THE YESHIVA PIRCHEI SHOSHANIM SHULCHAN ARUCH PROJECT

Loans Shiur One

Mareh Makomos for this Shiur

Bava Basra 175a-176a

Kidushin 13b

Rif (Bava Basra 83a in the pages of the Rif)

Rambam (Laws of loans 11:4)

Rosh (Bava Basra 10:49 and Bava Kama 1:14)

Ramban, Rashba and Ritva (Kidushin, ibid.)

Arachin 22a

Gittin 50a and Tosfos dibur hamas'chil keivan

Imrei Bina (Laws of loans, Siman 2)

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Shiur

1

Introduction to the laws of loans

After learning the laws of testimony, which focus on witnesses who testify in *Beis Din* due to a quarrel between two parties in which the truth must be determined, we come to the laws of a *shtar*. This area deals with evidence that is in the hands of any sort of beneficiary from the outset of a mutual arrangement between the one who bestows and the one who receives, so that the beneficiary can use it if need be to prove his right to what he received.

What we will not be learning in the laws of loans:

We will not learn the parameters of the *mitzva* of lending money (*Im kesef talveh*…), whose *dinim* we will learn *iy"H* in *Siman* 97.

We also will not be learning the laws of the procedure for collecting money from estates, and the order of priorities regarding this, such as collecting from buyers, inheritors or while not in one's presence and the like, as these rulings are dealt with in *Siman*im 97-119.

We also will not be learning the *dinim* of how payments are actually made and when a borrower has finished payment of his loan, and the laws of *shelichus* for payment or collecting of debts, which are explained in *Siman*im 120-125. The time by which loans must be paid will be learned in *Siman* 73-74.

There are two types of **המחאת חוב** that will be studied in separate *Siman*im (126 and 66).

Subject of the laws of loans:

In the *Siman*im before us, we will focus mostly on the kashrus of *shtaros* (contracts), how they are written and signed. Throughout, we will see how *Chazal* consistently prevented any deviation, additional obligations not agreed upon by the two sides, any act of fraud or forgery, not against the one obligated by the *shtar* nor against others, to the extent that *Chazal* at times disqualified any *shtar* that could have such a possibility.

The validity of a shtar as evidence

It is worth recalling what we learned in Lesson 6 of the Laws of Testimony, in *Siman* 28, that testimony in a *shtar* should seemingly not be accepted, because *Chazal* learn from the verse "from the mouth of two witnesses," that testimony is only accepted if said before the *beis din* by witnesses, as it states " **מפיהם, ולא מפי כתבם**". Certain *poskim* hold that if this *shtar* does not have the status of a *kasher shtar*, then this is not fit to be accepted at all, not even as evidence of the facts recorded in it, and this will be explained further in *Siman* 39, which we are about to begin.

Siman 39 Seif 1

Siman 39: Writing a shtar for the borrower without a lender and for which admissions do we write (17 Seifim)

1 One who loans to his fellow man with witnesses or he admitted before witnesses that he owes him, this is called an oral loan and one does not collect from encumbered property, and one who loans to his fellow man with a shtar [collects from encumbered property].

Explanation of the seifim:

The types of loans mentioned by Chazal

SIMAN 39:1

We learned in the *Mishna* (*Bava Basra* 175a-b) that one who loans to his fellow man with a *shtar* collects from *meshu'abadim* (from encumbered properties), one who loans before witnesses (but without a *shtar*) collects only from *bnei chorin* (unencumbered properties). If he (the lender) produces a hand-written note that he owes him he collects only from unencumbered properties (*bnei chorin*),

With this, Chazal have enumerated three types of loans:

1. **An oral loan**: This is a loan that has no documentation, whether there are witnesses or not (we will learn about the ban on loaning without witnesses and the need to write a *shtar* in *Siman* 70, *seif* 1).

2. **A loan recorded in a shtar with witnesses**-A loan whose documentation is supported by witnesses who saw the debt as it was incurred, whether they saw the actual loan take place or heard the admission of the *baal din* that he owes the lender. In addition from this testimony a *shtar* was made at the behest of the one owing the money, which they signed and delivered to the lender so that he would have it as evidence (we will learn later, *iy"H,* that included in this classification is another type of loan, one that includes a *kinyan*, which according to many *poskim* has the full status of a loan with a *shtar*, even if no document was written).

3. **A note written in the borrower's own hand**-A loan documented by the writing of the borrower himself, who testifies to the debt. This text is binding based on the borrower's own admission ("*hodaas baal din*").

