If it would teach the case of **מציאה** – **אי תנא מציאה**

Overview

The גמרא explains the need for the משנה to teach us the rule of יחלוקו בשבועה both by מציאה and ממכר ומקח. If the משנה would have mentioned only one of these cases, we may have mistakenly assumed that only in this case there is a חיוב שבועה since there is a certain מורי התירא (that is not found in the other case) and vice versa. Therefore the משנה teaches us that in both cases there is a חיוב שבועה. It is not clear in the הו"א why there is no חיוב שבועה in the case where there is no מורה היתר.[1] It is also not clear in the conclusion (of the קמ"ל) why indeed there is a חיוב שבועה in the 'other' case.[2] תוספות offers his explanation on both these issues and derives from this a new הלכה.

תוספות explains why there could be a שבועה by מציאה and not by מקח וממכר:

משום דמורה ואמר חבראי לאו מידי חסר לכך תפיס אף על גב שיודע שחבירו מצאה –

Because he justifies his action of grabbing the מציאה from the other **by saying, my friend is not losing anything** by my grabbing (since he merely found it and was not 'really' something which he [previously] owned, [or necessarily needs]), **therefore he is** willing **to grab it** from his friend **even though he knows that his friend found it -**

ורמו רבנן שבועה עליה כדי שיפרוש –

And so **the רבנן obligated him to swear in order that he should withdraw;** when the grabber realizes that he will be required to take on oath that it is his, he will withdraw his claim[3]. This is true concerning מציאה -

אבל מקח וממכר דליכא למימר הכי שאם יודע שחבירו קנאה לא הוי תפיס[4] –

However by buying and selling where this reasoning **does not apply, for if he would know that his friend bought it he would not have grabbed** it -

ומדתפיס בה סבור שלו הוא ונתרצה המוכר כדמסיק לקמן דנקיט זוזי מתרוייהו –

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[1] The שיטה מקובצת explains that according to רש"י (see ד"ה אבל where רש"י states שלא כדין מחסרו) in the case where there is no מורה היתר there should be no שבועה for since he is suspect of stealing (חשיד אממונא), he is suspect of swearing falsely (חשיד אשבועתא).

[2] According to רש"י (see previous footnote # 1) the קמ"ל teaches us that by both מציאה and מו"מ there is a מורה היתר and therefore an oath is administered. However when there is no מורה היתר (and certainly where one is a ודאי רמאי) there is no יחלוקו בשבועה as רש"י stated on the previous עמוד in במקח ד"ה.

[3] Alternately, as the גמרא will state later in the name of ר' יוחנן; that he will not grab initially, since he knows that ultimately he will be required to take an oath.

[4] He knows that his friend intended to buy it and indeed bought it, this indicates that his friend needs it and spent effort to obtain it; we can assume that if the 'grabber' had this knowledge he certainly would not have grabbed it. Therefore following this logic we are obligated to assume that the 'grabber' is not a 'grabber' in his own mind, for he thinks that it is really his, as תוספות explains.

And therefore since he is holding on to it this indicates that he **is of the opinion that it is** indeed **his;**[5] meaning **that the seller agreed** to sell it to him, **as** the גמרא **concludes later** concerning the case of מקח וממכר, **that** the seller **is holding monies** of the sale **from both** parties[6], therefore -

אימא לא ישבע דמשום שבועה לא יפרוש שהרי סבור הוא לומר אמת[7] **–**

I would assume that **there is no** obligation for him to take an **oath, since the oath will not cause him to withdraw** his claim, **for he imagines that he is saying the truth,** therefore the משנה -

קא משמע לן דאפילו הכי ישבע[8] **–**

teaches us that nevertheless an oath should be administered.

תוספות derives a (new) ruling based on his interpretation:

והיכא שודאי אינו סבור לומר אמת –

And in a case where he certainly has no illusion of saying the truth; one of the parties is fully aware that he is lying -

כגון דקא טעין כל אחד אני ארגתיה שאחד מהן טוען שקר במזיד –

For instance where each of the litigants **claims, 'I weaved this** garment'; in this case **where one of them is purposely lying -**

או כגון שנים אדוקין בשטר[9] **דלקמן (דף ז.)**[10] **–**

Or for instance the case mentioned **later of two people grasping a שטר -**

התם פשיטא דיחלוקו בשבועה דעל ידי שבועה ודאי יפרוש –

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[5] תוספות disagrees with רש"י (see footnote # 1) that when there is no מורה היתר we assume that the 'liar' is stealing, but rather that he 'really' thinks that it is his. תוספות maintains that everyone is assumed to have a חזקת כשרות (and will certainly not grab things from others), unless proven otherwise.

