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תמצית ערוך השולחן

TAMTZIS ARUCH HASHULCHAN

A Concise Summary of the Dinim of the Aruch HaShulchan

CHOSHEN MISHPAT · VOLUME I · SIMANIM 1–188

Dayanim & Beis Din ◆ Edus ◆ Halva'ah ◆ To'en v'Nitan
Geviyas Chov ◆ Arev ◆ Chazakah ◆ Nizkei Shecheinim ◆ Shutfim
Shlichus

Concise practical rulings, with source references and explanatory notes from the Pischei Teshuva and the Pischei Choshen

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Choshen Mishpat, Volume I — Courts, Loans, Claims & Partnership

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הורינו היקרים



דבורה בת זוסיע ז״ל
דוב צבי בן יעקב הלוי ז״ל



משה אהרן ורעיתו פייגל ברייטמן

In everlasting memory of our dear parents
Devorah bas Zusya · Dov Tzvi ben Yaakov HaLevi

Dedicated by Moshe Aharon and Faigie Braitman



and the payment toward another, they are two separate matters. (AH §26; Rambam, Hilchos Edus, ch. 21)

Regarding *motzi shem ra*: this applies only where the husband cohabited with her, for otherwise the fine does not arise. If he brought witnesses that she committed adultery while betrothed and the father rebutted them, the husband's witnesses are executed; and if the husband then rebutted the father's witnesses, the father's witnesses are executed and pay money to the husband — death toward one and payment toward another. (AH §26)

If two testified that a man came upon a betrothed maiden and were rebutted, they are executed and do not pay; **if** they testified "he came upon so-and-so's daughter," they are executed and pay the fine to her father; **if** "so-and-so raped the ox," they are stoned and do not pay; **if** "his ox [was mounted]," they are stoned and pay the value of the ox to its owner. (AH §26)

- Some of our teachers hold that everywhere death toward one and payment toward another exempts from payment, and only with *zomemin* — to fulfill "as he schemed" toward each party — one does not apply *kim lei b'derabbah minei*. (AH §26; Rabbeinu Tam in *Tosafos*)
- Rambam's ruling that they pay the fine to the father in the "his daughter" case is difficult, and his intended fine and case require study; it appears his view is that although the *Torah* exempted one who came upon a betrothed maiden from the fine only because of *kim lei b'derabbah minei*, the obligation exists, so the witnesses who sought to obligate him — including the fine he would owe to satisfy Heaven — pay it beyond the death penalty. (AH §26; *Sanhedrin* 72a) Some editions of Rambam instead read that they pay the fine to the accused. The *Kesef Mishneh* rejected that reading, but the *Aruch HaShulchan* finds the rejection surprising, since the witnesses were rebutted and it was the accused they sought to charge.



39: Loans and When a Document Is Written

The *Mitzvah* to Lend

There is a *Torah* positive commandment to lend to a poor person when he needs it. (AH §1; *Exodus* 22:24)

- This is an obligation, not optional; one who does not lend when he is able is called wicked. (AH §1; *Deuteronomy* 15:9)
- It is also a *mitzvah* to lend to a wealthy person who needs a loan, though the poor take precedence if one cannot lend to both. (AH §1; *Sukkah* 49b)
- Acts of kindness (*gemilus chasadim*) are greater than charity, since charity is only for the poor while acts of kindness are for both poor and wealthy. (AH §1)

Types of Loans and Documents

There are two kinds of loans: **an oral loan (*milveh al peh*)** and **a loan by document (*milveh bishtar*)**. (AH §1)

- An oral loan may be either before witnesses or privately between lender and borrower. (AH §1)
- A loan by document may be written by the borrower himself ("I, so-and-so, borrowed from so-and-so") or by witnesses who testify in the document. (AH §1)

Where witnesses effected a *kinyan sudar* from the borrower, it has the status of a loan by document, and the witnesses may write a document, since an unspecified *kinyan* stands to be written up. (AH §1)

- This applies only where the witnesses wrote for the purpose of a document; if they merely recorded "what so-and-so admitted before us" and did not write that he made them witnesses to it, that shows it was only a memorandum, and the debt remains an oral loan. (AH §1)

Our Sages advised not to lend without witnesses or a document, so the borrower cannot deny the debt. (AH §1)

Every "loan by document" discussed in these laws refers to a document written by witnesses; a document signed only by the borrower does not have the status of a loan by document. (AH §1)

These laws deal with loans of *gemilus chasadim*, not the *iska* documents customarily used commercially, which follow the laws of *iska* in *Yoreh De'ah*. (AH §1)

Liens: Collecting From Sold or Transferred Property

By *Torah* law both a document-loan and an oral loan may be collected from encumbered property, since a lien is a *Torah* obligation. (AH §2; most Rishonim and Acharonim, and not like the Shach)[241]

- From the moment of the loan the borrower's person is obligated to repay, and his property — both movables and land — serves as surety for the debt. (AH §2; *Proverbs* 22:7)

The Sages enacted that **an oral loan** may not be collected from property the borrower sold or gave away after the loan, to protect the buyers, since there was no publicity to the loan. (AH §2)

- The same protection is given to a recipient of a gift, who is treated like a buyer. (AH §2)

A loan by document may be collected from land the borrower sold or gave away, since the document gave the matter publicity and the buyers brought the loss upon themselves. (AH §2)

Notes

241. see *Pischei Teshuva*, citing the *Mishkenos Yaakov siman* 16, who at length upholds that a lien is a *Torah*-level obligation (*shibuda d'oraisa*).