Their respective dinim:

With an **oral loan**, one does not collect from encumbered property (to be explained). The borrower is also believed to say "*parasi* — I paid my debt" even if the loan was done before witnesses. Clearly, as long as witnesses do not testify on the loan before *beis din*, and all the more so if there were no witnesses to the loan, the borrower can deny the debt by saying **"לא היו דברים מעולם"** , -- i.e., this loan never took place.

A **shtar with witnesses** has the advantage of being a physical proof of and attestation to the debt, and with it a borrower cannot deny that the loan took place.

Furthermore, it has two additional characteristics:

1. The borrower is not believed if he later claims that he already paid, because had he done so, he should not have allowed the *shtar* to remain with the lender, but rather should have torn it up himself.

2. Should the borrower have no assets to collect from when the time of payment arrives, the lender can collect his debt from the *lekuchos*, meaning from properties that people bought from the borrower after the writing of the *shtar* and did not leave enough property with the borrower to pay his debt. Since a lien was placed on these properties at the time of the loan, *Chazal* call this "collecting from *nechasim meshu'abadim* (encumbered property). We will learn further on that in certain cases, even if a *shtar* was not yet written, if the witnesses are able to write it, this is enough for the *dinim* of a loan with a *shtar* and witnesses to apply.

A handwritten note of the borrower is valid as it is an admission of the *baal din* on the loan itself. Therefore, the *shtar* is a proof of the loan and the borrower is not believed to say, "This loan never took place." Beyond this, however, such a *shtar* does not empower the lender to collect from *Meshuabadim*, and as for whether the borrower can claim *parasi*, the *poskim* differ if this is likened to a *shtar* with witnesses or not, as will be explained in *Siman* 69.

The basis for the difference in oral and written loans concerning collection from *meshu'abadim*

In the *Gemara* (ibid.-175b), the *Amoraim* differ as to the reason for this differentiation:

According to **Ulla**,

> Under Biblical law every loan places a lien on the possessions of the lender, so that the lender has the ability to collect his debt. *Chazal* call this a "*Shibuda d'Oraisa*." Therefore, whether recorded or oral, every loan can be collected from land that was sold by the borrower after the loan took place.
>
> Why, then, did the *Chachamim* state in the *Mishna* that for an oral loan one does not collect from *Meshuabadim*?
>
> This is because of *peseida delekuchos* (losses incurred by the buyers).

In other words,

Chazal feared that since oral loans are generally done privately, as the borrower is interested in keeping the matter a secret (see **Rashbam** *Bava Basra* 42a, *dibur hamas'chil yazif*). Therefore, even if the loan was done before witnesses, since no document was made, the loan was never publicized and the buyers lacked the possibility of verifying whether there was a lien on this property or not.

SHOULD THE LENDER COLLECT FROM THESE PROPERTIES, THE INNOCENT BUYERS LOSE OUT

This, however,

> Is not the case with a loan done with a *shtar* and witnesses, as there, the witnesses are commanded to make a *shtar* to serve as proof of the debt for the lender, and this generates a *kol* (literally a "voice," meaning news of the loan spreads and is made public). Now, purchasers are expected to beware and avoid buying properties from the lender if sufficient assets do not remain with him to be able to pay his debt from the *bnei chorin*. If the buyers fail to do so, they have only themselves to blame for their loss.

This is also the position of **Rabbi Yochanan** and **Reish Lakish**, who hold "*Shibuda d'Oraisa*." Further on, we will see statements of other *Amoraim* appearing elsewhere in *Shas* that, while not explicitly stating that they hold *Shibuda d'Oraisa*, seem to imply that this is their position as well.

According to **Raba**,

> There is no *Shibud* at all under Biblical law ("*Shibuda lav d'Oraisa"*), and even a loan recorded with witnesses does not allow for collecting from *Meshuabadim*.
>
> Why, then, does the *Mishna* state that for a loan with a *shtar*, the lender collects from *Meshuabadim*?

The *Chachamim* made this *takana*,

> "SO AS NOT TO LOCK THE DOOR IN THE FACE OF BORROWERS"
>
> Meaning *Chazal* perceived that without sufficient guarantees for debt-collection, creditors would avoid lending money.

Why, then, was the same not done for oral loans?

> This is because for an oral loan, there is no *kol* or publicizing of the loan. Therefore, buyers may end up purchasing properties with liens on them. To prevent *peseida delekuchos*, the *Chachamim* left the Biblical law unchanged, that there be no *Shibud*.

