**YESHIVAT HAR ETZION**

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

**Shiur #07: Forcing a Borrower to Pay a Debt in the   
Presence of Witnesses**

Typically, loans can be repaid in private, without attending witnesses. Nevertheless, it is always good policy to secure witnesses to observe payment so that they can testify in future litigations and disputes. If a payment is subsequently disputed and no witnesses are available, however, the defendant will still triumph based on the general rule of *ha-motzi mei-chaveiro alav ha-ra’aya*, which awards the benefit of the doubt to the defendant, forcing the plaintiff (*tovei'a*) to muster evidence

There is an interesting scenario in which payment MUST be proffered in the presence of *eidim* or witnesses. The *gemara* in *Shavuot* (41a) asserts that if at the time of the loan the *malveh* (lender) stipulated that the payment should only be executed in the presence of witnesses, the payment must be rendered accordingly. If the *loveh* (borrower) subsequently claims that he in fact paid but didn’t pay in the presence of witnesses, he is not believed and must surrender a [second] payment. At first glance, this halakha seems odd. Why shouldn’t we believe the defendant, who claims that he paid, just as we believe any defendant in possession of disputed funds or value? How does an initial "loan-time stipulation" alter the standard rule, *ha-motzi mei-chaveiro* which favors the defendant?

The simplest manner of understanding this exception is to view it as an EXTERNAL stipulation. Fundamentally, the borrower remains the default "believed" person since he is the defendant. However, he OBLIGATED himself not only to render compensation, but to arrange for attending witnesses (to obviate any further litigation). Although he is trusted to claim that he rendered payment, (since he is the possessor and the default “favorite),” he did not fulfill his COMPLETE obligation because he paid in private and without witnesses. By stipulating that the payment must be performed in the presence of *eidim*, the lender “augmented” the obligation of the *loveh*. This is how the Ramban (*Shavuot* 41) explains this phenomenon.

Alternatively, this stipulation may not generate any extrinsic or added responsibility on the part of the borrower, but rather alters the rules of default believability. When the Torah favors the defendant through the principle of *ha-motzi mei-chaveiro alav ha-ra'ayah*, it is not establishing a fixed and inflexible policy, but rather setting a DEFAULT standard that MOST cases adhere to. In the absence of any stipulation, the defendant receives the benefit of the doubt and triumphs. However, the two parties can engineer their relationship and upgrade the lender’s credibility at the expense of the borrower’s. They can adjust the case so that in the absence of evidence, the lender will be believed and not the borrower. If the *loveh* claims that he paid but can’t verify with *eidim* he isn’t trusted about the payment.

The most obvious difference between these views would evolve from a situation in which the *loveh* asserts that he DID compensate the *malveh* in the presence of witnesses but they are no longer available to verify this fact. According to the Ramban’s view, the *loveh* should be believed, and thus exonerated. The stipulation to pay in the presence of witnesses never diminished his default believability. If he claims that he fulfilled ALL his obligations, including the obligation to compensate in the presence of witnesses, he is trusted even without supporting his claim. By contrast, if the loan time stipulation adjusted the parties’ respective levels of believability, the defendant no longer enjoys favored status and must forensically verify his claims. Failure to summon evidence that he paid in the presence of *eidim* would lead to the lender’s victory and the borrower’s responsibility to make new payment. In fact, the *gemara* in *Shavuot* (41b) cites this scenario as a debate between Shmuel (who claims that the *loveh* is trusted) and R. Asi (who claims the he is not). Presumably, they are debating the nature of this halakhic principle by questioning its application to this unique permutation.

A second interesting application is a situation in which no explicit stipulation is asserted but the EXPECTATION of witnesses attending the payment of the loan is IMPLIED. If the *malveh* delivers the loan in the presence of witnesses, it implies that the loan must similarly be reimbursed by the *loveh* in the presence of witnesses. If a STIPULATION to pay in the presence of *eidim* obligates the *loveh* to EXTRA responsibility, IMPLYING these expectations would be insufficient. A *loveh* can only incur added obligation through explicit stipulation. If, however, the stipulation adjusts the standard levels of believability, perhaps an overt stipulation is unnecessary. By simply stationing witnesses during the loan, the *malveh* has ESTABLISHED adjusted expectations and adjusted levels of believability. By positioning *eidim* (even though he is not required to do so), he may be legally upgrading the legal parameters of this loan. Typically, unsubstantiated claims of the *loveh* are believed, but in this situation, ANY statement without witnesses will be rejected.

