THE YESHIVA PIRCHEI SHOSHANIM SHULCHAN ARUCH PROJECT

Eidus Shiur One

Mareh Makomos for this Shiur

Bava Kama 55b

Nemukei Yosef (Bava Kama 24a)

Ketzos Hachoshen (Seif Katan 3)

Nesivos Hamishpat (Seif Katan 1)

Tosefos (ibid., dibur hamas'chil peshita)

Shevus Yaakov (Siman 146)

Maharshal (Yam shel Shlomo, Perek Hakoneis, Siman 6)

Hagahos Maimoniyos (Laws of Testimony, chapter 5)

Mishneh Lamelech (Laws of Loans, 4:6)

Responsa of the Rashba (Vol.1, Siman 657, and Klal 6, Siman 21)

Noda Beyehuda, Orach Chaim, Siman 35)

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The obligation to testify, and the cherem on one who does not testify

Shiur 1

Siman 28 Seif One

1 Whoever knows testimony about his fellowman and is fit to serve as a witness and his fellow man derives benefit from his testimony is obligated to testify if he is called to do so (in Beis Din — Tosefos, Beis Yosef), whether there is another witness with him or whether he is alone. And if he withholds his testimony, he is exempt from dinei adam and is obligated in dinei Shamayim.

Rama: And a sole witness can only testify concerning monetary matters that will obligate the defendant to take an oath or in matters of distancing [his fellowman] from a transgression, but if the transgression has already taken place the witness may not testify, as this is mere slander (Hagahos Maimoniyos, Laws of Testimony, chapter 5). One may not testify about something he does not know, even though it was told to him by someone whom he knows does not lie And even if he told him just come and stand together with another witness that I have and don't testify, just that the one who owes me money becomes afraid and assumes that I have two witnesses and confess, do not listen to him.

Siman 28 Seif Two

2 A man has the right in shul to place a cherem on anyone who knows testimony that he should come and testify.

Rama: But he cannot make them swear, only 'If he does not say, then he bears his sin' (Vayikra 5:1) (Responsa of the Rashba, Siman 658). However, if the beis din sees fit to make a temporary order and force witnesses to swear that they are saying the truth they have the right to do so (Beis Yosef in the name of the Rosh). And see earlier, Siman 16, Seif 3, and later in Siman 71, Seifim 7 and 8. And there are those that say that when a cherem is made for testimony, even relatives must testify (Mordechai, beginning of Perek Shevuas Ha'eidus), and even the litigants themselves must testify (Tur, Siman 77).

And there are those that disagree (Responsa of the Rashba, Vol.1, Siman 657 and Responsa of the Rosh, Klal 6, Siman 21), and this is the accepted halachic position.

When is one obligated to testify?

SIMAN 28:1

The source of this *Halacha* is *Bava Kama* 55b.

There, the *Gemara* states,

> One who does not go to testify for his fellowman is exempt from *dinei adam* (as this is a matter of *Gerama*) but is held guilty in *dinei Shamayim*.

The *Gemara* asks: What is the case?

If there are two witnesses, they have an obligation from the Torah to testify, as stated in *Vayikra* 5:1 — "If he does not say, then he shall bear his sin"

Rashi explains there that this verse refers to two witnesses.

> If so, what is the *chiddush* that if they do not testify they are obligated in *dinei Shamayim*?

Therefore, the *Gemara* concludes that the *chiddush* is that even when this involves only one witness (who has the power to obligate a litigant in an oath), if he does not testify he is exempt from *dinei adam* but obligated in *dinei Shamayim*.

Why, in fact, is the witness exempt from *dinei adam*?

> Based on the above, the simple reason is that this is a matter of *Gerama* (indirect damage), which incurs no damage payment halachically.

The Nemukei Yosef (*Bava Kama* 24a), however, offers a different reason:

> If this would not be *Gerama* (but rather *Garmi* — meaning a sort of direct damage that generally does incur an obligation to pay), the witness (or witnesses) would nevertheless still be exempt for withholding testimony.

This is because of the fact,

> The Torah obligated them to testify is based on the principle of *gemilus chesed*, and one is not punished for not being *gomeil chesed*. Based on this, the Beis Yosef writes in *Avkas Rocheil Siman* 195 that if a witness will lose money by testifying, he is exempt from testifying, because a man is not obligated to lose money in order to perform a *chesed* for his fellow man.

Ketzos Hachoshen (*Seif Katan* 3) and the Nesivos Hamishpat (*Seif Katan* 1) both write that the obligation to testify also stems from the mitzvah of *hashavas aveida* (returning a lost object).