This is the opinion of **Rav** and **Shmuel**,

> An oral loan is not collected from inheritors or from buyers because "*Shibuda lav d'Oraisa*." Only the *meforshim* (the **Shach** and **Ketzos Hachoshen**) write that unlike **Rav Pappa** (see further, "is a *Shibud* Biblical or not — the *Halacha*"), their opinion is that this is true also for financial obligations incurred by an explicit verse in the Torah (a **"מלוה הכתובה בתורה"),** such as the money paid in a *pidyon haben*.

The terms "meshu'abadim" and "bnei chorin"

In general, the term *Meshuabadim* mentioned by *Chazal* and the *poskim* refers to properties that were in the borrower's possession at the time of the loan (and in certain cases, also properties that he received after the loan), and by the date of payment of the loan they have been sold and are in others' possession. *Bnei chorin* are properties that remain with the borrower. The *Chachamim* differed in their explanation for the use of these terms:

1. The **Rashbam** (*Bava Basra* 175a, *dibur hamas'chil Meshuabadim*): *Chazal* called them *Meshuabadim* because they are sold properties. The **Bach** (*seif* 1) explains that the **Rashbam's** intent is that these properties are now *Meshuabadim* to their new owners, as opposed to *bnei chorin,* which have this name to express that they are not *Meshuabadim* to any other owner, but rather are free to be collected by the creditor.

2. The **Beis Yosef** (*seif* 1-2) explains that the term *Meshuabadim* expresses that despite their now being in the possession of the buyer, they remain with a *Shibud*, a lien, to the creditor. The **Drisha** (*seif* 1) explains that they are called *Meshuabadim* because it is only now that their *Shibud* comes to actualization. This, unlike properties still held by the borrower, for which the lender does not need to invoke the law of *Shibud* to actualize his right of collection. Therefore, these are called *bnei chorin*. The **Drisha** holds that this is in fact the opinion of the **Rashbam** brought above as well.

The reason for the shibud according to those who hold shibuda d'Oraisa

The **Imrei Bina** (Laws of loans, *Siman* 2) brings three approaches among the *Rishonim* on the essence and functioning of a *Shibud*. Clarifying these approaches now will assist us greatly in understanding the differences between the *shitos* and their many details in this very wide-ranging *sugiya*.

This is a *svara,*

> As there is surely an agreement between lender and borrower at the time of a loan that certain guarantees be in place. This is predicated on the *chazaka* that a man does not throw his money away. On the basis of these guarantees, the lender assumes that he will get his money back. Therefore, the borrower willingly entitles the lender to the right of a *Shibud* in all of his properties. This is not a complete *kinyan* that would give the lender full rights to the borrower's property. Rather, this is a *Shibud*, a lien, and until the actual collection, the properties are in the possession of the borrower, and he can sell them to whomever he wants. If the time of payment comes and the borrower cannot pay his debt, the lender can collect the sold properties from the buyers, because his right of *Shibud* preceded their purchase.

According to this *svara*,

> It would seem that the *Shibud* goes into effect only for what the lender knew he had as a security, but not for movable property, which offers no security, as it can be hidden away. Properties the borrower purchased after the loan would also have no *Shibud.*
>
> The **Ketzos Hachoshen** (*seif katan* 1) proves from the fact that one collects a loan written in the Torah (such as the money for *pidyon haben* and the like) from *Meshuabadim* that "*Shibuda d'Oraisa*" does not stem from a convention or agreement between people to place a lien, because in these types of loans it was the Torah that placed the obligation and not the parties involved.

This *svara* alone is not reason enough for the *Shibud* to go into effect,

> This is because even if it is the will of both sides, it is impossible to bestow property to another in a partial way. Meaning, all a person can do is make a complete sale and transfer of ownership of property, so that it is no longer his but the buyer's. A *Shibud* is not like this, because so long as a *Shibud* is not actualized through collection, the property is in the possession of the one who was *meshabeid* it, to sell it or give it to another, and therefore it cannot be put into effect. However, from the verse that speaks of a borrower's obligation to provide a lender with a *mashkon* (collateral) for the purpose of collecting his debt, "…the man to whom you lend shall bring the security to you outside" (*Devarim* 24:11), we learn that the Torah was *meshabeid* the borrower's property so that it should serve as a "*kinyan shel chatza'in*," a "half-way purchase" for the benefit of the lender.

