YESHIVAT HAR ETZION

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**GEMARA BAVA KAMA 5771**

**Shiur #24: The Exemption From *Shein* in *Reshut Ha-rabim***

Last week's shiur addressed the nature of the exemption from *shein* payments in *reshut* *ha-rabim*. Should it be viewed as formal in nature - by writing '*bisdei acher*' the Torah excludes the public domain from these payments - or might we adopt the Rif's opinion, which perceives the exemption as a 'logical' rule. Since damages of *shein* and *regel* are urchei (standard behavior) when performed in *reshut* *ha-rabim*, the owner cannot be held liable. We examined these differing perspectives through the prism of several intriguing cases of *shein*: an animal which eats from another's back, one who jumps upon another animal and eats, and finally, an animal which consumes food from a storefront which juts out into *reshut* *ha-rabim*. This week's shiur will I"H extend the discussion into several additional scenarios, which might confirm our previously established notions of the exemption as well as introduce new formulations.

After discussing the machloket between Rav and Shmuel regarding a protruding storefront, the gemara (21a) presents the situation of *mekatzeh makom*. Though the Rishonim differ as to the exact nature of this area, a generalized picture emerges: the gemara addresses an area which is legally part of a PRIVATE DOMAIN but through which pedestrians are allowed to pass. Rav applies the *shein* exemption while Shmuel maintains liability for these damages. Our instincts support Shmuel's contention - if this area is legally defined as *reshut* *ha-nizak*, why should payments be exempted? After posing an initial suggestion the gemara offers a more attractive explanation for Rav's stance: the *mazik* can complain to the *nizak*, "Who gave you license to position your fruits so close to *reshut* *ha-rabim*?" Even though the *nizak* placed his fruits in his own domain, since he invited/allowed pedestrian crossing through that area he was in effect 'inviting' the damage upon himself. In as much as the owner of the animal pays because of his negligence in watching his animal, he is excused from payments if the damages were precipitated by the *nizak*'s negligence. Said otherwise, the '*peshiyat* *ha-nizak*' could potentially absolve the *mazik* of payments. Even though the fruits were formally stationed in the *reshut* *ha-nizak*, the blame is assigned to the *nizak*, since the fruits were easily accessible to animals walking in *reshut* *ha-rabim*, legally passing into his *reshut*. By presenting this situation, the gemara might be developing a new concept - the exemption of the *mazik* for *shein* damages in *reshut* *ha-rabim* is based upon the *nizak*'s own negligence in leaving his fruits unattended and susceptible to damage. This rule is highlighted by providing a situation in which *shein* is exempted EVEN though the fruits are lodged in what is formally defined as a *reshut* *ha-nizak*. Since pedestrians are expected, the *nizak* erred in leaving his fruits unattended.

This *nizak* factor - gauging his level of negligence - might underlie a different sugya regarding *shein* in *reshut* *ha-rabim*. In last week's shiur we introduced the case of *mitgalgel* and the gemara's (20a) uncertainty about applying the *reshut* *ha-rabim* exemption. The Rishonim differ as to the conditions of *mitgalgel* (literally, rolling). The Ra'avad suggests that the gemara questions fruits which lie in *reshut* *ha-nizak* but can be eaten by an animal which is standing in *reshut* *ha-rabim* (or possibly vice versa). Thus, according to the Raavad, the gemara's question is whether we determine payments based upon the location of the fruit or the location of the animal. This reading of the gemara seems very difficult. Why should we place such significance upon the location of the fruit? If the entire eating process occurs in a *reshut* *ha-rabim*, why should the initial location of the fruit in *reshut* *ha-nizak* dictate liability? We might explain this approach based upon the aforementioned '*nizak*-based' understanding of the *reshut* *ha-rabim* exemption. If the ONLY reason that we exempt this payment is because the *nizak* was negligent in leaving his fruits unattended, we might not excuse payments if the *nizak* were not negligent, even though the actual damages occurred in *reshut* *ha-rabim*. *Reshut* *ha-rabim* damages per se do not provide basis for exemption. Rather, most cases of damages within *reshut* *ha-rabim* entail some degree of negligence of the *nizak* (for leaving his fruits in a public thoroughfare). In this unique case - where he placed his fruits safely in his own property (and did not invite the public to trespass as he did in the case of *mekatzeh makom* - the case addressed earlier) he might exhibit absolutely no negligence. In the absence of his negligence, we cannot excuse the *mazik* from payments - EVEN if the actual damage occurred in the *reshut* *ha-rabim*.