The Sefer Hachinuch writes,

> The obligation is included in *Lo taamod al dam rei'echa*.

Tosefos' Opinion

The Tosefos (ibid. *dibur hamas'chil peshita*) brings several *chiddush*im.

The Tosefos asks:

- Why does the *Gemara* ask that if the case is of two witnesses, this is an explicit verse in *Vayikra* (and therefore there is no *chiddush* in the *Gemara*)?
- This verse pertains only to a witness who violates his oath, meaning he swore that he did not know (as it states *veshama kol alah*) but not to other witnesses.
- How can the *Gemara* here be *mechadeish* that all witnesses who do not come forward to testify are obligated in *dinei Shamayim*?

The Tosefos answers that the verse refers not only to a witness that violated his oath, but rather that this sin applies to one who withholds evidence that he knows.

The Tosefos adds that the *issur* of the Torah,

> ("If he did not say then he bears his sin") applies only when witnesses testify in *Beis Din* (and there they state that they do not know).

> Only in such cases can they no longer testify case, as per the principle of "*keivan shehigid, shuv eino chozeir umagid* — once one speaks [in *beis din*] he cannot retract." However, if the witnesses said that they do not know outside of *beis din,* they are able to retract.

Therefore, the Beis Yosef concludes, as do the Tosefos that if witnesses withhold testimony outside of *beis din,* they are exempt (because what they say is in any case meaningless, as they can retract).

Conditions in which one is obligated to testify

The Tur lists the cases in which one is obligated to testify:

1. He knows needed information about his fellowman (the Beis Yosef explains that this comes to exclude one who knows testimony for a non-Jew, in which there is no obligation to testify).

2. He is a fitting witness to testify (the Beis Yosef explains that this comes to exclude a witness who is a relative or has a different sort of disqualification).

3. His fellowman derives benefit from his testimony (the Beis Yosef explains that this refers to a witness who, even if he does testify, will not cause anyone a monetary loss. A case could be where one saw the defendant commit a transgression that incurs no payment, such as when a defendant already confessed to this transgression and by a hint of doing so is not obligated to pay, and the like).

The Tur adds,

> This obligation to testify applies whether there is a sole witness or a pair — just as two witnesses can obligate one to pay money with their testimony, so, too, a sole witness can obligate a litigant to take an oath. This means he must come forward and testify, as a litigant may be ready to pay in order to avoid taking an oath.

The Shulchan Aruch brings the above ruling in short, adding the *Rishonim* brought by the Tur:

> Whoever knows testimony about his fellowman (i.e., as opposed to a non-Jew. This is the first condition) and is fit to serve as a witness (second condition) and his fellow man derives benefit from his testimony (third condition) is obligated to testify if he is called to do so (fourth condition).

As for the second condition,

> He must be fit to serve as a witness. A question arises if he is not fitting to serve as a witness but both litigants were willing to accept his testimony. The Shevus Yaakov (*Siman* 146) quotes the Baal Halachos Haketanos, who rules that such a witness is not obligated to testify because at the time that he witnessed the act in question, he was not a fitting witness. The Shevus Yaakov disagrees with this ruling, based on the reason brought by the Ketzos and the Nesivos Hamishpat above, that the obligation to testify stems from that of *hashavas aveida.*

Apparently, the Ketzos and Nesivos do not hold, that the fourth condition,

> Is necessary because the obligation of *hashavas aveida* does not require the party that loses the object to make any demand. This is in fact the ruling of the Shaar Hamishpat *Seif Katan* 2, that the witness must come forward even without being summoned.

However, the Imrei Bina states,

> While one is obligated to help return a fellow man his money, he is not obligated to trouble himself to come to *beis din*, just as in cases of *hashavas aveida* one does not have to trouble oneself to travel far away to return it. If he happens to be in *Beis Din* already, however, all opinions agree that he must testify.

Concerning the third condition,

> His fellow man can derive benefit from his testimony, the Tumim writes,
>
> > Even if the defendant is in any case obligated to take an oath, as in his denying the claim against him entirely (in which he must take a *shevuas heset*). If by the impact of this witness' testimony the defendant will become obligated in an oath of the Torah (as opposed to *shevuas heset*, which is a Rabbinic oath), he is obligated to testify, as this may cause the defendant not to deny the claim against him.

The Rama adds the words "in *beis din*" parenthetically,

> Which fits with what we learned from the Tosefos, that only a witness who is in *beis din* is obligated to testify, but while outside, in any case his words have no value as he has the right to retract them.