According to this *svara*,

> It would seem that the same *Shibud* applies to both land and movable property, as the Torah was *meshabeid* all of the borrower's assets. Furthermore, it would seem that the borrower cannot enlarge the *Shibud*, such as by obligating himself to pay from the superior part of his land and not the average (see further).

A third opinion,

> Is that a *Shibud* is a direct consequence of the *mitzva* of *priyas baal chov*, which is a *mitzva* unlike the *Mitzvos* that are incumbent on a person himself, such as building a *sukkah* and taking hold of a *lulav*. For the latter *Mitzvos*, we do not go to one's estate to have a *sukkah* built or *lulav* purchased against his will. By contrast, for a *mitzva* that the Torah commands to fulfill by paying money, one does go to a person's estate to fulfill this *mitzva* against his will.

According to this *svara*,

> It would seem that properties bought even after the loan had a *Shibud* to the lender, because as long as the lender is under obligation to fulfill this *mitzva*, the *Shibud* is in effect on his property. On the other hand, if the borrower is in a situation where he is exempt from the *Mitzvos*, this apparently would prevent a lender from collecting from his properties.

Shibuda d'Oraisa or Shibuda lav d'Oraisa — the Halacha

The **Shach** (*Seif Katan* 2) analyzes the question of *Shibuda d'Oraisa* or not *d'Oraisa* at length, delving into the differences among the *poskim*. What follows is a synopsis of the *seif* and other *nossei keilim*, *iy"H*:

The *poskim* that seek a final ruling analyze statements of **Rav Pappa** which appear contradictory. On the one hand, it states in *Bava Basra* 176a "*Hilchasa*" that one collects an oral loan from inheritors, so as not to lock the door in the face of borrowers. This reason applies for the one who holds *Shibuda lav d'Oraisa*, because if not, the reason given should have been *Shibuda d'Oraisa*, meaning since the *Shibud* was in effect while their father was alive, it does not fall away after his death, and is still collected from the inheritors. If so, this seems a proof that **Rav Pappa's** final ruling was that *Shibuda lav d'Oraisa*.

Just the opposite however, appears to be the case in *Kidushin* 13b.

> There, the *Gemara* debates a case where a woman was obligated to bring a *Korban* but died before she could do so. The *Gemara* questions when it is that her inheritors are obligated to bring her *Korban*. One of the *Amoraim* states that even if the woman did not set aside this *Korban* in her lifetime, the inheritors are obligated to bring it, and the *Gemara* concludes with **Rav Pappa's** statement that the *Halacha* is that an oral loan is collected from the orphans because of *Shibuda d'Oraisa*!

The **Rif** (*Bava Basra* 83a in the pages of the **Rif**)

> **Rav Pappa's** explicit statement that *Shibuda d'Oraisa* is the essential statement and this is the *Halacha*. When **Rav Pappa** gave the reason (in *Bava Basra*) of not locking the doors in the face of borrowers, this did not come to explain the reason for the principle of a *Shibud*, but rather to explain why, when *Chazal* did away with a *Shibud* for an oral loan, they did not do so for collection from inheritors, which they left as the *din d'Oraisa*. So, too, holds the **Rambam** (Laws of loans 11:4) and the **Smag** (*Essin*, 94), that "*Shibuda d'Oraisa*." The **Shach** also quotes the **Beis Yosef** (*seif* 1-2), who explains the law of collecting from *Meshuabadim* for a recorded loan, that it is because of *Shibuda d'Oraisa*, and that this is also the final ruling of the **Maharshal** (**Yam Shel Shlomo** *Bava Kama* 1:16).

The **Tosefos** (*Bava Basra* 176a, *dibur hamas'chil goveh*, *Kidushin* 13b, *dibur hamas'chil amar* and others).

> The obligation to bring a *Korban* is the subject of the *sugiya* in *Kiddushin*, which is a Biblical obligation called by *Chazal* a "*milveh hakesuva baTorah*," a financial obligation which we would not have understood had it not been commanded explicitly by the Torah. Only in this case does **Rav Pappa** hold that *Shibuda d'Oraisa*, and so, too, for other debts of this sort such as *arachin*, damages, *pidyon haben* and the like. However, these cannot be compared to a debt that stems from an agreement between people, such as a loan, sale or the like, where it is not the Torah that placed an obligation but rather the person himself. In these cases, **Rav Pappa** holds that *Shibuda law d'Oraisa*, and this is the subject of the *sugiya* in *Bava Basra* and, so, too, is the *Halacha*.