Movable property the borrower sold or gave away cannot be collected in either case — even if he designated them as *apotiki* — since the lender did not rely on them and they carry no publicity. (AH §2; Rashi *Bava Metzia* 67b)

- Slaves the borrower sold or gave cannot be collected without *apotiki*, despite their land-status for the rest of *Torah* law. (AH §2; *Urim VeTumim*)

From the borrower himself, one collects from everything he has, since his person is obligated to pay. (AH §2)

The Presumption of Scribal Error Regarding Liability

Even if the guarantee clause (*achrayus*) was not written in the document, one still collects from encumbered property, for we assume the scribe erred and omitted it. (AH §3)

- This applies only where it is not stated that there is no *achrayus*; if the document explicitly states there is no *achrayus*, one does not collect. (AH §3)
- This presumption applies to any clause customarily written and omitted, and applies equally to documents of sale. (AH §3)

Practical Differences Between the Two Loans

A document-loan collects even from land sold or given after the loan; an oral loan does not. (AH §4)

- From movables sold or given, neither collects; from unencumbered property (*bnei chorin*), both collect from land and movables. (AH §4)
- If the borrower rented or lent property to others, both loans collect from the renter or borrower — but an oral loan (and a document-loan on movables) only after the rental or loan-period ends, while a document-loan on land collects immediately. (AH §4)
- Even if the renter prepaid the rent, the document-lender collects and the renter recovers his rent from the landlord; but if the court sees no loss to the lender in waiting, the renter is left in place for his term. (AH §4)

Witnesses Writing a Document Requires the Borrower's Instruction

If one lent before witnesses and even said "you are my witnesses," the witnesses may not write out their testimony and give it to the lender, unless the borrower explicitly said "write, sign, and give him a document." (AH §5)

- The witnesses must take care not to write until they hear the borrower instructing them to write a document. (AH §5)
- Some say that even after he instructed and they wrote, they must ask the borrower again before delivery. Others distinguish: the Sages required a second inquiry for a gift-document or a *kesubah*, where he obligates himself from his own property, but not for a loan; so is the practice. (AH §5; Raavad, Hilchos Malveh, ch. 11; Levush)
- If the lender said to write and the borrower remained silent, silence is like admission and they write. (AH §5; Shach)

Witnesses who, without the borrower's instruction, wrote a record not cast in the language of a *shtar* produced no valid document; it is like a mere ledger. It cannot be used to collect where the witnesses are unavailable or remember the testimony only through this writing, for that is testimony "from their writing" as discussed in *Siman* 28; if they are present and recall independently, they may testify orally. (AH §7; Shach)

The requirement of "write and sign" applies only to a document of obligation; **where one forgives or exempts another** they write immediately upon hearing him, since forgiveness needs no *kinyan*. (AH §8)

Writing a Document Based on a Kinyan

If the borrower accepted a *kinyan sudar* — even privately between him and the lender — the document is written even if the witnesses did not see the loan, provided the borrower fully admitted before them, since an unspecified *kinyan* stands to be written. (AH §6)[242]

- Even after a long delay the lender may come to the witnesses and have them write and deliver a document, without concern that it was repaid. (AH §6)
- The witnesses should write the date of the *kinyan* in the document; if they do not recall it, they write that they delayed and later wrote it. (AH §6)
- The document is written even if the borrower died before it was written, even if a repayment-date was set and passed; likewise for the lender's heirs. (AH §6)
- Some of the great early authorities hold that after the repayment-date, and in an ordinary loan after thirty days, one does not write, out of concern it was repaid; so too appears the view of the Geonim cited in the *Beis Yosef*. The Shach decided like the first view, which permits writing, but the *Aruch HaShulchan* leaves that decision requiring study and concludes that it is at any rate a doubtful law. (AH §6; Geonim cited in the *Beis Yosef*; Shach)[243]

For a *kinyan* on an admission to enable collecting from buyers, some hold this works only where the *kinyan* obligated payment by a set date; a bare admission-with-*kinyan* is merely a *kinyan devarim* and works only to collect from the borrower himself. (AH §9; *Hagahos Ashri*, Zeh Borer)

Notes

242. see *Pischei Teshuva*, citing the *Tumim* (s.k. 17), who rules like the *Shach* that a *kinyan* effected privately (before a single witness or the parties alone) is likewise effective.

243. see *Pischei Choshen*, *Edus uShtaros* 3:5, distinguishing when a repayment-date was set versus an ordinary loan within thirty days.

- The *Shulchan Aruch* disagrees, holding that admission plus *kinyan* automatically encumbers his property; the matter requires further study. (AH §9; Shach)

In the *kinyan sudar*, the lender gives the cloth, the borrower acquires it, and in exchange the borrower obligates his property for the debt. (AH §10)

The Borrower's Right to Retract

Even after the borrower instructed or made a *kinyan* for a document, he may still retract from having the document written; a *kinyan* not to retract is a mere *kinyan devarim*. (AH §11)[244]

- Correspondingly, the lender may say he no longer wishes to lend without a lien, and the loan is voided. (AH §11)
- If the borrower dissipates his money or goes overseas, the witnesses write the document against his will. (AH §11; *Urim VeTumim*)
- As long as the document was not written, the borrower is not believed to say "I repaid," and pays only against witnesses or a receipt. (AH §11; *Urim VeTumim*)
- If the borrower is trustworthy and honest and stays local, and the witnesses will not travel overseas, they write only a memorandum; if the witnesses will travel and the lender objects, the lender and witnesses go to court, which writes a full document effective even against encumbered property. (AH §11)[245]
- According to this first view, even after the witnesses wrote the document the borrower may still bar its delivery, so long as it has not yet been delivered. (AH §11; *Nesivos*)[246]
- Others hold the borrower can in no way object once he instructed or made a *kinyan*, and the witnesses write against his will even if he is honest and stays local; retraction was permitted only for a gift, not a loan or sale. (AH §11)

