oath is transferred to the plaintiff, who will win his case if he is willing to swear.

Tosafot then ask: There are, however, other instances when the defendant cannot take an obligatory oath, even though he is not a chashud. In these cases, however, we do not make the plaintiff swear, but we say "mitokh she-eino yakhol lishava - meshalem" - since the defendant cannot take the oath he must pay. Why, ask Tosafot, does this rule not apply to the chashud as well?

Tosafot suggest two answers. In their first answer, they admit that basically the defendant who is chashud should be automatically obligated to pay. However, in order to protect the chashud from being taken advantage of (i.e. that someone should loan him a sum of money, and then claim that he lent him a larger sum, and when the other party admits to only the smaller sum he will be obligated in a shevu'a of "modeh be-miktzat," and since he will be unable to swear, he will have to pay the full sum), they transferred the shevu'a from the chashud to the plaintiff.

Tosafot then suggest that the halakha of mitokh is not employed because the chashud may claim that he would gladly swear if beit din would allow him; therefore, he does not have to pay - even when he does not take a shevu'a.

Last week these two answers were discussed in the context of "mitokh" specifically. However, we may also approach this question based on the understandings of "chashud" mentioned above. If a "chashud" is merely prevented by beit din from taking a shevu'a, he still may be obligated to pay in the absence of the shevu'a, and therefore we must explain that beit din made an independent takana to transfer the shevu'a to the plaintiff. However, according to the second explanation, it would seem that a chashud is not defined as "eino yakhol lishava,” for he has never become obligated in a shevu'a in the first place![[1]](#footnote-1)

This explanation, however, may depend upon what happens when both parties are chashud, and therefore neither of them may take a shevu'a. The mishna in Shevu'ot (45a) presents a debate between Rabbi Yossi and Rabbi Meir whether, in such a situation, we fall back of the original halakha and obligate the defendant, since he was unable to take the shevu'a[[2]](#footnote-2), or, whether we say that they should split the sum, "yakhloku," and the defendant should only pay half.

We may suggest that this debate revolves around our question. If we do not employ the halakha of "mitokh" when the person's inability to swear is a result of his status as a chashud, then even if both are unable to swear, we have no recourse but to apply the compromise of "yakhloku." However, if fundamentally the halakha of "mitokh" can be employed, but we prefer not to, in a situation in which BOTH parties are suspect, we may then revert to the basic halakha and obligate the defendant to pay, since he was unable to take a shevu'a. (See Shulchan Arukh CM 92:7 where the Mechaber and Rema debate whether the halakha is in accordance with Rabbi Yossi or Rabbi Meir.)

However, it should be noted that even according to Rabbi Yossi, who maintains that if both parties are suspect the defendant must pay, it is still unclear whether this is based upon the original principle of "mitokh,” or whether fundamentally the halakha of mitokh CANNOT be employed in this situation, but rather he is obligated to pay "mi-derabbanan." (See Ketzot HaChoshen 75:11)

**4. What if the Plaintiff is Willing to Accept the Shevu'a of the Chashud?**

Are there any exceptions to the halakha of chashud? For example, what if the plaintiff is willing to accept the shevu'a of the chashud?

The Shulchan Arukh (CM 92) maintains that if the plaintiff agrees to accept the shevu'a of the chashud - beit din does not listen to him. However, the Sma and Ketzot cite a number of opinions who maintain that in this case beit din may administer an oath to the chashud.

The Ketzot notes that if beit din is concerned that his shevu'a may lead to a chillul Hashem, then the plaintiffs willingness to accept the shevu'a may be of no significance.

It should be added, however, that according to our understanding which maintains that a chashud is unable to be obligated in a shevu'a, then the plaintiff's willingness to accept his shevu'a might also be insignificant.

(Interestingly, this debate is not only important to our understanding of chashud in general. See the Rabbenu Peretz who reads this issue into the flow of our sugya.)

**5. The Nature of Shevu'a in General - and Different Types of Shevu'ot**

In order to deepen our understanding of the above question, whether technically beit din will not administer a shevu'a to a chashud, or whether a chashud cannot even incur an obligation to take an oath, we should take a moment to discuss whether this question may be related to the nature and role of shevu'a in general.