The **Shach** notes that this is also the opinion of many other *Rishonim*, such as the **Mordechai** (*Bava Basra Siman* 653), **Baal Haterumos** (Shaar 61, *Chelek* 1, *Siman* 2 in the name of the **Raavad**), the **Baal Ha'Itur** (*Acharayus*, fourth *maamar*) and the **Tosfos** Rid (*Kiddushin*, ibid., *dibur hamas'*chil *goveh*), all of whom agree that *Shibuda lav d'Oraisa.*

The opinion of the **Ramban**, **Rashba**, **Ritva** (ibid. *Kiddushin*) and others:

> These *Rishonim* reject the differentiation made by **Tosfos**, because **Rav Pappa's** statement was made "*stam*," meaning unqualified and from his phrasing one can infer that no differentiation should be made between a *milva hakesuva baTorah* and other debts. Rather, the *dinim* should be the same in all cases (see the **Ritva**, who brings other claims against **Tosfos**' differentiation that go beyond the scope of this lesson). On the other hand, they also reject the **Rif's** position, holding that his explanation of **Rav Pappa's** explanation in *Bava Basra* is forced and goes against the *Gemara's* plain meaning. Moreover, in a third place, one can infer from **Rav Pappa's** statement that he in fact holds that *Shibuda lav d'Oraisa* (as will be explained).

As for a Halachic ruling, however, these *Rishonim* agree in principle to the **Rif's** position that *Shibuda d'Oraisa*, but for other reasons.

> In *Arachin* 22a, the *Amoraim* differ over the reason *Chazal* said that in general, one does not pay debts from the property of orphans who have not yet reached the age of *Mitzvos*. **Rav Pappa** holds that this is because paying a debt is a *mitzva*, and the young orphans have not yet reached the age of *Mitzvos*. **Rav Huna berei deRav Yehoshua** holds that in principle, there is no reason to prevent collection from young orphans, but *Chazal* fear that perhaps their father already paid the lender and the orphans are not old enough to verify this. Therefore, **Rav Huna berei deRav Yehoshua** holds that if the *beis din* is positive that their father did not pay anything to the lender, such as he was placed in *nidui* for lack of payment, and until his death this *nidui* was not removed, one does collect from the orphans. In the *Gemara*, the *Halacha* is ruled according to **Rav Huna berei deRav Yehoshua**.

These *Rishonim* hold,

> The *Machlokess Amoraim* concerns whether the *mitzva* of paying a debt is what obligates the lender, and not the *Shibud*. This is because *Shibuda lav d'Oraisa*, which is the opinion of **Rav Pappa**; or, *Shibuda d'Oraisa* and therefore a *Shibud* is in effect for the properties and this is what obligates the payment, and not simply the obligation to do the *mitzva*, which is the opinion of **Rav Huna berei deRav Yehoshua**. Since the *Gemara* states that the *Halacha* is like **Rav Huna berei deRav Yehoshua**, this means that the *Halachic* ruling is that *Shibuda d'Oraisa*.
>
> The **Shach** holds that this is not a proof, because one can say that **Rav Huna** agrees that *Shibuda lav d'Oraisa*, but it is enough for a *Shibuda de*Rabbanan (in this case, the *takana* of not locking the door in the face of borrowers) to obligate collection from the orphans.

In *Gittin* 50a, **Rava** states that under Biblical law, one collects debts incurred from damages from the "*idis*," the superior land of the orphans. From this statement, we see explicitly that under Biblical law, one collects a father's debt from orphans, meaning **Rava** holds that *Shibuda d'Oraisa*. The **Ritva** brings this proof, noting that **Rava** is the *basrai* (the most latter *Amoraic* opinion), and in a *Machlokess Amoraim*, the *Halacha* like is the *basrai*.

> The **Shach** rejects this proof, because **Rava** stated this concerning a debt based on damages, *Nezikin*, and we already learned above that a *milveh hakesuva baTorah* is different, as all opinions agree that for this type of debt, the law is *Shibuda d'Oraisa*. However, the **Shach** concludes that this is not a question against the **Ritva**, because as was said above, the **Ritva** did not accept this differentiation. Therefore, this is a proof within the **Ritva's** own *shitah*.

Further on, the **Shach** notes that in the same *sugiya*, **Rava's** position above (in 2) is brought even for a *milveh* that is not written in the Torah, from which we can infer that **Rava** holds *Shibuda d'Oraisa* in all loans, and a proof of this is bought from the **Rashba** (*Gittin*, ibid.).