Scope of "An Unspecified Kinyan Stands to Be Written"

This principle applies to writing all provisions of the document, including *achrayus*, so if it was omitted we say the scribe erred and one collects from encumbered property. (AH §12; Shach)

Whether the *kinyan* must be specifically before the lender is disputed: some say only a *kinyan* before the lender allows writing, others say even not before him. (AH §12)

- In any *kinyan*, the cloth need not be the acquirer's own — another person may provide his cloth on the acquirer's behalf; the only requirement is that it not be the cloth of the one transferring. (AH §12; Siman 195)

Which Witnesses May Write the Document

Only the specific witnesses whom the lender and borrower designated for the *kinyan* may write the document; other witnesses who saw the *kinyan* may not. (AH §13; Sma)

- For oral testimony, however, testimony is accepted from all who saw the *kinyan*. (AH §13)

Where the lender produces no document and sues, if the borrower denies the loan he is obligated to pay on the testimony of those who saw the *kinyan*, and if he then denies he is established as a liar. (AH §13)

- But if he claims "I repaid," he is believed with a *heses* oath even within the loan's term, since the lender's claim is weak for not producing a document. (AH §13)
- If the designated *kinyan*-witnesses are present and say no document was yet written for him, the borrower is not believed to say "I repaid" within the term. (AH §13)
- If the witnesses say they wrote a document and the lender says he lost it, the borrower is believed to say he repaid, even within the term. (AH §13; Siman 41)

Admission Before a Court Versus Before Witnesses

When one admits before a court — whether admission was made before witnesses or before a court — the court does not write a document unless he instructed them or made a *kinyan*. (AH §14)

- This is so even if the borrower gathered the court, seated them, and said "be judges over me that I owe so-and-so." (AH §14)

But if a standing court, sitting in their fixed place, was approached by the plaintiff, sent a court-agent to summon the defendant, who came and admitted before them — the judges write his admission and give it to the plaintiff, since it is now like a loan by document, being public. (AH §14; Rashi, Zeh Borer)

- Before a court one need not say "you are my witnesses," since one does not jest before a court. (AH §14)
- The court must recognize both litigants, per Rambam, lest they conspire to obligate someone; but many hold only the borrower need be recognized, and this is the ruling. (AH §14; Shach)
- When the court writes such a document it has full document-status: he is not believed to say "I repaid," and one collects from encumbered property. (AH §14)

But if two came to court on their own and one admitted "yes, I owe you a *maneh*," the court does not write, since they were not summoned; it is like admission before witnesses, and he is believed later with a *heses* oath that he repaid. (AH §15)

Notes

244. see *Pischei Teshuva*, citing the *Rishmei She'elah siman* 52, that per our custom to write a document after every *kinyan sudar* the borrower may retract even from the loan itself.

245. see *Pischei Teshuva*, citing the *Shach* (s.k. 18–19), that both conditions — fixed judges and a summons — are required, correcting later works that misread the *Sma*.

246. see *Pischei Choshen*, *Edus uShtaros* 3:4, on the dispute whether witnesses may write even over the borrower's protest.

Court Rulings (*Pesak Din*) and Their Force

According to the Rif and Rambam, every *pesak din* is a full "court act" (*maaseh beis din*): he is not believed to say "I repaid," and one collects from encumbered property. (AH §15)

- A *pesak din* is written only where the defendant was summoned and did not come on his own, or where he came but was found liable through his own arguments — but where he came voluntarily and immediately admitted, it is only like admission before witnesses and he is believed to say he repaid. (AH §15)

According to the second view, a *pesak din* is not a court act but merely a record of the ruling; he is believed to say "I repaid," and the judges need not notify him. (AH §15; Shach)

- On this view they may issue a *pesak din* immediately after ruling, but if the lender returns later to request it they do not write, out of concern he was repaid, unless the court knows he was not yet repaid. (AH §15; Shach)

Where a *pesak din* is held, the *Shulchan Aruch* rules the borrower is not believed to say he repaid; the Rema cites those who hold he is believed against a *pesak din* in any case. (AH §16; Shulchan Aruch; Rema)[247]

- On the Rif/Rambam view, the judges must inform the defendant that a *pesak din* was given, so he takes care to retrieve it upon paying; if they did not inform him, he is believed to say he repaid, and the judges are believed to say they did not tell him. If the judges do not remember whether they informed him, we presume they acted as required and did inform him. (AH §16)
- If it becomes known that the lender held the *pesak din* many days without suing, it is reasonable he was repaid, and the judges should investigate the matter thoroughly. (AH §16)

A *pesak din* records "so-and-so and so-and-so argued thus and were ruled liable for such"; a *maaseh beis din* records that so-and-so is obligated and his property is encumbered, in the language of debt-documents. (AH §16)

- The current practice seems to follow the second view, and people are not careful to retrieve the *pesak din* upon payment. (AH §16)

Admissions Concerning Deposits Versus Land

Where one admits owing money or movables — even a deposit still in existence — a document is not written without instruction or *kinyan*, lest he return the movables and be sued again on the document. (AH §17; Sma)

But an admission concerning land or something attached to land — such as "this house is so-and-so's" — is written even before only two, without *kinyan* and without "write and sign," since there is no concern he will return it and be sued twice. (AH §17)

Documents Brought to Court Lacking the Instruction Clause

A document of admission or loan brought to court, signed by two, in which it is not stated that the admitter said "write and sign," is valid, for presumably they would not have written without instruction or *kinyan*. (AH §18)

