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FEDERATION

## SHEVUOH IN CONTEMPORARY BEIS DIN [PART 2]

The biblical oath was taken with the expression of the Divine Name whilst holding a Sefer Torah. Rashi<sup>1</sup> comments, that because of the severity of such an oath, the Rabbis of his generation avoided these types of oath and replaced them with a less severe declaration of a penalty of a curse for swearing falsely. The Ritvo disagrees and said the biblical oath is more of a deterrent to lying and should therefore be used. Shulchan Oruch<sup>2</sup> mentions the custom of Rashi.

The Rambam<sup>3</sup> maintains that *בשמי תשבוע* is a positive commandment and includes this mitzvah in the 613 mitzvos of the Torah. He considers swearing in Beis Din a great declaration of Kiddush Hashem.

The Ramban<sup>4</sup> strongly disagrees. The oath in Beis Din cannot possibly be a mitzvah, it is of a permissive nature that a respondent can swear. He quotes the Midrash<sup>5</sup> that a thousand cities of King Yanai were destroyed as a consequence of taking oaths, even if no falsehood was incurred. There are divergent opinions as to the Rambam's view when the *shevuoh* is truthful but not essential.

The consensus in the poskim is against the Rambam. Shulchan Oruch<sup>6</sup> states that one should be careful about taking an oath, even a truthful one, and one which he fulfils. The Levush adds the punishment on King Yanai

was because they could have avoided taking oaths. This maybe the opinion of Rambam. Chasam Sofer<sup>7</sup> quotes further sources that even a truthful oath is sinful. Dayan Weiss<sup>8</sup> expresses surprise that he does not quote the Rambam.

It is customary, nowadays, to avoid imposing or accepting shevuos from either of the parties. This would appear to be a takonoh of the Vaad HoArotzot.<sup>9</sup>

The Beis Din may exempt one of the parties from taking an oath, even after the din has been concluded, by offering *peshoroh*.<sup>10</sup>

As a general rule, Botei Din will deduct a third from the claim in a case where the din is that he could take a *shevuoh* and win his claim but he is blocked from so doing because of the takonoh. Some attribute this to the ruling of Rav Yaakov Reisher<sup>11</sup> that a margin of a third is considered to be *peshoroh korov ledin*, however more than a third is too far from din to be considered *korov ledin*.

The act of restraint in not giving a *shevuoh* is considered a greater *kiddush hashem* than giving a true *shevuoh* and since for *hiddur mitzvoh* one is obliged to spend a third more<sup>12</sup>, it is suggested that it where the claimant can give a *shevuoh* his claim should be reduced by a third for forgoing his *shevuoh* and conversely where the respondent could take an oath to exempt himself from payment he should forgo the *shevuoh* and pay a third of the claim.<sup>13</sup>

## Halachah

Rav Malkiel Tannenbaum<sup>14</sup> claims that the responsum of Rav Reisher is not a valid source as he does not mention a case of *shevuoh* but was referring generally to *peshoroh korov ledin*.

Rav Moshe Feinstein<sup>15</sup> writes as follows:-

"I don't have in my possession all the writings of the acharonim to know clearly the custom of the dayanim *lefasher* whether to distinguish between swearing by the respondent or the claimant but I think the custom is to deduct a third in either case. However as there is no reliable source in the gemoro or early poskim it is not definite and it is all within the discretion of the dayan as he sees the case".

Thus the adjustment of a third is clearly not a cast iron rule, but depending on the circumstances of the case either more or less may be deducted from the claim.

It once happened that a trusted treasurer of the gemach in Shaarei Chesed, from the Porush family, was accused of misappropriating funds. The treasurer wanted to pay rather than give a *shevuoh* declaring his innocence. Rav Shmuel Salant zt"l insisted that he give a *shevuoh* so that no-one should suspect that the accusation was valid. The treasurer reluctantly agreed to swear, in deference to the saintly Rav of Yerusholayim.

It is reported that a false accusation was once levelled against the Vilna Gaon, and the Beis Din requested that he defend himself by taking an oath. The Gaon was prepared to undertake the *shevuoh*. Rav Chaim Volozhin explained that the Gaon was eager to fulfil the mitzvah of *בשמי תשבוע* according to the view of the Rambam.

<sup>14</sup> Shu't Divrei Malkiel 2,133

<sup>15</sup> Shu't Igros Moshe Choshen Mishpot 1, 32

<sup>1</sup> Shevuos 38b

<sup>2</sup> Choshen Mishpot 87, 19.

<sup>3</sup> Sefer Hamitzvos 7, also in the Yad, Hilchos Shevuos 11, 1-3. See also Sefer Hachinuch 435

<sup>4</sup> Hassogos Ramban see also Ramban's commentary on Chumash Devorim 6, 13, similarly Rashi Devorim 6, 13 and 10, 20. Interestingly *בשמי תשבוע* occurs twice and Rambam includes the 2<sup>nd</sup> mention as the mitzvah, not the first.

<sup>5</sup> Tanchuma and Midrash Rabbo parshas Mattos.

<sup>6</sup> Orach Chaim 156

<sup>7</sup> Shu't Chasam Sofer Choshen Mishpot 90, quote in Pischei

Teshuvo Choshen Mishpot 87, 22

<sup>8</sup> Shu't Minchas Yitzchok 4, 52

<sup>9</sup> Shu't Even Yekoro Choshen Mishpot 1, 6 Rav Binyomin Arye

Weiss AB'D of Tchernovitz

<sup>10</sup> Choshen Mishpot 12, 2

<sup>11</sup> Shu't Shvus Yaakov 2, 145

<sup>12</sup> Bovo Kamma 9b

<sup>13</sup> Shu't Even Yekoro Ch.Mishpot 1, 6

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