> The subject here is if the borrower was explicitly *meshabeid* to pay the lender from the most superior of his properties, the *idis*, which is more than he is required to pay (as the law for a debtor is to pay from average land, called "*beinonis*").

Mar Zutra holds in the name of his father, **Rav Nachman**,

> If this borrower dies and the creditor comes to collect from the orphans, he collects only from the *ziburis*, meaning the most inferior of his land, just as he would have collected had their father not made any additional obligations.

Abaye brings a support for **Rav Nachman**,

> Just as we see by the collection of a debt where no conditions were made, that from the borrower himself one collects average land (as per *Chazal's takana* to collect from average land so as to encourage creditors to lend money), one nevertheless collects *ziburis* from orphans. The same *din* applies for this unique sort of loan, that one collects *ziburis* from the orphans despite the fact that had collection been made from the father, it would have been done differently (i.e., from the *idis*).
>
> **Rava** objects to **Abaye's** proof, holding that specifically concerning a regular loan, which from the Torah is only collected from *ziburis*, did *Chazal* say that even though for all loans the creditor collects from average land, due to the *takana* for orphans, *Chazal* left the original law of the Torah in place and collection is done from the *ziburis*.

In the above case,

> However, where the borrower was explicitly *meshabeid* to pay the lender from the most superior of his properties, under Biblical law the collection is from the *idis*. Therefore, it is proper to collect *idis* from the orphans as well. If so, it would seem from here a clear statement that **Rava** holds *Shibuda d'Oraisa* even concerning loans that are not written in the Torah!

The **Shach** replies to this (based on the **Rashba**) that in a case where a borrower makes an explicit *Shibud* on his properties, even those who hold *Shibuda lav d'Oraisa* would admit that here the *Shibud* does go into effect under Biblical law (see lesson 2, "An explicit *Shibud*"). If so, **Rava** can also hold that *Shibuda lav d'Oraisa*.

> The **Shach** counters the *Rishonim's* proof from **Rava** that in the above *sugiya*, noting that **Rava's** statements are not the *halacha* because **Rav Nachman** disagrees with him, as do **Abaye** and **Mar Zutra**. **Tosfos** (ibid. *dibur hamas'chil keivan*) states that these differing opinions hold that *Shibuda lav d'Oraisa*, and one should rule like this majority.

The **Ketzos Hachoshen**, however, brings a very difficult question of the **Pnei Yehoshua** (*Gittin* 50a, *dibur hamas'chil emtza davar, i nami*): Based on what we learned earlier.

It should come out that the *poskim* who hold *Shibuda d'Oraisa* rule like the *shitah* of **Rava**, that when the borrower stipulates that he will pay from superior land, we should collect superior land from the orphans as well.

This is not the case, however,

> This is because the **Rif** and other *Rishonim* hold like the majority of *Rishonim* and rule like **Rav Nachman** and **Abaye**, and not like **Rava**, despite the fact that they hold *Shibuda d'Oraisa* (see there, as he asks further against **Abaye** [*Pesachim* 30b] that a creditor can collect retroactively, and this perforce stems from *Shibuda d'Oraisa*. See the **Ketzos Hachoshen**, whose analysis is beyond the scope of this lesson).

Based on this,

> The **Ketzos Hachoshen** is *mechadeish* against the **Shach** that it would seem that both **Abaye** and **Rava** hold that *Shibuda d'Oraisa*, but since the case here is one where a person places a *Shibud* on himself that the Torah never placed, one must ask if a person can create a *Shibud* which is only a partial *kinyan*, because **Abaye** holds that there is no such thing as partial bestowing (no "*hakna'ah lechatza'in*"), and a *Shibud* of superior land would not go into effect under Biblical law. **Rava** holds that a person can be *meshabeid* his properties under Biblical law (see above, "Explanation of *Shibuda d'Oraisa*" 1, 2 and in the following lesson, "An explicit *Shibud*").

We learned that in *Bava Basra*, **Rav** and **Shmuel** disagree with **Rabbi Yochanan** and **Reish Lakish**. The *Rishonim* write that the basic law is like **Rabbi Yochanan**, as in psak *Halacha* the rule is that in a *Machlokess* **Rav** or **Shmuel** against **Rabbi Yochanan**, the *Halacha* is like **Rabbi Yochanan**, who holds that *Shibuda d'Oraisa*.