- Some say this applied in earlier generations when scribes were expert; nowadays we suspect they wrote without instruction. Because the writing is cast in the language of a *shtar*, however, it is not testimony "from their writing" and is valid against the borrower himself, who cannot deny; it fails only against buyers. (AH §18; *Urim VeTumim*)
- With such a document the borrower is believed to say "I repaid," being like an oral loan. (AH §18; Shach)
- If the witnesses say he instructed them, they are believed, since they are not contradicting themselves, and it has full document-status. (AH §18)
- If the borrower admits he said "write and sign": if the witnesses died he is believed to say he repaid via *migo*; if the witnesses are alive he is not believed. (AH §18; Rabbi Akiva Eiger)[248]

Where the document shows it issued from a court ("before us, the court, he admitted"): if it states the borrower instructed them, it is valid even with only two signatures. (AH §19; Sma)

- If it does not state he instructed them, we suspect a mistaken court that thought admission before two equals admission before a court, and it lacks document-status. (AH §19)
- It is nonetheless valid if the document shows three were present — e.g. "we sat as a court of three," or "one of us was absent," or that it was done before an expert, or "and so-and-so said to us," from which it emerges that three were present. (AH §19; Shach)

Writing a Document for the Borrower Without the Lender

A document is written for the borrower even though the lender is not present, since he may obligate himself. (AH §20)

- Still, if the lender protests — saying he does not wish to be considered wealthy, or other claims — he is heeded and it is not written against his will. (AH §20)

A document is not written for the lender without the borrower. (AH §20)

- This holds even if the lender says "write and sign it

Notes

247. see *Pischei Teshuva*, citing the *Chacham Tzvi*, applying the not-believed rule of a written *pesak din* even to a claim regarding land.

248. see *Pischei Teshuva*, citing the *Maharchash siman* 1 (via R' Akiva Eiger), that where the witnesses died he is believed via *migo*, but not where they are alive.

and hold it, and give it to me if the borrower comes today to make a *kinyan*, otherwise tear it," lest he intend some scheme. (AH §20)

- Even if the borrower already accepted a *kinyan sudar* before witnesses in the lender's absence, and the lender later asks that a document be written on that admission-with-*kinyan*, it is not written, per the view that an unspecified *kinyan* stands to be written only where the *kinyan* was before the lender. (AH §20)

Kinyan Required for a Document Written Without the Lender

A document is written for the borrower without the lender only where a *kinyan* was made, so his property is immediately encumbered even before the document reaches the lender. (AH §21; *Nesivos*) All the more so, where the *kinyan* was made before the lender, the property is encumbered even if no document was written at all, as the *Nesivos HaMishpat* notes.

- Without a *kinyan* one does not write, even if the borrower handed over the money before us, lest he later deliver the document and the buyers wrongly assume the lien dates from the writing. (AH §21)
- There is a remedy without a *kinyan*: the witnesses immediately take the document into their hands and deliver it to the lender, or acquire it on his behalf, since one may act to another's benefit in his absence. (AH §21; Sma)
- Per the Rema, another remedy is to write explicitly that he encumbers his property "from now," so that even if the document reaches the lender later, he collects from buyers from the date of writing — but later authorities hold this does not help on the view requiring a *kinyan*. (AH §21; Rema)

Some early authorities hold that even without a *kinyan* one writes for the borrower without the lender: once the document reaches the lender — even much later, and even if the loan itself occurred later — the property is encumbered from the date of writing; if the document never reaches the lender, there is no encumbrance. The *Shulchan Aruch* did not cite this view, but the Shach ruled that one in possession may invoke it. (AH §22; Shach)

Delivery of the Document

If the borrower said "make a *kinyan* that I owe so-and-so, and write him a document," the witnesses write and deliver it to the lender, if he does not protest. (AH §23)

- But if he said "write it and place it in my hand," they do not give it to the lender, who does not acquire until it leaves the borrower's hand — and then the lender acquires from the time of the *kinyan*. (AH §23; Shach)
- Even per the view that after a *kinyan* one cannot retract, if he explicitly said at the *kinyan* "write and give it to me," they do not give it to the lender. (AH §23)

A Debt to Two Lenders

Where one borrowed from two partners and instructed a document be written in both their names, even if delivered to one of them, both have document-status to collect from buyers, since they are partners in the debt. (AH §24; Siman 77)

Where he did not actually borrow but obligated himself to two, wrote a document in both names, and delivered it to one: the one who received the document has document-status, collects his share from encumbered property, and the obligor is not believed against him to say "I repaid"; the other has only oral-loan status, collects from unencumbered property, and the obligor is believed against him to say he repaid. (AH §24; Siman 40)

- If, however, he accepted a *kinyan* obligating himself to both, they become partners from the time of the *kinyan*, so delivery to one is like delivery to both — even if the other never knew and even if he died — and it follows all the laws of a partnership loan. (AH §24; Siman 77)
- This holds even if he told the witnesses to write and give the document to him and he later handed it to one of them; the *kinyan* obligates him to both as partners. (AH §24)

Documents That Cannot Be Written

Witnesses who saw a *kinyan* made from a minor may not write a document about him, since his *kinyan* is void; likewise if he said "write," it is void. (AH §25)

Whether witnesses may write, for now, what they saw regarding a benefit to Reuven whose entitlement is not complete until further witnesses testify, is discussed elsewhere. (AH §26; Siman 205)

Retracting a Promise to Lend

One who promised to lend and told the borrower to have witnesses write a document that he owes a *maneh*, and then retracted before lending, gives the borrower no claim, since the borrower acquired nothing. (AH §27)

- Even if he accepted a *kinyan sudar*, it is void, since money is not acquired by *kinyan sudar*. (AH §27)
- He must, however, reimburse the scribe's fee, under *dina d'garmi*. (AH §27; Levush)[249]
- But if he said "bring a pledge and I will lend on it," and the borrower brought it and the lender took hold of it, he cannot retract, for through taking the pledge he acquired the promised money; likewise regarding a promise to lend an object, which the borrower acquires through the *kinyan* exchange. (AH §27)

Notes

249. see *Pischei Teshuva*, citing R' Akiva Eiger (responsum 134), who grounds the scribe-fee reimbursement in *dina d'garmi* from the Rosh's craftsman case, but only where the lender told him to prepare a document.