In previous shiurim (see [shiur #9](http://etzion.org.il/en/what-generates-obligation-shevua)), the nature and role of the shevu'a have been discussed. Is a shevu'a to be viewed as merely an obligation to respond to a legitimate claim of a plaintiff, or as not only a response, but as a form of evidence, serving, for instance, to counter the doubt raised by a single witness, or should we understand that a situation of partial admittance (modeh be-miktzat) or in a situation in which a single witness claims that he owes money to someone, the defendant is actually obligated to pay, but the Torah allowed the defendant to take an oath in lieu of payment, or as a legitimate refutation of the claim, thereby exempting himself from payment.

This question has far reaching consequences regarding a central issue in the laws of shevu'ot: Are we truly concerned with the veracity of the shevu'a itself, or, with placating the plaintiff. According to the latter, perhaps the veracity of the shevu'a is less important.

This question may impact how we understand the halakha of "chashud." If we are to view the obligation of shevu'a as a form of evidence, or as a defense, then we may be very wary of allowing a former thief to take a shevu'a, or, the Torah may have even categorically exempted a chashud from the entire obligation to take a shevu'a. However, if a shevu'a is to be viewed as a response, intended merely to appease the plaintiff, then we may, in certain circumstances, accept a shevu'a from someone whose honesty is questionable.

I would like to conclude by mentioning just two cases in which this question may be relevant.

There are those who note that the above cited Tosafot in Bava Kama (108a), who assert that the halakha of "chashud" even regarding one who has previously sworn falsely is only of Rabbinic origin, is limited to an oath taken by a shomer. One may suggest that the oath of a shomer, unlike other shevu'ot, is intended to appease the owner of the object (see Bava Metzia 35b), and not as a form of evidence, since the plaintiff in this case cannot register a definitive claim. Therefore, one may suggest that it is more reasonable to compromise on the veracity of the oath of a shomer and accept an oath from a person who is suspect of lying. Hence the disqualification of a "chashud" only in this case may be of Rabbinic origin.

Secondly, it should be noted that the approaches to "chashud" in general, as presented in this shiur, may also be employed to explain the question of the next sugya: Is one who is suspect regarding money (i.e. a modeh be-miktzat, etc.) also suspect regarding the shevu'a RELATING to that case. If we view this as an extension of the basic halakha of chashud, this would be difficult if we assume that a chashud may not even incur an obligation of shevu'a. (See Ketzot 92:1 who adopts the opposite approach.) However, if it is merely a policy of beit din which dictates that they must not administer an oath to one who may lie (see Ritva 5a), the extension in reasonable.

It is interesting to note, however, that while the gemara attempted to disprove this halakha from a number of different oaths, two were left out: the oath of a shomer (not according to Rami Bar Chama), and the oath obligated by the testimony of a single witness. We may suggest that just as the veracity of the shevu'a of a shomer, as mentioned above, may be less important, similarly the shevu'a created by the testimony of a single witness may also be intended as a form of payment (or appeasement) to the plaintiff. Therefore, beit din may not be concerned with a possible scenario in which the defendant may lie, and it may be clear to the gemara that one who is "chashid amamona" would not be "chashid ashevu'ata" regarding these cases.

Sources for next week's shiur:

1. 6a "Ba'i R. Zera ... shani."

2. Rashi 6a s.v. takfa, 6b s.v. ha-motzi.

3. Tosafot 6a s.v. hikdisha, Ran s.v. lo, s.v. ve-im timzta lomar.

4. Rashba s.v. ve-im.

5. Rambam Hilkhot To'en Ve-nit'an 9:12.

Questions:

1. Can R. Zera's question be applied to any case where one grabs an object from another? If yes, why did he raise this issue here?

2. In the case of "safek bekhor" can the silence of the original owner be construed as admission? If not, what does the gemara attempt to deduce from this case?

3. Does the Rambam rule that lack of immediate reaction is considered admission? If so, why after one's initial silence. Can he grab the talit back, after "admitting" that it does not belong to him?

1. The wording of Tosafot indicate the opposite conclusion` that the halakha of "mitokh she'eini yachol lishava" doesn't apply because the defendant is prevented from swearing by bei din. [↑](#footnote-ref-1)
2. The ensuing Gemara in Shavuot notes an alternate explanation of Rabbi Yossi, which does discussed in last week's [shiur](http://etzion.org.il/en/mitokh-she-eino-yakhol-lehishava-mishalem). [↑](#footnote-ref-2)