[6] The גמרא shortly explains that the case of מו"מ in the משנה is when both litigants paid the merchant for the goods; however the seller agreed to sell it to only one of them, and each one assumes that the merchant agreed to sell it to him. In this case the סבור שהיא שלו is quite apparent.

[7] The oath will not accomplish anything, for they will both swear, since each one thinks that he is the legitimate buyer. See 'Thinking it over'.

[8] It is evident from תוספות shortly that the קמ"ל of the משנה and the attendant חיוב שבועה is (not because of the מורה היתר that there is by מכירה, which the גמרא will shortly state [as attributed to רש"י (footnote # 2)], but rather) because [even when he (mistakenly) thinks it is his] the חיוב שבועה will give him sufficient cause to pause and rethink his position, that perhaps the מוכר did not agree to sell it to him, but rather to his friend. See following footnote # 11.

[9] תוספות cites this case of שנים אדוקים בשטר (in addition to אני ארגתיה [which is not mentioned in the גמרא]), in order to prove his point that by a ודאי רמאי (which שנים אדוקים בשטר is), the גמרא rules יחלוקו בשבועה, which would seemingly refute רש"י (on the עמוד א'). See שטמ"ק for various answers to explain רש"י.

[10] The case there is where the מלוה and לוה are both holding the שטר חוב. The מלוה claims the לוה never paid, and I lost the שטר and I found it, while the לוה claims that I paid the loan and received the שטר as proof of payment and I lost and found the שטר. The rule is that יחלוקו בשבועה even though one of them is certainly lying. [However it is still a case of החלוקה יכולה להיות אמת, for it is possible that the לוה paid half (and they are both lying). See תוספות ב,א ד"ה ויחלוקו.]

In those cases it is obvious that they must divide (only) **with an oath[11], for the oath will certainly** cause the liar **to withdraw** his claim –

דחשיד[12] אממונא לא חשיד אשבועתא:

For the rule is **that one who is suspect of** stealing **money is not suspect of swearing** falsely.

Summary

The משנה teaches that there is a חיוב שבועה even in a case where he (mistakenly) thinks that he is saying the truth. There is certainly a חיוב שבועה when he is definitely a liar. One who is חשיד אממונא is not חשיד אשבועתא.

Thinking it over

According to תוספות it appears that in the הו"א the גמרא thought that a שבועה is administered only in a case of מורה היתר, however in a case where there is no מורה היתר we assume that the person [thinks he] is saying the truth and therefore does not have to swear. How can we explain, the various שבועות of מודה במקצת and עד אחד and שבועת השומרים, etc.? In these cases there is (seemingly) no מורה היתר and nevertheless there is a חיוב שבועה. How can we have ever assumed that there is a שבועה only by מורה היתר?!

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[11] תוספות maintains as a corollary from our משנה that by a ודאי רמאי there is a חיוב שבועה. It is therefore evident that the קמ"ל of the גמרא means that even when there is no מורה היתר there still is an obligation to swear. The reason is that the deterrent of שבועה is so powerful that even when a person thinks (but is not completely sure) he is right; the שבועה will compel him to withdraw his claim. It therefore follows that when he knows he is lying, he certainly will withdraw his claim when he is required to take an oath. (See following footnote # 12.) However if we would maintain that the קמ"ל of the משנה is that he is required to take an oath, only because there is a מורה היתר (both by מציאה and מו"מ), then we would argue that the deterrence of a שבועה is limited only to cases where he is מורה היתר. A שבועה would be a deterrent only for such a person who does not want to do anything wrong; without a שבועה he is not doing anything wrong [in his mind; this is the מורה היתר], but to swear falsely that is patently wrong. However, a שבועה will not be a deterrent when he assumes that he is right; the שבועה will not deter him since in his mind he has a rightful claim, and certainly not when he is a ודאי רמאי (for he is not concerned at all about being honest). To summarize; if the קמ"ל would be that there is a חיוב שבועה since there is a מורה היתר that would indicate that when he is not a מורה היתר (and possibly a חשיד אממונא) then there is no שבועה (for he is חשיד אשבועתא).

[12] We cannot differentiate between the case of סבור לומר אמת (where he is מחויב a שבועה since he is not a חשוד אממונא) and a case of ודאי רמאי (where we should not administer a שבועה, since he is a חשיד אממונא), because a חשיד אממונא is not חשיד אשבועתא, for a שבועה is a powerful deterrent. Therefore it follows that if where סבור לומר אמת a שבועה is administered (even though it may not prove to be a deterrent since he believes his lie), then we should certainly administer a שבועה where there is a ודאי רמאי for there he knows that he will be swearing falsely (which he is not wont to do).