

מחוי רבי אבהו והשאר בשבועה –

indicated; and the rest is divided with an oath

OVERVIEW

The **בריייתא** which was read before ר"א states, if two people are grasping a **טלית**, each one retains the part which he is holding, and the rest is divided equally; to which ר"א indicated (they divide it) with an oath. In some of the texts the wording was **והשאר בשבועה** and the remainder is divided with an oath; indicating that they need not swear regarding that which they are actually grasping.¹ גירסא rejects this תוספות.

נראה דלא גרסינן והשאר דאף במה שידו מגעת ישבע –

It is the view of תוספות that our texts should not read 'והשאר' (and the remainder)², for even regarding what he is holding in his hand; he is also required to swear. תוספות explains why there is a requirement to swear even במה שידו מגעת –

כיון דנתקנה השבועה שלא יהא אדם הולך ותוקף –

Since the שבועה was instituted so that a person should not go and grab, something which is not his –

מטעם זה ישבע אף במה שהוא תופס³ –

For this very same reason he swears even for that which he is grasping.

תוספות responds to an anticipated difficulty:

ומכל מקום שפיר מוכח בסמוך דבקנין⁴ מאי דתפיס כמאן דפסיק דמי⁵ –

¹ According to this גירסא, if one would refuse to swear, he would still retain the part of the **טלית** which he is holding, without a שבועה, because it is like anyone who is in possession of an article that he is not required to swear that it is his..

² See 'Overview' (footnote # 1).

³ If there would be no requirement to swear for the part that he is holding then people would continue to grab items which are not theirs and receive them without a שבועה.

⁴ By קנין סודר the קונה gives to the מקנה a כלי (a garment for instance) and the מקנה holds on to part of the כלי (at least ג' על ג') and this effects the קנין. The question is since the מקנה held only part of the כלי, how can it be considered that he received something from the קונה. The גמרא explained that we can derive from the שנים אדוקים ברייתא that the part which one holds is considered separate and removed from the rest of the item.

⁵ מה שהוא תופס questions the legitimacy of the proof if we maintain that he is required to swear on תופס. If we would maintain like the other גירסא that he is required to swear only on what he is not holding, but regarding that which he is holding he is פטור משבועה, then we can prove that the part that one is holding is considered separate and removed from the rest. And therefore even though he is required to swear on that which he is not holding, nevertheless he is not required to swear on that which he is holding (just as no one is required to swear if another claims that the item which in his possession belongs to the claimant);

But notwithstanding this (that he is required to swear for even what he is holding) the **קנין סודר** **shortly correctly proves regarding גמרא**, that the piece **which he holds** is considered as if it is **separate** from the rest of the garment. The reason it is a proper proof is that -

כיון דהכא לאחר שבועה נוטל כל מה שהוא תופס אפילו יותר ממחצה⁶ –

Since here after he swears he takes whatever he was holding even if it is more than half; this proves that the part that is being held is considered separated from the rest of the garment, otherwise why does he receive more than half.

והשבועה היא בשביל הטענה ומפני התקנה:⁷

And the oath is on account of the claim (of the other party) **and because of the תקנה** of ר' יוחנן שלא יהא כל אחד הולך ותוקף וכו'.

SUMMARY

In the case of שנים אדוקים they each have to swear that they own both the part that they are holding and that which they are not holding, to satisfy the תקנה of ר' יוחנן. Nonetheless the fact that one may receive more than half indicates that what he is holding is separate from the rest

THINKING IT OVER

states that the reason he has to swear on the part which he is holding is בשביל הטענה ומפני התקנה.⁸ Why then if only one person is holding the item (and another person claims that it was taken away from him) do we not also rule that the one who is holding the item completely, should swear בשביל⁹?! הטענה ומפני התקנה

indicating that the part which he is holding is separate from the rest of the טליית (and the same would apply by חליפין). If, however he has to swear even on the part which he is holding it would seem that it is all one garment with no differentiation between what he is and is not holding (indicating that the part he is holding is not really ודאי his, and he receives it only מספק once he swears), so what proof do we have regarding חליפין that דפסיק דמי.

⁶ He receives the part that he is holding that is more than half because he is holding it so it is considered completely his as opposed to the part which he is not holding. The same applies to חליפין.

⁷ See 'Thinking it over'.

⁸ See footnote # 7.

⁹ See נה"מ.