- Some dispute this regarding a pledge, and the *Aruch HaShulchan* concurs, since we do not find a *kinyan* effected by a pledge given before the loan; he leaves the words of the *Nesivos HaMishpat* requiring study. (AH §27; *Ketzos*)[250]

Payment of the Scribe

For all documents the borrower pays the scribe's fee, since the benefit is his — even in an *iska* document. (AH §28)

- If the lender lost the document and needs another, he pays the scribe for the second one. (AH §28)
- When the borrower needs a receipt written, the lender pays, since he should have guarded his document. (AH §28)
- But if the term passed and another document is needed, or even if the first was lost, the borrower pays, since the lender can demand "pay me." (AH §28; *Urim VeTumim*)

40: One Who Obligates Himself to Another

Obligating Oneself in Writing

A person can obligate himself to another **even though he never borrowed any money from him** at all. (AH §1)

If he writes in his own hand "I, so-and-so, owe so-and-so a *maneh*" and hands him the document, he is obligated to pay, even though we know he never borrowed from him. (AH §1)

If he handed him the document privately, he collects only from unencumbered property (*bnei chorin*), not from encumbered/sold property. (AH §1)

If he handed it to him before witnesses of transfer (*edei mesirah*), he collects even from encumbered property. (AH §1)

Obligating Oneself Verbally

By the accepted view — that of the *Shulchan Aruch* and most *Rishonim* — an oral self-obligation creates no liability at all, even before witnesses. (AH §1)

According to the Rambam, one can obligate himself even verbally: if he says to witnesses "Be witnesses that I owe so-and-so a *maneh*," or wrote "I hereby owe you a *maneh*" even without witnesses present, or said before witnesses "I hereby owe you a *maneh* by document" — even without saying "You are my witnesses" — he must pay, since he obligated his person like a guarantor (*arev*). (AH §1; Rambam; *Bava Metzia* 94b)[251]

- This works to bind one's person for a monetary liability only where there is no condition attached; a condition renders it an *asmachta*. (AH §1)[252]
- Obligating oneself verbally to give a specific object is worthless, since an object is acquired only through an act of *kinyan* — *meshichah*, *mesirah*, *hagbahah*, or *kinyan sudar*. (AH §1)[253]
- Even according to the Rambam, such a verbal obligation does not collect from encumbered property. (AH §1)[254]
- Many *Rishonim* dispute the Rambam's view. (AH §1)

Waiver (*Mechilah*)

If one says to another "I have received such-and-such toward the debt you owe me," even though we know he received nothing, or says "I hereby waive for you the debt up to such-and-such an amount" — all agree it is a valid *mechilah* and he cannot retract, since *mechilah* requires no *kinyan*. (AH §1; Siman 241)

This applies only where he did not err; but if he erred, thinking he had received it and it became clear that he had not, a *mechilah* made in error is no *mechilah*. (AH §1)

All the more so where one admitted a debt to another under the assumption that he owed it and it later became known that he erred — established by witnesses or by the creditor's own admission that nothing was owed — it is an admission made in error and worthless, even if he handed over a document before witnesses or made a *kinyan sudar*, for any *kinyan* made in error is retractable, and likewise a document made in error is no document at all. (AH §1; Shach)[255]

Collecting from Encumbered Property

If a borrower wrote in his own hand and witnesses signed on it, he collects from encumbered property even if the document was handed over not in the presence of witnesses. (AH §2)

If he wrote a document in his own hand without witnesses signing it, but handed it to the lender before witnesses, it is a documented loan and collects from encumbered property, since *edei mesirah* are like *edei chatimah* and generate publicity. (AH §2)

- This applies only where the witnesses read the document handed over in their presence and it is written in the borrower's own hand, so that it cannot easily

Notes

250. see *Pischei Choshen*, *Halva'ah* 1:38, on the caution against retracting a promise to lend.

251. see *Pischei Teshuva* 40, citing the *Shevus Yaakov* (III:145) and *Chavos Yair* (137), that where it is known the written obligation arose from an *arev*-after-the-loan without a *kinyan*, we do not extract payment.

252. see *Pischei Choshen*, *Kinyanim* 18:5, that a verbal or written self-obligation binds only when made absolutely, but not when made contingent on a condition.

253. see *Pischei Choshen*, *Kinyanim* 18:19, that while one cannot obligate himself to transfer the *body* of a specific object without a *kinyan*, one can obligate himself monetarily even for a thing not yet in the world.

254. see *Pischei Choshen*, *Kinyanim* 18:7, that all the *Poskim* dispute the Rambam and hold one is bound even for an unspecified (*davar she'eino katzuv*) obligation, though some limit collection to *bnei chorin*.