The Shulchan Aruch adds the closing of the Tur:

"WHETHER THERE IS ANOTHER WITNESS WITH HIM OR WHETHER HE IS ALONE"

The Shulchan Aruch then concludes with the *Gemara*:

> In addition, if he withholds his testimony, he is exempt from *dinei adam* and is obligated in *dinei Shamayim* (as in all cases of *Gerama*). The Sma adds that even if two witnesses withhold their testimony they are exempt from *dinei adam*.

The Sma (*Seif Katan* 11) is mechadeish,

I. Even if damage is caused to the defendant by withholding testimony.

II. This is in a case where he was asked to testify about a loan made with a signed document.

III. The witnesses know that the loan was paid and they withhold testimony.

IV. The witnesses later admit that they knew that the defendant was in fact exempt from payment, they nevertheless are not believed now (because of the rule "*shuv eino chozeir umagid*, meaning they cannot retract).

V. They do not have to pay.

The Sma (*Seif Katan* 1) brings a ruling in the name of the poskim. If the witness says that he cannot testify because he promised that this information would remain a secret with him, the law is that the one who told him that the information must be kept secret must allow him to say what he knows as testimony.

The defendant grabbed from the witnesses

The Shach (*Seif Katan* 2) brings the ruling of the Maharshal (Yam shel Shlomo, *Perek Hakoneis*, *Siman* 6), who holds,

> Whenever the ruling is that a *mazik* in *Gerama* is obligated in *dinei Shamayim*, if the defendant (i.e., damaged party) snatches something from the mazik's property, the snatched item is taken away from the defendant.

This applies here,

> As one who refuses to testify and causes a litigant a loss is a mazik through *Gerama* (because the witness' obligation is only in *dinei Shamayim*).

Therefore,

> The defendant has no right to grab the other's property.

The Maharshal adds,

> When the *mazik* through *Gerama* is exempt from *dinei adam*, one is not allowed to force him to pay — not even if attempts are limited to verbal threats alone. This is true even if he is obligated in *dinei Shamayim*.

Concerning the Maharshal's first ruling,

> When a defendant grabs an item it is taken from him, the Pischei Teshuva (*Seif Katan* 6) brings the opposing viewpoint, that of the Rashba and Ran, who hold that when the defendant is obligated in *dinei Shamayim*, if the claimant grabs from him this is effective (i.e., and he is not forced to return what he grabbed).

The Pischei Teshuva brings a "*chakira*" (a theoretical question raised in order to highlight a certain point):

> Is the claimant allowed to grab from the defendant and then claim "*kim li*," meaning, "I personally hold like the *Rishonim* who say that *tefisa*, the grabbing of the defendant's property, is effective. Therefore, I do not have to return what I've grabbed."

The Pischei Teshuva explains,

> In this case one cannot claim *kim li*, because of the *chiddush* of the Mishneh Lamelech (Laws of Loans, 4:6), that when the matter of *tefisa* is itself the subject of disagreement, *kim li* is ineffective.

The Meiri holds (in *Perek Hakoneis*),

> That one who is obligated to pay in *dinei Shamayim* and does not pay is disqualified as a witness.

The Rama adds several rulings:

Guidelines for a sole witness

The Rama begins with the ruling of the Hagahos Maimoniyos (Laws of Testimony, chapter 5),

> A sole witness can only testify concerning monetary matters that will obligate the defendant to take an oath. (This to exclude cases in which the defendant would not have to swear irrespective of the sole witness' testimony, such as when a defendant is disqualified from taking an oath for other reasons).

Otherwise,

> Concerning a matter involving distancing his fellowman from a transgression (even if it is unclear whether his fellowman will listen to him or not — Noda B'Yehuda, *Orach Chaim, Siman* 35). However, the witness may not testify concerning a transgression that has already taken place, as this can bring about no benefit, making his testimony nothing more than *motzi shem ra* (slander).

The Rama then quotes the Tur,

> One may not testify about something he does not know, as in cases where one wishes to relate another person's account of an event before the *beis din.* Such testimony is invalid even if the person speaking before the *beis din* knows that the eyewitness whose account he would like to tell over does not lie.

The Sma (*Seif Katan* 13) asks:

> But it states in the Torah "and he is a witness and he saw *or knew*…" which indicates that one can testify based on knowledge alone, even when one was not an eye-witness to a deed.

The Sma explains,

> The Torah's intent is to have knowledge of matters pertaining to the loan itself, such as the borrower's having admitted to him personally that he paid the loan, but not that one relies on the account of another person.