We have so far demonstrated three different views of the *shein* and *regel* exemption in *reshut* *ha-rabim*. The Rosh claimed that it was a purely formal issue, based upon the verse '*ubi'eir* *bisdei acher*.' The Rif asserted that since these damages are perfectly routine, we cannot obligate the owner to pay - "should we demand that he walk in *reshut* *ha-rabim* grasping the tail of his animal?" (BK 19b). Based on the gemara 21b we posed a third option - a person who leaves his fruit in a public area unattended is the truly negligent party and cancels any liability of the *mazik*.

A possible fourth option arises from a gemara in the sixth perek regarding the manner of appraising the compensation. If an animal ate attached fruit from a field, should its owner compensate the value of the fruit, or the loss which the field absorbed? A bushel of fruit when sold alone is worth more than its value relative to the overall field. Which strategy should be employed to assess the damages? The mishna (55b) cites the majority opinion that the value is assessed based upon the overall field. The ensuing gemara cites the following source in support: "*Ubi'eir* *bisdei acher*" (he will consume another's field) comes to teach us that we evaluate based upon the overall field. We might reason that this assessment strategy is not merely a peripheral issue but rather reflects a broader concept. What do we identify as the 'damaged item' the fruit or the field? Assessing the diminished value of the field might indicate that we view this animal as having damaged the field by eating its fruit.

Keep in mind that this gemara refers to ATTACHED FRUIT - a situation in which the animal might truly be attacking the field by eating the fruit. In different circumstances - for example, eating detached fruit gathered in the *nizak*'s field or damaging items which were never attached - we might not visualize the attack as one against the field. Alternatively, we might claim that all *shein* and *regel* is an attack on the 'field.' Animals are not expected to roam into private property, but to remain within the public domain; by violating this rule and invading my privacy the animal pays for that very invasion. Of course, if no damage to any item occurs no liability exists, for the invasion was harmless. If, however, some form of damage ensued, we might obligate full payment since the field or domain has been invaded in a harmful manner.

This question might revolve around a grammatical issue - how to read the letter 'bet' within the word *bisdei*. This letter could connote 'in another field,' indicating the LOCATION of the damage. Alternatively, it might connote upon, or 'a,' in which case it identifies the field as the object of the attack. For example, the talmudic term '*me'ila b'hekdesh*' (which also applies the introductory bet) suggests abuse 'of' *hekdesh*, not abuse within the location of *hekdesh*. It is possible to view the actual private field as the object of the damage and the particular item which was consumed as merely the manner by which this invasion becomes abusive.

If we adopt this broader perspective, we understandably redefine the nature of the *reshut* *ha-rabim* exemption. As the liability exists for invading a field - if the damage of the same specific item occurred without any invasion of the private realm, no liability exists.

This might help us better understand several specific applications of the *reshut* *ha-rabim* exemption. For example, consider the manner in which Rashi explains the *mitgalgel* case: the fruits were positioned in *reshut* *ha-nizak* and the animal seized the fruit and transferred them to a *reshut* *ha-rabim* in which he ate them; do we assess the location of the seizure or the actual eating. Intuitively we would certainly side with the latter approach. Since the animal ultimately pays for the consumption and destruction of the item, we would be inclined to study the location of the eating. Why should we attribute meaning to the area in which the seizure occurred? However, *shein* and *regel* pay for the harmful invasion of a field - the actual appropriation of the item and detachment from the field looms larger than the subsequent consumption. The actual seizure constitutes the attack of the field - once it has been removed, the subsequent consumption is of little consequence to the actual field. It would therefore be logical to assess the location of the '*lekicha*,' or seizure. See also Tosafot in his commentary to the gemara 23a s.v. Tifshot, regarding the significance of *lekicha*.

Sources and Questions for Next Week's Shiur:

BK (19b) mishna

BK (20a) *ve-kama... minei* (21a)

Tosafot (20a) *s.v. zeh ein*

Rif (8b in the pages of the Rif) *ve-im* ...(9a) *mammona*

Tosafot (20b) *s.v. ha ithanit*

Tosafot (21a) *ve-yahavi*

1) What generates the obligation known as *Ma She-neheneit*?

2) How could we exempt *zeh neheneh ve-zeh lo chasser* while also exempting *ze lo neheneh ve-zeh chasser*?

3) How much liability exists if minor loss allowed significant benefit?

4) If the resident supplied lateral benefit (see gemara (21a) about preventing spirits from damaging the house) why should that excuse his primary obligation to pay?

5) How might we explain the *machloket* between Rabba and Rava in assessing the *mah she-neheneit* obligation?