> The **Shach** holds that this is insufficient, because as was said above, **Rav Pappa** argues on this and the rule is that the *halacha* is like the *basrai* (the latter *Amora*), and **Rav Pappa** lived in a later era than **Rabbi Yochanan**. Moreover, the *Halacha* is like **Rav Nachman**, **Abaye** and **Mar Zutra**, who hold that *Shibuda lav d'Oraisa*, and it appears that this is the tacit conclusion of the *Gemara*, all of which supersedes the rule that when **Rav** or **Shmuel** argue against **Rabbi Yochanan**, the *halacha* is like **Rabbi Yochanan**.

Machlokess Acharonim in the opinion of the **Rosh**

> The **Maharshal** (**Yam Shel Shlomo**, ibid.) holds that one should adopt the explicit statement of the **Rosh** in *Bava Basra* 10:49 that we hold that *Shibuda d'Oraisa*. The **Shach** holds that this is not a proof, because we find in numerous instances that the **Rosh** quotes the wording of the **Rif** even if he does not hold like him halachically, and this is one such instance.
>
> The **Shach** states: One can prove from *Bava Kama* 1:14, where the **Rosh** holds that *Shibuda de*Rabbanan, as there (12a) the *Gemara* discusses if an *eved* has the status of land or movable property. The **Rosh** concludes (9:6) that in matters of Torah law, the *eved's din* is like land, as the Torah places an *eved* together with land, whereas in matters that are *de*Rabbanan, an *eved's din* is like movable property.

Further on,

> The *Gemara* cites **Rav Nachman**, that a creditor cannot collect his debt in *avadim* that were inherited by orphans because no lien to the creditor was ever placed on the orphans' movable property. There, the **Tosfos** (*dibur hamas'chil ana*) and the **Rosh** (ibid.) explain that **Rav Nachman** holds that *Shibuda de*Rabbanan. Therefore, the rule is that in *de*Rabbanan matters, the *eved* has the status of movable property. From here, we see that the **Rosh** rules like this statement of **Rav Nachman**, clearly that *Shibuda de*Rabbanan.

The **Ketzos Hachoshen** (*seif katan* 1) rejects this proof,

> This is because even if we say *Shibuda d'Oraisa*, nevertheless, in this specific discussion we relate to this as a matter *de*Rabbanan. The **Ketzos Hachoshen** explains that although the Torah sets down that *Shibuda d'Oraisa*, the Torah itself did not differentiate between land and movable property, and under Biblical law, both have the same *Shibud* (see further on, "A *Shibud* on movable property").

Rather, *Chazal* made a decree to differentiate between them, ruling that movable property of orphans is different from their land possessions.
Therefore, when we seek to determine if *avadim* have the status of land or movable property concerning this matter, we must understand the context in which this is said. Since we determined that in matters that are *de*Rabbanan, *avadim* have the status of movable property, this is why they are not collected from orphans, and this is what **Rav Nachman** meant (see **Ketzos Hachoshen**, who brings proofs for this statement that exceed the scope of this lesson).

Summary of the shitos of the Rishonim:

1. According to the **Rif**, **Rambam**, **Smag**, **Ramban**, **Rashba** and **Ritva** (and some say the **Rosh** as well), *Shibuda d'Oraisa*.

2. According to the **Tosfos**, **Mordechai**, **Baal Haterumos** in the name of the **Raavad**, the **Baal Ha'Itur** and the **Tosfos** Rid (and some say the **Rosh**), *Shibuda lav d'Oraisa*.

Ruling of the Acharonim

1. The **Shach** leans in the direction of ruling that *Shibuda lav d'Oraisa*, but concludes that he does not have the power to be *machria* (issue a final ruling) in light of the many weighty opinions on either side. However, he leaves the matter as a *sefeika dedina*, in which case the *muchzak*, the one in possession, can say "*kim li*" (I hold like such-and-such *shitah*).

2. The **Beis Yosef** and **Maharshal** rule that *Shibuda d'Oraisa*, as said above, and so holds the **Tumim** (*seif katan* 2). The **Tumim** adds that in light of such great *poskim*, one must make a ruling, and unlike the **Shach** holds that one cannot say, "*kim li* like those who hold *Shibuda lav d'Oraisa*." So, too, rules the ***Beur Hagra*** (*seif katan* 3), the **Pischei Teshuva** (*seif katan* 1) and the **Mishkenos Yaakov** (Siman 21) and this, in principle, is the *halacha*.