255. see *Pischei Teshuva* 40, noting the *Tumim* and *Nesivos* on the scope of the Shach's rule, and Maharshak's objection from the Rif and Rosh.

be forged; written in another's hand it is not a document. (AH §2; Sma)[256]

Some Geonim ruled that the borrower must tell the witnesses before whom it was transferred, "Sign and testify that it was handed over in your presence," so that there be publicity; without this instruction there is no publicity. (AH §2; Shach)

- They need not sign this very document; even on a separate writing they may record that so-and-so handed such a document to so-and-so in their presence, and then he collects from encumbered property. (AH §2)
- **If he did not so instruct them**, he collects only from unencumbered property, not from encumbered property. (AH §2)
- It appears that once he did so instruct the witnesses, then even if they did not write it he collects from encumbered property, since the instruction itself generated the publicity. (AH §2)

41: A Lost Or Erased Loan Document

Renewing a Worn or Erased Document Through *Beis Din*

One holding a document he sees is wearing away and about to be erased entirely may bring witnesses before *beis din* — whether the signatories to the document or others who recognize the signatures and know its contents — who testify, and *beis din* issues him a confirmation (*kiyum*). (AH §1)

Even if it was already erased entirely, since the witnesses know what was written in it they testify before *beis din*, which issues a *kiyum*. (AH §1)

This testimony may be received even not in the presence of the borrower, and even for a fully erased document, just as testimony is received for one going overseas. (AH §1; Siman 28)

While the document is not yet fully erased, witnesses are not really needed, for *beis din* can read it themselves; still it is better for the lender to bring witnesses, lest it become unreadable by the time it reaches *beis din*. (AH §1; Sma)

The witnesses themselves — even the document's own signatories, and even if the document was erased in their presence — may not draw up a new document on their own, whether dated from the original date or from now, without the instruction of the borrower and lender; only *beis din* has this power. (AH §1)[257]

- **If, however, they erred in their original writing** so that it was not written properly, they may write it again, since they have not yet discharged their agency. (AH §1)

When a Kiyum May Be Issued for an Erased Document

Beis din issues a *kiyum* on an erased document only when it is established through witnesses that it was erased by accident, through some cause, or from age. (AH §2)

Where it is not clarified that it was erased by some cause, no *kiyum* is issued — since the holder did not guard it and left it in a place liable to erasure, we suspect the debt was paid; hence without the borrower present no *kiyum* is made. (AH §2)

All the more so if it became known that the lender erased the document of his own will — we certainly say it is a paid document. (AH §2)

The Text and Force of the Kiyum

The *kiyum* is written as a new document stating: "We, *beis din*, so-and-so, so-and-so, and so-and-so — so-and-so son of so-and-so produced before us an erased document for the sum of such-and-such, dated such day, its witnesses being so-and-so and so-and-so," the *dayanim* also attesting that the document was erased. (AH §3)

If the witnesses to the erasure are others [not the *dayanim*], they must be named in the document — that so-and-so and so-and-so testified to the erasure and to what was written and signed in it — so the borrower can challenge and disqualify them if they testified falsely. (AH §3; Sma)

The *dayanim* sign the document, and it carries all the force of the original. (AH §3)

Making the Kiyum Serve Also as a Court Authentication

Every document requires court authentication (*kiyum beis din*) so the borrower cannot disqualify it as forged; if the lender wants this erased document also to have such authentication, *beis din*, when receiving testimony from the document's own witnesses, must have each testify concerning both signatures — that this is their signature, or per Rambam that each say "and I am a witness to this matter" — and then it is authenticated like any authenticated document. (AH §4; Rambam)

When others testify on the signatures, although for ordinary documents it suffices that they attest to the signatures, here — since the document was erased — it counts as new testimony requiring *derishah vachakirah*, meaning each testifies not in the presence of the other. (AH §4; *Nesivos*)

Even if *beis din* did not spell all this out, if they wrote "and

Notes

256. see *Pischei Teshuva* 40, citing the *Chavos Yair* (78), who both defends reading the Sma to require two conditions and describes his practical scribal formula for lenders whose borrowers refuse a *kinyan*.

257. see *Pischei Choshen*, *Sh'taros* 3:15–16, for the practical requirement that *beis din* also authenticate the signatures and record it in the *kiyum*.

we were required to take the testimony of the witnesses and it was found consistent," one collects with it and no further authentication is needed, and the borrower may not contest it. (AH §4)

If they did not write this wording, the lender will later need to bring proof when the borrower contests, like any document requiring authentication; failing such proof it is like an unauthenticated document. (AH §4)

Where the document is not fully erased so that it can be read, and others testify to the signatures, it is an authenticated document even if *beis din* did not write the extra wording, for this is the standard authentication of all documents. (AH §4)

Tearing the Original Document

Some say *beis din* must write in the *kiyum* that they tore the original document; if they did not tear it, it is invalid, lest two sets of witnesses who know its contents each go to a different *beis din*, giving the holder two documents to collect twice. (AH §5; Shach)[258]

- Even if they did not mention it, presumably they acted lawfully and tore it, for we do not suspect *beis din* erred; still, to avoid doubt, they should be careful to write so. (AH §5; Shach)

For a gift document or a sale document that states it carries no *achrayus* that was erased, *beis din* writes a new one even though the original was not torn, since it concerns a specific parcel of land and there is no concern. (AH §5)

Where the gift document contains *achrayus*, and likewise sale documents with *achrayus*, they must tear the original: once the land is seized from the recipient, he can collect through the *achrayus*, and if two documents remained in his hand he and the transferor could collude so that he collects from two buyers. Alternatively they write that this document was not written to collect from encumbered or free property but only to establish this land in the recipient's or buyer's hand. (AH §5; Shach)[259]

- For a loan document such wording cannot be written, since a loan document's whole purpose is to collect with it, whereas a sale or gift document's purpose is to establish the land in his possession. (AH §5)