The Rama adds in the name of the Tur (what was brought earlier from the *Gemara*),

> Even if the claimant told him: Just come and stand together with my witness, don't testify, but be there and that will scare my defendant into thinking that I have two witnesses, so that he'll confess — this, too, is forbidden.

The Sma (*Seif Katan* 14) brings the *Gemara*'s explanation of the above. It states,

> "DISTANCE YOURSELF FROM A LIEING MATTER" (AND THIS IS CONSIDERED LIEING),

This is because perhaps through the fear of seeing two witnesses, a defendant will agree to a compromise to which he otherwise would not have agreed. The result would then be that the seeming witness caused him to lose money unfairly.

Placing a cherem so that a witness testifies

SIMAN 28:1

The source of this *Halacha* is the Responsa of the Rashba (Vol.1, *Siman* 657), who writes that a litigant can make a *cherem* in *shul* against anyone who does not come forward with testimony that could be to his advantage in a pending case.

The Rashba adds,

> That relatives of the one placing the *cherem* are not included in the *cherem*, because they in any case could not have testified on his behalf, as relatives are disqualified to testify for each other.

The Responsa of the Rosh (in *Klal* 6, *Siman* 21) also states,

> One can make a *cherem* so that the public will testify for. The Rosh as well holds that this *cherem* does not apply to the relatives or the people involved in the case, namely the claimant and defendant.

The Beis Yosef quotes the Mordechai (Shevuos *Siman* 760),

> Who also holds that one can place a *cherem* on a public so that those who have testimony come forward with it. However, unlike the *Rishonim* quoted above, the Mordechai holds that a general *cherem* applies even to those who are unfit to testify (although one could ask: what benefit the *cherem* has for them, as in any case their coming forward to testify has no value?).

The Shulchan Aruch gives a brief ruling based on the *Rishonim* above, writing that a man is allowed to place a *cherem*, while in a *shul*, asking that whoever knows information to come and testify.

The Rama adds in this *Seif* the ruling of the Rashba (Responsa, Vol. 1, *Siman* 658),

> While one can place a *cherem* on a public that they should testify, one cannot make them swear (that they know nothing about which to testify). However, if they do not come forward, they violate

"IF HE DOES NOT SAY, THEN HE BEARS HIS SIN" (*VAYIKRA* 5:1)"

The Sma (*Seif Katan* 15) explains,

> The difference between a *cherem* (that one may place) and an oath (that one may not force another to take) is that a *cherem* is applied generally and can be done easily, whereas an oath is individual, and the litigant does not have the power to make someone do this.

The Rama adds another ruling that while somewhat off the subject of the *Siman*, is nevertheless related, and that is the ruling of the Rashbatz (brought by the Beis Yosef).

> If the *beis din* sees fit to make a temporary order and force witnesses to swear that they are saying the truth (a case could be if the *beis din* sees that saying false testimony is viewed lightly by the masses, but speaking under oath is still taken seriously — as explained by the Sma, *Seif Katan* 16), they are allowed to do so.

This oath is not essential for the acceptance of testimony (i.e., it is not *mei'ikar hadin*). The Biur HaGra here refers us to *Siman* 15, *Seif*` 4, where the Rama ruled:

> "AND THEY [THE *BEIS DIN*] CAN EVEN FORCE ONE TO SWEAR IN AN INSTANCE WHERE THERE IS NO HALACHIC OBLIGATION TO SWEAR IF THEY DO SO IN ORDER TO CLARIFY THE TRUTH."

Does the cherem take effect on the litigants themselves and their relatives?

Afterwards, the Rama brings the Mordechai quoted above (in the wording of "and there are those that say"), stating,

> When a *cherem* is made in order to elicit testimony, even relatives must testify, as they are included in the *cherem*. The Mordechai adds that even the litigants themselves must testify (if either of them know information which could be valuable for the other party).

The Sma explains,

> These testimonies are collected in order to investigate the matter more deeply (but the question still remains, how will their testimony be used, as ultimately, they are invalid witnesses), but emphasizes that money certainly cannot be taken from a litigant based on their testimony.

The Rama comments on this that "there are those that disagree" (i.e., the Rashba and Rosh brought above), adding that the latter is the accepted halachic position ("*vechein ikar*").

There is a question,

> Concerning cases where a woman's testimony is accepted (*Sotah* and *igun*): Does a *cherem* apply to them and must they testify when called upon to do so?

The Rama, in Responsa, *Siman* 179 rules,

> A woman does not have the title of "witness," and therefore is not included in the verse from *Vayikra* brought above. The Shaar Hamishpat, *Seif Katan* 30, however, rules that women are obligated to testify based on the verse "*al taamod al dam rei'echa*. If they withhold testimony, they transgress this verse. Therefore, a *cherem* certainly does apply to women as well.

