

For one who is suspect — דחשיד אממונא לא חשיד אשבועתא — concerning money, is not suspect concerning an oath

OVERVIEW

The גמרא states that a חשיד אממונא is not אשבועתא. Our תוספות offers explanations for this ruling and discusses the difference between a חשיד אממונא who is לשבועה כשר and a גזלן who is פסול לשבועה.

נראה דהיינו טעמא משום דשבועה חמורה¹ כדאיתא ביומא (דף פו,א)² —

It seems that the reason why a חשיד אממונא is not אשבועתא, is because
— מסכת יומא — שבועה is a stringent prohibition as is mentioned in

ובשבועות (דף לט,א)³ שהעולם נזדעזע על לא תשא —

— לא תשא ה' said it states that the world trembled when מסכת שבועות

asks:

ואם תאמר אם כן אמאי גזלן פסול לשבועה⁴ דאמר שכנגדו נשבע ונוטל⁵ —

And if you will say; if this is indeed so, that שבועה is more חמור than stealing, then why is a thief פסול לשבועה that we rule if a גזלן is obligated to swear, we do not allow him to, but rather his opponent swears and takes the money!

answers:

ויש לומר דגזלן לא פסול לשבועה אלא מדרבנן⁶ —

And one can say that a גזלן is not פסול לשבועה מן התורה, only מדרבנן.

¹ It is more stringent than גזול (which is 'merely' a תעשה)

² The ברייתא (beginning on the bottom of פה,ב) states מלא תשא חוץ ולא תעשה חוץ מלא תשא (פה,ב) indicating that (קלות הן קלות עשה ולא תעשה חוץ מלא תשא) (which is from the מצות חמורות) (as opposed to גזול which is from the קלות) (which is from the מצות חמורות) (as opposed to גזול which is from the קלות).

³ The גמרא there states (beginning on the bottom of לה,ב) that בי"ד tells the נשבע, 'you should know שכל העולם כולו נזדעזע בשעה שאמר הקב"ה בסיני לא תשא את שם ה' אלקיך לשוא'.

⁴ The חשיד is allowed to swear; even though we suspect that he is lying (and therefore willing to steal). We administer the oath to the חשוד with the assumption that he is lying (for if he is not lying, why give him an oath). The purpose of the oath is to prevent him from lying (he will recant and not swear falsely). If we assume that he is lying and willing to steal, seemingly he will just as easily swear falsely; nevertheless we administer this oath, because we assume that even though he is willing to steal, he will not swear falsely (since שבועה is חמורה). The question תוספות asks is that a גזלן should also be allowed to swear even though he is willing to steal (since שבועה is חמורה). What is the difference between a חשיד and a גזלן?!

⁵ We should allow the גזלן to swear and not pay, instead of having the שכנגדו swear and take his money.

⁶ A גזלן is really לשבועה כשר since חשיד אממונא לא חשיד אשבועתא. However the חכמים instituted that we will not allow the גזלן to swear, since it is public knowledge that he is a גזלן it would seem improper to have him swear (see (גיטין נא,ב in תוד"ה ובכ"ה). However by a חשיד since he is not a certified גזלן (he may be telling the truth), there is no impropriety in allowing him to swear, and we are not concerned that he will swear falsely since חל"א.

ולעדות הוא דפסול מדאורייתא משום אל תשת רשע עד⁷ –

It is only for עדות that he is פסול מדאורייתא because it is written אל תשת
(רשע is a גזלן); the תורה specifically prohibited a רשע from being a witness (a גזלן is a רשע עד).

גזלן offers an alternate answer; differentiating between a חשיד and a תוספות

ויש מפרשים בשם הרב רבי יהודה חסיד הא דחשיד אממונא כשר לשבועה –

And others explain in the name of ה"ר יהודה חסיד that the reason a חשיד
is - כשר לשבועה is אממונא

משום דשמא על ידי שבועה יפרוש מגזל –

Because perhaps through (the additional prohibition of) the שבועה he will
distance himself from stealing -

אבל גזלן ודאי כמו שמממן אינו פורש הוא הדין משבועה⁸ –

However a certified גזלן, just as he is not held back from taking other
people's money, he will also not be prevented from swearing falsely.

תוספות responds to an anticipated question:

ולא קשה מההוא רעיא דאסהידו ביה דאכל מינייהו אמאי פסול –

And there is no difficulty (to the explanation of the י"מ⁹) from the case of
רעיא where they testified that he ate some of the sheep; why should
he be פסול for a שבועה (according to the י"מ) -

דבהנך תרי דאכל צריך לשלם ומהשאר יפרוש על ידי שבועה –

Since the two sheep that he ate he is required to pay (so therefore he is no
longer a גזלן), and concerning the rest of the sheep which we suspect he
stole, he will refrain from lying through the שבועה which we will administer,
since he is now merely a חשוד and not a גזלן! Why do we not let the רעיא swear?!

תוספות replies:

דמה שהוא משלם על ידי עדים אין זה השבה מעליא דעל כרחו משלם –

For that which he is paying because of the witnesses' testimony; that is
not considered a proper return (to acquit him from being considered a

⁷ אל תשת ירך עם רשע להיות עד חמס (שמות [משפטים] כג, א) reads פסוק The

⁸ The difference seems to be as follows; the חשיד did not yet steal the money (at worst he is possibly 'merely' lying and trying to keep the money he owes), it is possible that (on account of the שבועה) he may admit and pay back the money. Therefore we administer the oath to him. However this גזלן stole money already and did not return it (willingly), proving that he is not concerned about stealing at all, so therefore in this new case he will continue to steal and swear falsely. [See (בד"ה דאמר רב דימי) where he states: "ל דהתם דודאי גזל וטעם טעמא דאיסורא, חשוד הוא אכל מילי, אבל הכא דאכתי לא טעם ועכשו הוא בא לתחלה למעבד תרתיה בתחלה].

⁹ See 'Thinking it over' # 3.

(גזלן), for **he is paying against his will**. Therefore since he remains a גזלן even after he pays for the sheep he is לשבועה.

concludes: תוספות

והיינו טעמא דכופר בפקדון פסול לעדות:

And this is also the reason that one who denies holding a deposit is פסול לעדות if witnesses testify that when he denied holding the deposit we saw it in his possession. He is פסול לעדות even though he will return the פקדון, because he is not returning the פקדון willingly, only because he is forced to do so by the עדים.

SUMMARY

A גזלן is not חשיד אשבעתא since שבועה is more חמור than גזל. Therefore even a גזלן is פסול לשבועה only מדרבנן. Alternately only a חשיד is חשיד because perhaps he will admit on account of the שבועה; however a confirmed גזלן is פסול לשבועה. A גזלן can be reinstated to be לשבועה if he returns the גזילה voluntarily.

THINKING IT OVER

1. (in the first answer) תוספות maintains that a גזלן is מדאורייתא פסול לעדות, however concerning a שבועה he is פסול only מדרבנן. Why is there this difference between עדות and שבועה?¹⁰

2. Is a גזלן פסול to swear מדאורייתא?¹¹

3. Is the question from רעיא¹² on the י"מ only, or on the first answer as well?¹³

¹⁰ See בל"י אות קלו, סוכ"ד אות סג, # 67 אמ"ה.

¹¹ See בל"י אות קלה.

¹² See footnote # 9.

¹³ See ח"ב אות קא.