With a gift document one must also be careful to write it from the original date and not from the date *beis din* writes it, lest after the gift the recipient sold or gave the land back to the original donor in a full *kinyan*, and he then produce this *kiyum* claiming it was later re-gifted to him. (AH §5)

A Document Reported Lost

One who comes saying his loan document was lost and asks *beis din* to write him another — even if he brought the original witnesses who attest they wrote and delivered it, and even witnesses that it was lost — *beis din* does not write him another, lest he find the original too and collect twice. (AH §6)

Only if witnesses attest the document was burned or the like, so that it no longer exists at all, do they write him another; and we do not suspect he has many sets of witnesses to the burning to collect from many courts, since when the borrower pays on the strength of the burning-witnesses the lender writes him a receipt. (AH §6)[260]

The prohibition against writing another when he brought witnesses that it was lost applies only where *beis din* does not inform the borrower; **but when beis din informs the borrower**, they may write another, and the borrower will be careful to take a receipt when he pays. (AH §6; Shach)

- Beis din should therefore take care, when the lender brings witnesses that his document was lost, to inform the borrower. (AH §6; Shach)

Although there is concern he may collect from orphans who do not know of this, it is not in our power to cause the lender to lose his debt over such concerns where he did not act negligently. (AH §6)

If he brought no witnesses that it was lost, *beis din* does not attend to him, lest there be some deception; but when he brought witnesses they must attend to him so he not lose his debt. (AH §6)

Beis din should not write a copy of any document unless they see a need — such as it being erased, burned, or lost with witnesses. (AH §6)

If one brought a copy of a document to *beis din* and no reason was written in it for why it was written, *beis din* does not collect with it until he produces the actual document, lest those who wrote the copy erred, causing the borrower to pay twice. (AH §6)

Copies of Gift and Sale Documents Without Achrayus

For a gift document without *achrayus*, or a sale document stated not to have been sold with *achrayus*, if he says his document was lost, they write him another even without witnesses that it was lost, since there is no concern. (AH §7)

But with no need at all — where he does not claim it was lost but merely asks for another copy — no copy is made even for a sale or gift, for no document is copied without need. (AH §7)

With some need it is written — e.g., a will document listing gifts to several people, and one of them comes to *beis din* to have his portion written separately so he holds

Notes

258. see *Pischei Choshen*, *Sh'taros* 3:17, that the requirement to tear the original and record the tearing is essential to the validity of the *kiyum*.

259. see *Pischei Choshen*, *Sh'taros* 3:18, on the alternative wording — that the document was not written to collect from encumbered or free property — in place of tearing the original.

260. see *Pischei Teshuva* 41, citing *Zichron Yosef*, on the case where witnesses attest the document was burned; and *Pischei Choshen*, *Sh'taros* 3:23.

a document of his own; they write it, for a will document does not serve to collect from buyers and the orphans can claim they paid, so there is no concern of double collection. (AH §7)

- This applies to a will document that witnesses wrote from what they heard from the dying person, which has no status of a proper document; but a document a *shechiv mera* himself commanded be written and made *kinyan*, merely phrased as a will, is a full document. (AH §7; Shach, end of Siman 253)

A Document Held by a Third Party or Deposited

A loan document not in the lender's hand but held by a *shalish* with whom both parties deposited it, and the *shalish* reports it was lost — even without witnesses, they write another, since there is no concern the borrower will find it, as it was not lost from his hand and he does not know where it was lost; and the *shalish* is believed even without witnesses. (AH §8)

If it is known the lender deposited it with another and the lender brought witnesses it was lost from that person's hand, they write him another even without informing the borrower, but they inform the depositary that they wrote another — lest he find it and return it and the lender collect with it. (AH §8; *Nesivos*)

- There is no concern to inform the borrower about the lender finding it, since it was not lost from the borrower's hand and he does not know where it was lost. (AH §8)

A Lender Traveling to Collect Overseas

Where the borrower is overseas and the lender must travel there to collect, and fears his document may be lost on the way, he may come to *beis din*, which writes him another; he deposits his document with the *beis din* of his city, and they write in the copy that it was given for this reason. (AH §9)

The *beis din* in the borrower's place will inform the *beis din* in the lender's place when he pays, and then that *beis din* tears the original held by them. (AH §9)

If he says he lost the copy on the way, they give him another copy even without witnesses that it was lost, and we do not suspect double collection, for when collecting with the copy he must request a receipt and it will be written for him. (AH §9; *Nesivos*)

But the actual document is not returned to him unless he brought witnesses it was lost on the way; and we do not suspect he will find it, since a thing lost on the way is presumably not searched for. (AH §9; *Nesivos*)

Verbatim Copies of Sale and Gift Documents

The caution against giving an unneeded copy of sale and gift documents with *achrayus* is only when written in the form of a document; but **when copied letter-for-letter** and marked as a copy of the document, it has no status of a document to collect from encumbered property — since it is evident the original is intact — so such a copy needs no *beis din*, and even witnesses may copy it, provided they are valid witnesses. (AH §10)

For a loan document, however, one does not write without *beis din*. (AH §10)

The Borrower's Pleas When the Document Is Absent

If the lender claims his document was lost with no witnesses that it was lost and no witnesses who know of the document at all, and the borrower says "it never happened — there was never a document, and I never borrowed from you," the borrower is believed and swears a *heses* oath. (AH §11)

But if there are witnesses that he had such a document and the borrower says "it never happened," he is established a liar on their word and must pay. (AH §11)

