YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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This week’s shiurim are dedicated in commemoration of the yarhzeit of
Rabbi Lipman Z. Rabinowitz, by his family

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Please daven for a refua sheleima for YHE alumnus
Rav Daniel ben Miriam Chaya Rut

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**Shiur #09: Is a *Shevua* a *Beirur* or a *Chov*?**

All three *shevuot* that are required *mi-de’oraita* are “defensive;” they are taken by the defendant “in place” of payment. When describing these oaths, the Torah employs two very different terms. One *pasuk* casts the *shevua* as an interaction between the two litigants: “*Shevuat Hashem tihyeh bein shneihem*” (*Shemot* 22:8). A different *pasuk* suggests that the oath is primarily directed toward *beit* *din* (*Shemot* 22:10). These two different formulations imply very different notions of *shevua*. Is an oath essentially an attempt to help *beit* *din* clarify the details of the disputed case? That is, in the absence of witnesses, *beit din* can demand that a defendant provide an oath to help ascertain the facts. Or is an oath primarily an obligation toward the *tovei’a* (plaintiff)? Perhaps under certain conditions the defendant, although excused from actual payment, must still offer the *tovei’a* his sworn statement affirming his innocence. To phrase the distinction differently, is a *shevua* a “*beirur*,*”* an attempt to clarify the details of the case to *beit din*, or is it a “*chov*,” a non-monetary obligation to the *tovei’a*?

This core question shapes multiple applications of *shevua*. One application surrounds the concept of *mitokh she-eino yachol li-shava* *meshalem*, the principle that dictates that if the defendant cannot render a *shevua*, he must pay the disputed money. This principle is generally assumed to be a *de-oraita* halakha derived from a *pasuk* by the *gemara* in *Shavuot* (47a) (although the *Ketzot Ha-Choshen*, chapter 92, does cite a Maharshach who maintains that this is merely a Rabbinic adjustment). Those who cannot legally offer a *shevua* include a defendant who claims that he does not remember owing money, as well as a defendant who has been caught grabbing money that he claims is his. In either case, the inability to produce a *shevua* requires full payment.

On the surface, this seems to support the notion that a *shevua* is an interpersonal, non-monetary obligation. In typical cases, the defendant owes the *tove’ia* an oath-based explanation. In unique situations in which this verbal obligation cannot be met, the *nitva* must actually pay the disputed money. On the other hand, if *shevua* is merely an obligation to assist *beit din* in ascertaining the facts, the rule of *mitokh* would be attributed to a penal category; defaulting on oath obligations is **penalized** through payment requirements. Of course, the nature of *mitokh* dramatically affects the scope of when *mitokh* applies.

A second relevant question is the suitability of a suspicious person to render a *shevua*. The *mishna* in *Shevuot* (44b) establishes that a suspicious individual cannot defend his position with a *shevua*. Instead, the *tovei’a* has the option of HIMSELF taking an oath and extracting the disputed monies. In assessing this halakha, Tosafot (*Bava Metzia* 5a) offer two different opinions as to whether this suspicious person is completely unsuited for his *shevua*. According to one opinion, despite his suspect nature, he **is** a candidate for *shevua*, but *beit din* still “flips” the *shevua* to the *tovei’a*.

R. Naftali Trop maintained that this issue is dependent on the nature of an oath. If the entire purpose of an oath is to assist *beit din*, a suspicious person would be completely unsuited for this task. If, however, the primary role of a *shevua* is to offer verbal **payment** to the *tovei’a*, we might envision a suspicious person as basically obligated toward this debt. *Beit Din* may not be willing to process this oath, but fundamentally, the defendant is obligated to take the oath.

Another question that may be impacted is the issue of *migu* replacing a *shevua*. Most *Rishonim* believe that *shevua* may indeed by acquitted through a *migu*. In fact, the classic example of *modeh be-miktzat shevua* entails a built-in *migu*. The defendant had the option of denying the entire claim and escaping without a *shevua*. The logic of *migu* mandates that despite of his partial confession, he should be excused from his current *shevua*. Many maintain that the *Amora* Rabba asked this very question (see *Bava Metzia* 4a and assorted other *gemarot*, which quote *Rava*) and maintains that there is another reason that that this *migu* is flawed. Fundamentally, however, a *migu* DOES replace a *shevua*.

By contrast, the Ri Migash claimed that a *migu* CANNOT replace a *shevua*. In part, the Ri Migash may have viewed a *shevua* as an interpersonal OBLIGATION to the *tove’ia*, which cannot be absolved with a *migu*. Other *Rishonim* who maintained that *migu* **can** replace a *shevua* may have defined *shevua* as an attempt to clarify the facts to *beit din*, or a *beirur*. Since *migu* may provide an alternate *beirur* or clarification of truth, it may replace the need for a *shevua*.

Another interesting *shevua* rule which may be affected by the definition of *shevua* is the concept of *gilgul*. If a *nitva* is obligated to take an oath, he can be required to swear about previous litigations that, for whatever halakhic reason, did not yield oaths. For example, if he currently is swearing to defeat the incriminating testimony of a lone witness (*eid echad*), he can be required to ALSO swear regarding past denied claims about which he was not required to take an oath. The notion of *gilgul* is certainly more logical if a *shevua* is a responsibility to clarify the facts to *beit din*. Once he is mandated to swear, *beit din* can conceivably “stretch” the current *shevua* to include previously unresolved litigations. If a *shevua* is an interpersonal obligation to provide clarity to the *tovei’a*, the notion of expanding a *shevua* through *gilgul* would be far less obvious.

This question would also impacts how halakha defines cases that are immune to oaths. The *gemara* in *Shavuot* claims that oaths are not rendered regarding land disputes. What type of land disputes are exempted, those that involve land **litigation** or those that involve land **collection**? For example, although debts are litigations regarding funds, they may lead to land collection. Are such cases exempted from oaths because the collection will technically be rendered with land? Or is an oath required because the basis of the litigation is not primarily about land? What about a reverse situation in which the litigation surrounds land but the payment will be rendered in cash? For example, if the litigation involves land DAMAGES that will be compensated with money, can a *shevua* result? These two cases are hotly debated by the *Rishonim*. The first situation is termed a *milveh ba’al peh* (a non-contractual loan), while the second scenario is referred to as *demei karka* litigations surrounding land damage and is the source of a *machloket* between the Rambam and the Ra’avad.

Presumably, if a *shevua* is primarily directed to *beit din* as an attempt to clarify the uncertainties, the topic that *beit din* is currently deliberating would be paramount. If *beit din* is **focused** on land, no *shevua* should obtain, even if **payment** is rendered in money. On the other hand, if they are deliberating regarding a **monetary** dispute, a *shevua* should be mandated even if the **payment** will be rendered in land.

If, however, a *shevua* is an interpersonal, non-monetary payment, the key determinant should be the potential PAYMENT that the *shevua* absolves. If the potential payment (in the absence of a successful *shevua*) will be land-based, the *shevua* can be considered an oath about land, which is halakhically void. However, if the payment will be monies, even if the source litigation surrounds a land dispute, the *shevua* can be considered an exemptor of money and should apply.