

**YESHIVAT HAR ETZION
ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)**

TALMUDIC METHODOLOGY

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***SHALISH*: THE AUTHORITY OF A LEGAL CUSTODIAN TO
TESTIFY ABOUT THE CONTENTS OF A *SHTAR***

The gemara considers the interesting situation of a *shalish*, someone who safeguards a document on behalf of the interested parties. Several gemarot suggest that he is authorized to testify to the document's nature. This *shiur* will explore the nature of his authority.

The gemara on Gittin 64a describes a *machloket* regarding a dispute between a husband and a *shalish*. The former claims that his *get* was delivered for safekeeping and his wife is not divorced. The *shalish* disputes the claim, insisting that he is a *shaliach* of the woman and her divorce was final immediately upon his receipt of the *get* from the husband. Though Rav Huna asserts that the husband is believed (and the woman remains married), Rav Chisda disagrees, claiming that we trust the claim of the *shalish*. Why should this custodian be believed in legal disputes? What "mechanism" underwrites his authority?

Facing the dilemma of Rav Chisda's position, Tosafot adopt a radical reading: in fact, the *shalish* is not trusted! However, by delivering a document to him, the husband waives the right to determine the implementation of a *get*. It is as if the husband - by depositing the *get* - stipulates that the validity of this *get* rests solely upon the discretion of the *shalish*. If the latter declares that the husband's intent was to deliver a valid *get*, the divorce is valid and binding. Even if the *shalish* were to lie, as long as he asserts the husband's original intent to divorce, the *get* is valid.

Tosafot strips the *shalish* of any inherent 'believability;' we do not inherently trust him more than the husband. The husband delivers a *get* and conditions its validity upon the 'wishes' – capricious as they may be – of the *shalish*. This reading, though radical, DOES stem from an interesting sequence

in the gemara. Suggesting that Rav Huna would agree that a *shalish* is believed for monetary contracts, the Gemara explains that since money can be waived (a process known as *mechila*), a *shalish* is believed, even according to Rav Huna. He only disagrees with Rav Chisda about contracts concerning *issurim*, in which *mechila* is less operative. It appears that a *shalish's* unanimous capability for monetary contracts stems from the author of the *shtar's* ability to "work around" the question of believability through the operation of *mechila*. By depositing a *shtar* in the hands of a custodian, the owner agrees to relinquish his claim if the *shalish* claims it was already paid. Since money can be easily waived through the mechanism of *mechila*, a *shalish* is believed according to everyone, in monetary contracts.

Presumably, this gemara provides the basis for Tosafot's position regarding Rav Chisda; Rav Chisda merely extends this circumvention to *issurim*. Even though an "issur" status cannot be unilaterally determined (unlike monies which can be unilaterally waived), the same condition can be affected by the stipulation of a *tenai*. By delivering the *get*, the husband, in effect, stipulates or conditions the *get's* validity upon the *shalish's* discretion.

This approach to Rav Chisda is both logically and textually strained. The gemara itself claims that according to Rav Chisda the *shalish* is *ne'eman* (believed), whereas according to the approach of *Tosafot* he is not believed, but his 'opinion' is implemented or upheld. However, the very fact that *Tosafot* adopt this stance indicates how challenging Rav Chisda's position truly is.

Rashi takes a more conventional approach toward explaining the believability of the *shalish*. Since he possesses the *shtar*, he can deliver the *get* to the woman and effect the divorce at any stage. Since he possesses this capability, he is BELIEVED to claim that the husband delivered the *get* with intent to divorce. Based upon the classic mechanism of *migu*, litigants are BELIEVED to lodge a claim when they could have accomplished the equivalent goal through some other alternative means. In this instance, we trust that the *shalish* is not lying; had he wanted to effect the delivery of the *get*, he could have just delivered it personally. He is believed to CLAIM that the husband originally delivered it to him with the intent to divorce his wife.

Though Rashi's position is more moderate than Tosafot's, it still raises certain concerns. Foremost is the fact that the gemara does not mention *migu* as the baseline for Rav Chisda's position. Additionally, if Rav Chisda's view is premised upon *migu* it would be difficult to understand why Rav Huna argues; is not *migu* a universally accepted tool? Finally, we could even question the relevance of *migu* to our scenario, since the *shalish* may not have the ability to execute the divorce; perhaps the woman will avoid him or take other measures to prevent the current delivery of the *get*. This *shalish* may not be empowered to personally deliver the *get* and therefore may not be reinforced in his claim by any particular *migu*. These questions force Tosafot to disagree with Rashi's reading and suggest his own logic to understand Rav Chisda.

The Rashba raises a completely different option – one which may just be the most literal reading of Rav Chisda. By delivering the *get* to the guardianship of the *shalish*, the owner upgrades his level of legal believability. Typically, Halakha affords default levels of reliability. For example, two witnesses have more believability than one witness or a litigant. Alternatively, the litigant possessing the item is trusted in the absence of contravening evident ("*ha-motzi mei-chavero alav ha-re'aya*"). These default levels, however, may be subject to personal adjustments. For example, a solicitor of a loan may award his creditor extraordinary levels of believability to entice him toward the loan. By empowering him more than his normal level, the potential debtor assures him of simple future litigation and thereby encourages delivery of the loan. The easiest manner to accomplish this adjustment is by writing a *shtar* which strips the debtor of his default believability; he cannot claim that the loan was paid as long as the *shtar* is extant.

The Rashba claims that a *shalish* enjoys one of these 'believability adjustments.' Typically, one person would not be believed to claim that a divorce occurred — "*ein davar she-be'erva pachot mi-shenayim*" — and certainly not to contradict the author of the *shtar*, the husband. However, by depositing the *shtar* in the possession of the *shalish*, the husband empowers the *shalish* to be believed as if her were two *eidim*. In fact, in one of his responsa, the Rashba asserts that a *shalish* is believed even if he is contradicted by two *eidim*. The husband has the capacity to reinforce the *shalish's* level of believability so that he is more trusted than *eidim*.

This opinion is appealing on two levels: it does not exhibit the 'extremism' of Tosafot's approach, and it does not introduce a new factor which does not appear in the gemara. This position also strongly reflects the language employed by Rav Chisda to describe the supremacy of the *shalish*: "since the *ba'al* trusts him." According to the Rashba, since the husband trusts him, the *shalish* achieves a superior level of believability.