If he says "I paid," he is believed with a *heses* oath — even if the document's own witnesses are alive, even if a *kinyan* was made at the loan, and even if it was a dated loan still within its term — since the document was his and is not in his hand and he has no witnesses it was lost, this is worse [than a verbal loan], for we suspect he did pay and therefore did not keep it; the borrower swears *heses* and is exempt. (AH §11)

Even if the document is produced by another who found it, and the borrower claims "it fell from me after I paid," though within its term, he swears *heses* and is exempt — since the document is not in the lender's hand we do not apply the presumption that one does not pay within the term, for its having fallen weakens it, making it worse than a verbal loan. (AH §11)

But if the lender deposited it with another and the document is produced by that depositary, the borrower is not believed to say "I paid and it fell from me and you found it," even though it was not deposited with witnesses, and even though he is not a full *shalish* — since the depositary is believed with a *migo* that he could have returned it to the lender. (AH §11; Siman 56)

A City Destroyed or Burned

A city besieged and destroyed, or burned, where it is known Reuven had documents there — they are presumed lost, and *beis din* writes him others on the strength of witnesses who know of those documents, and even if the borrower protests he is disregarded. (AH §12)[261]

- All this depends on the nature of the destruction or fire and the *beis din*'s assessment. (AH §12)

Notes

261. see *Pischei Choshen*, *Sh'taros* 3:21, that even after judgment was rendered, a strong *umdena* that the document was lost lets *beis din* reinstate collection.

42: Writing and Interpreting Documents

Material That Can Be Forged

A promissory note may not be written on material that can be forged; if it was, it is invalid — even to collect immediately — and has only the status of an oral loan. (AH §1)[262]

This applies to a loan document, or a sale or gift document where the *kinyan* was effected by some other means and the document is merely proof; but a document by which the *kinyan* itself is effected (*shtar akna'asa*) — which does not serve as proof and need not endure for many years — is valid on such material. (AH §1; *Jeremiah* 32:14)

Any document not made according to the enactment of the Sages should not be drawn up *lechatchilah*, even where there is no reason to invalidate it; *bedieved* it is valid. (AH §1)

- An exception is a folded document (*shtar mekushar*), not used nowadays, whose witnesses signed on the outside — invalid even *bedieved*, since the witnesses' signatures must be on the inside. (AH §1; Shach)

Language, Script, and Care in Writing

A document may be written in any language and any script, provided the scribe is precise so that no alteration or fraud can be introduced — that the lender can neither add nor subtract a letter to his advantage. (AH §2)

Among the safeguards in examining documents is to scrutinize the *vavs* and *zayins*: if they are crowded between words, suspect that a *vav* or *zayin* was forged in; if the letters are too far apart, suspect that a letter — a *heh* or *ches* — was erased and one leg left standing as a *vav*. This examination applies in every script and language. (AH §3)

The letters should be uniform and the writing even throughout — not crowded in one place and spaced in another — lest a letter be added in the gap without detection. (AH §3; Sma)

Witnesses may not sign until they scrutinize every letter, and when a document comes before the judge he must examine and compare its letters; if he sees any alteration he does not collect on it until he investigates thoroughly. (AH §3)

Wherever an erasure can be suspected — that the document's holder erased a spot — we assume so, and the document is invalid. (AH §3) If necessary, the court presses and chastises the document's holder until he admits, so that the true judgment emerges.

The judge is obligated to inspect the document. The essential ruling is that the court raises a suspected-forgery claim on its own only for heirs and buyers, for whom the court ordinarily pleads, not against the borrower, seller, or giver himself. (AH §3)

- Against the party himself, *beis din* shows him the document; if he senses no defect, the court does not raise one for him.
- If the party disputes some detail of the document's contents, however, the judge must raise the suspected forgery on his behalf even under this rule, as the Shach qualifies. (AH §3; Shach)

Numbers at the End of a Line

The scribe must take care not to write the numbers three through ten at the end of a line, lest ten be forged into twenty or three into thirty. (AH §4)

If "thirty" is written at the end of a line, we do not suspect it originally read "three," for there is a presumption the witnesses acted properly and did not write "three" at a line's end. (AH §4; *Nesivos*)

If written in the masculine form (*sheloshah*, *asarah*) there is no concern, since forging into thirty would require erasing the *heh* and leaving a visible erasure; still, it is proper to be careful even here, and it is proper to avoid "eight" (*shemonah*) too. (AH §4; Shach (against the *Nesivos*))

- *Bedieved* a document is not invalidated when written "eight" or "thirty" in the masculine. (AH §4)

Since numbers are usually written in the feminine, when the numbers three through ten fall at the end of a line the scribe rearranges the text until the number falls within a line, so that a forged "thirty" at line's end will be exposed by the "three" appearing mid-text. (AH §4)

Even under the rule that the lower text overrides the upper, where the upper reads "three" and the lower, at line's end, reads "thirty," we do not follow the lower text, since it appears more likely a forger added the *yud* and *mem*. (AH §4; Shach)

Numbers should not be written as single letters (e.g. *bet* for two, *dalet* for four), lest *bet* be forged into *kaf* or *dalet* into *resh*; if so written, the document can be forged and is invalid. (AH §4)

- If written as a *gematria* or acronym that cannot be forged — such as *yud-bet* (twelve) — it is valid, since witnesses would not have signed on a lone *bet* and it would appear crowded; still, *lechatchilah* one should avoid all acronyms and *gematrios* in documents. (AH §4; Shach)

Contradiction Between Upper and Lower Text

If the upper and lower text can be reconciled without

Notes

262. see *Pischei Choshen*, *Edus uShtaros* 5:2, on the parallel dispute whether such a document may collect immediately when *eidei mesirah* remember its contents.