Interestingly, according to one opinion in the *gemara* (*Shavuot* 41), this constitutes a second debate between Shmuel and R. Asi. Shmuel, who trusted a *loveh* to claim that he compensated in the presence of "no longer available" *eidim*, does not require payment in the presence of *eidim* if the requirement was not verbally stipulated. Presumably, his logic is consistent. The mechanics of this general principle are based on the *loveh*’s accepted augmented responsibility to compensate in the presence of *eidim*. This augmentation requires explicit stipulation (rather than an implicit EXPECTATION by stationing *eidim* at the loan), and if the *loveh* claims that he fulfilled his responsibility, he is trusted. R. Asi's logic is similarly consistent. He views the principle as adjusting the levels of believability, and it can be adjusted implicitly by positioning *eidim* at the loan. The *loveh* is not trusted to claim that he paid in the presence of *eidim* because his believability has been adjusted and lowered and any claim he renders must be substantiated by *eidim*.

An interesting statement of the Rambam expands the scope of the principle, and thereby affects its nature. Typically, a thief is believed to claim that he returned a stolen item based upon the principle of *ha-motzi mei-chaveiro alav ha-ra’aya*. The Rambam (*Hilkhot Gezeila* 4:14) claims that if someone stole an item in the presence of *eidim*, he is responsible to reimburse the victim in the presence of *eidim*. Obviously, the thief has established no “agreement” with his victim about future legal dynamics. To claim that his theft in the presence of *eidim* augments his obligation and therefore requires payment in the presence of *eidim* makes little sense. However, if the presence of witnesses adjusts the standard rules of believability, perhaps their presence at the theft can similarly alter the standard norms of who is and who is not believed.

A second interesting statement of the Rambam suggests that by stipulating that the loan should be repaid in the presence of *eidim*, the levels of believability have not been altered, but rather an extrinsic obligation has been introduced. The Rambam (*Hilkhot Malveh Ve-Loveh* 15:1) addresses a situation in which the lender stipulates that payment should be rendered in the presence of SPECIFIC NAMED witnesses. He claims that the borrower is not believed to claim that he paid in the presence of different witnesses. Clearly, if the stipulation introduces augmented obligation to the borrower, ANY stipulation can be introduced. Just like the condition can mandate payment in the presence of *eidim*, it can mandate that payment in the presence of SPECIFIC *eidim*, justifying the Rambam's position. However, if the stipulation of payment in the presence of witnesses alters the levels of believability, it may be more difficult to obligate the *loveh* to pay in the presence of specific *eidim*. By demanding *eidim*, the *malveh* can upgrade the levels of verification necessary, but can he also demand specific *eidim*? If this statement of the Rambam is indeed premised upon viewing the halakha as an extrinsic stipulation, we would have to re-explore the previously considered statement of the Rambam about a theft witnessed by *eidim*, which implies that the rule is not based on a stipulation, but rather on adjusted levels of believability.

A final question pertains to a *loveh* who claims that he paid without *eidim*. Even though he would not normally succeed, he seeks vindication based on a “*migu*.” Since he could have claimed that he paid in the presence of witnesses who are no longer available to testify (at lease according to the aforementioned position of Shmuel), he should triumph based on the principle that if one can make a claim that would assure him of victory, any claim is accepted. The Rashba (*Shavuot* 41b) asserts that a *migu* would indeed yield the *loveh*’s victory in this case, while Tosafot claims that a *migu* would be ineffective. Perhaps this dispute reflects the two different strategies toward understanding the dynamics of this halakha. If the stipulation "to pay in the presence of *eidim*" diminishes the *loveh's* generic and built in believability, a *migu* would be able to “boost” his believability and grant the *loveh* a victory. However, if the stipulation introduces an augmented obligation, the debt is not considered paid until witnesses ACTUALLY attend the payment. While the *migu* certifies the claim of the *loveh*, even according to his claim, he has not fulfilled his obligations.