Questions and Answers

1. What is the *Halacha* concerning one who does not go to testify for his fellowman?

   One who does not go to testify for his fellowman is exempt from *dinei adam* (as this is a matter of *gerama*) but is held guilty in *dinei Shamayim*.

2. Does the above apply to two witnesses or even to a sole witness?

   This is in fact the question of the *Gemara*, which asks: What is the case? If there are two witnesses, they have an obligation from the Torah to testify. If so, what is the *chiddush* that if they do not testify they are obligated in *dinei Shamayim*? Therefore, the *Gemara* concludes that the *chiddush* is that even when this involves only one witness (who has the power to obligate a litigant in an oath), if he does not testify he is exempt from *dinei adam* but obligated in *dinei Shamayim*.

3. Why in fact is the witness exempt from *dinei adam*?

   The simple reason is that this is a matter of *gerama* (indirect damage), which incurs no damage payment halachically.

   The Nemukei Yosef, however, offers a different reason: If this would not be *gerama* (but rather *garmi* — meaning a sort of direct damage that generally does incur an obligation to pay), the witness (or witnesses) would nevertheless still be exempt for withholding testimony. This is because the fact that the Torah obligated them to testify is based on the principle of *gemilus chesed*, and one is not punished for not being *gomeil chesed*. The matter of returning a lost object as well does not incur for them a monetary obligation.

4. Doesn't the obligation to testify apply only when a litigant lies?

   No. The Tosefos explains that the verse refers not only to a witness that violated his oath, but rather that this sin applies to one who withholds evidence that he knows.

5. Do witnesses transgress by withholding testimony outside of *beis din*?

   Tosefos holds that the *issur* of withholding testimony applies only when witnesses testify in *Beis Din* (where they state that they do not know). Only in such cases can they no longer testify in this case, as per the principle of "*keivan shehigid, shuv eino chozeir umagid*" — once one speaks [in *beis din*] he cannot retract. But if witnesses said that they do not know outside of *beis din*, they are able to retract.

   According to other reasons brought in the lesson, this *issur* always applies.

6. Give the conditions listed by the Tur that obligate a witness to testify?

   1. He knows needed information about his fellowman (the Beis Yosef explains that this comes to exclude one who knows testimony for a non-Jew, in which there is no obligation to testify). 2. He is a fitting witness to testify (the Beis Yosef explains that this comes to exclude a witness who is a relative or has a different sort of disqualification). Such a witness is of course not obligated to testify. 3. His fellowman derives benefit from his testimony (the Beis Yosef explains that this comes to exclude a witness who even if he does testify, he will not cause anyone a monetary loss. A case could be where he saw the defendant transgress in a way that incurs no payment, such as the defendant confessed beforehand and testimony will not obligate him to pay and the like).

7. What is the law if a witness says that he cannot testify because he promised that this information would remain a secret with him?

   If the witness says that, he cannot testify because he promised that this information would remain a secret with him, the law is that the one who told him that the information must be kept secret must allow him to say what he knows as testimony.

8. If a defendant grabs the property of a witness who is obligated to testify for him in *dinei Shamayim*, is this *tefisa* (grabbing) effective?

   The Maharshal holds that whenever the ruling is that a *mazik* in *gerama* is obligated in *dinei Shamayim*, if the defendant snatches something from the *mazik's* property, the snatched item is taken away from the defendant. This applies here, as one who refuses to testify and causes a litigant a loss is a *mazik* through *gerama* (because the witness' obligation is only in *dinei Shamayim*). Therefore, the defendant has no right to grab the other's property.

The Pischei Teshuva brings the opposing viewpoint, that of the Rashba and Ran, who hold that when the defendant is obligated in *dinei Shamayim*, if the claimant grabs from him this is effective (i.e., and he is not forced to return what he grabbed).

9. Is the claimant allowed to grab from the defendant and then claim "*kim li*," meaning, I personally hold like the *Rishonim* who say that *tefisa*, the grabbing of the defendant's property, is effective. Therefore, I do not have to return what I've grabbed?

   No. The Pischei Teshuva explains that in this case one cannot claim *kim li*, because of the *chiddush* of the Mishneh Lamelech, that when the matter of *tefisa* is itself the subject of disagreement, *kim li* is ineffective.

10. If a claimant places a *cherem* on people so that they come to testify, does this *cherem* apply to relatives or the litigants themselves?

    There are two opinions on this among the *Rishonim*, and the Rama rules that the *cherem* does not apply to them.