Questions and Answers

1. What are the types of loans mentioned by *Chazal*?

a) A loan made with a *shtar* and witnesses, b) an oral loan, c) a loan documented by the writing of the borrower himself and [d) a loan with a *kinyan*]

2. What are the differences between an oral or written loan?

With an oral loan, one does not collect from encumbered property. The borrower is also believed to say "I paid my debt." And if there were no witnesses to the loan, the borrower can deny the debt entirely.

A loan with a *shtar* with witnesses — the borrower cannot deny that the loan took place or claim that he paid already, and the lender can collect his debt from *nechasim meshu'abadim* in the hands of the *lekuchos*.

A handwritten note of the borrower – the borrower cannot deny that the loan took place, but the lender cannot collect from *Meshuabadim*.

3. Why is an oral loan not collectible from *Meshuabadim*?

Since oral loans are generally done privately, and the witnesses honor the borrower's will that the matter be kept a secret, the buyers lacked the possibility of verifying whether there was a lien on this property or not. Should the lender collect from these properties, the innocent buyers lose out. Because of this loss, *Chazal* said that even if *Shibuda d'Oraisa*, one does not collect from the buyers. In addition, even those who hold that the *Shibud* on a borrower's property is a *takana* of the *Rabbanan*, for an oral loan this *takana* was not made, for the same reason.

4. Why did *Chazal* employ the terms "*meshu'abadim*" and "*bnei chorin*?"

According to the **Rashbam**, *Meshuabadim* are properties that have been sold and now have a *Shibud* to their new owners. The **Beis Yosef** explains that the term *Meshuabadim* expresses that despite their now being in the possession of the buyer, they remain with a *Shibud*, a lien, to the creditor that he can actualize in collection.

5. What reasons are there to hold "*Shibuda d'Oraisa*?"

The *svara* that a man does not throw his money away, and does not lend money without a guarantee of a *Shibud* of the debtor's properties. Also, the Torah itself places this obligation on the borrower, as it states "…the man to whom you lend shall bring the security to you outside." Lastly, this is a *mitzva* that the Torah commands to fulfill by paying money, for which one does go to a person's estate to fulfill this *mitzva* against his will.

6. Does the opinion that holds *Shibuda lav d'Oraisa* hold this in all cases?

The **Tosfos** hold that **Rav Pappa** would admit that *Shibuda d'Oraisa* in cases such as *arachin*, damages, *pidyon haben* and the like ("*milveh hakesuva baTorah*"), since these are d'Oraisa obligations, the Torah was meshabeid one's property. The *Rishonim* disagree on this.

7. If the borrower was explicitly *meshabeid* to pay the lender from the most superior of his properties and then dies, what type of land does the creditor collect from the orphans?

The *Halacha* is like **Mar Zutra** in the name of **Rav Nachman**, **Abaye**, that from the orphans one collects *ziburis*.

8. Why does an *eved* have the status of movable property concerning collection from orphans?

This is because collecting this debt is a de*Rabbanan* matter, and in *de*R*abbanan* matters, the *eved* has the status of movable property. The reason why this sort of collection is considered deRabbanan is a *Machlokess Acharonim*:

The **Shach** holds that this is because all collection is de*Rabbanan* because *Shibuda lav d'Oraisa.*

The **Ketzos Hachoshen** holds that even if this collection is *d'Oraisa*, this is still a matter that is de*Rabbanan*, as it is the *Rabbanan* who differentiated between collecting land and collecting movable property.

9. Is the *Machlokess Amoraim* about whether one collects a loan (that definitely was not paid already) from young orphans connected to the *Machlokess* of *Shibuda d'Oraisa* or *Shibuda lav d'Oraisa*?

Most *Rishonim* hold that this is in fact the point of contention. The **Shach** holds that all hold that *Shibuda lav d'Oraisa*, and the *Machlokess* is on the *Shibud* that *Chazal* decreed to collect from orphans based on the fear of locking the door in the face of borrowers.

10. What is the final Halachic ruling concerning the *Machlokess Rishonim* over *Shibuda d'Oraisa* or *Shibuda lav d'Oraisa*?

The **Shach** holds that this is a *sefeika dedina*, in which the *muchzak* can say "*kim li*."

The **Beis Yosef**, **Maharshal**, **Tumim**, **Beur Hagra**, **Pischei Teshuva** and **Mishkenos Yaakov** rule that *Shibuda d'Oraisa*, and the **Tumim** emphasizes that one cannot say "*kim li* like those who disagree.