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ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

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**Shiur #05: *Kinyan Daled Amot* (Part II)**

In the previous *shiur*, we explored the scope of *kinyan* *daled amot*. Did *Chazal* merely award the item to the person in closest vicinity (even without a formal *ma’aseh kinyan*) in order to avoid aggression? Or did *Chazal* rezone the four *amot* radius into a personal and temporary *chatzer*? We also explored different applications of *daled* *amot*. In this *shiur*, we will examine some of the technicalities of *daled* *amot* employment, technicalities which may themselves reflect the true nature of the *daled* *amot takana*.

One immediate question of interest concerns the status of *daled* *amot* for someone who is in motion. The *Shita Mekubezet* (*Bava Metzia* 9b) cites the Ra’avad, who claims that *daled* *amot* was only instituted for someone who is stationary at the moment of *kinyan*, not someone who strolls through the *daled* *amah* radius of a *hefker* item. The Tur (*Choshen Mishpat* 268) cites the Ra’avad but disagrees, applying *daled* *amot* even to someone in motion.

Presumably, whether or not a person is moving has little impact upon whether hostility will occur in attempting to take first possession of a *hefker* item. If the *takana* is narrowly defined as awarding items to the first arriver in order to avoid strife, it would be odd to limit it to stationary people. Evidently, then, the Ra’avad agrees with the *Rishonim* who define the *takana* as a rezoning of the *daled* *amah* radius as a mini-*chatzer*. This rezoning is obviously virtual; the person within the *daled* *amah* radius does not actually OWN that area, as he does a classic *chatzer*. *Chazal* redefined this area as HIS for the purpose of *kinyanim* (and perhaps widespread *kinyanim*). However, this zoning can only occur if a person establishes a semi-permanent, or at least stable, “moment” at which the surrounding area can be designated as “HIS.” Indeed, it would be preposterous to claim that as a person walks, EVERY “panning” four *amah* radius becomes zoned as his. Thus, the Ra’avad’s restriction upon the application of *daled* *amot* only to stationary recipients may indicate that he viewed the *takana* as a rezoning of the four *amah* radius.

A statement of the Nimukei Yosef in *Bava Metzia* (10a) leads us to a similar conclusion. Considering the scope of *daled* *amot* (and agreeing that in theory it can operate for sales and gifts, and not only *hefker* acquisitions), the Nimukei Yosef questions why the *Chakhamim* bothered to institute the classic *ma’aseh kinyanim*, such as *meshikha* and *hagba’ah*. By definition, *daled amot* is ubiquitous and should obviate the need for any other *kinyan*. The Nimukei Yosef explains that while *daled* *amot* is THEORETICALLY possible for the purpose of a sale, most sales present a technical difficulty that would make the use of *daled amot* virtually impossible. The item is ALREADY LODGED IN THE FOUR *AMOT* of the previous owner, the *mokher* who now wishes to sell. Once he has established his presence and the area becomes HIS *chatzer*; the *lokei’ach* cannot utilize *daled* *amot* for his own *kinyan*. It is unclear from the language of the Nimukei Yosef whether the presence of the *MOKHER* or the presence of HIS ITEM renders the *daled* *amot* HIS, but either way, the Nimukei Yosef is asserting and incredible *chiddush*: the concept of *daled* *amot* can be used to BLOCK a *kinyan*, not only to ENABLE one.

Once again, it appears that we are encountering a broader definition of the *daled* *amot takana*. Had the *takana* been narrowly defined, it would have awarded items (lost or sold) to the people in closest vicinity who SEEK to claim the item. The prior presence of the *mokher* would therefore not disable the *takana*. However, if the *takana* rezones the area as belonging to the recipient, the prior presence of someone else – in this case, the *mokher* – may impede the rezoning of the area as belonging to the *lokei’ach*, thereby blocking the *kinyan*.

Another fascinating and innovative statement about *daled* *amot* may also reflect its structure. The *gemara* cites the *daled* *amot takana* in the context of a *mishna* in *Bava Metzia* that discusses two people angling for a *metzia*. One falls on top of the item, while the second person actually performs a *kinyan* (such as *hagba’ah*). The *mishna* awards the item to the second person, who actually performed a *kinyan*, and not to the person who tried to claim the item by falling upon it. The *gemara* questions this ruling, since the “faller” achieved *daled* *amah* proximity prior to the second person’s *kinyan*. The first answer supplied by the *gemara* is that *daled* *amot* does not operate for the faller since by falling upon the item, he demonstrated that he wanted to own the item through the act of falling (which is not a *kinyan*) AND NOT through the *daled* *amah* principle.

The Ran cites the Rashba, who claims that this rule governs ANY *kinyan*. Mere general interest in *kinyan* is insufficient; to be fully *koneh* an item, a person must intend to utilize the ACTUAL *kinyan* that was executed. This is a bold and unexpected statement about the nature of *ma’aseh kinyan* and its relationship with the *da’at* necessary to accompany that *ma’aseh kinyan*. The more apparent reading of this *gemara* would delimit this principle to the *kinyan* of *daled* *amot*. In fact, most *Rishonim* claim that general *kinyanim* do NOT require specific *da’at*. *Daled* *amot*, however, will not benefit someone who does not wish to exploit its advantages.

This more conventional approach may suggest a more narrow definition of the *daled* *amah* experience. Had the *Chakhamim* legislated a new form of *chatzer*, it would operate in the standard form of *kinyan*; as long as general intent exists and the *kinyan* was executed, a *kinyan* should entail. However, if *daled* *amot* was never intended as the creation of a virtual *kinyan chatzer*, but rather allows an extra-legal awarding of items to people in closest vicinity, we can better appreciate the failure of this *kinyan* for a person who does not intentionally implement it. Many *takanot* of *Chazal* do not apply to a person who rejects their implementation for one reason or another. This principle – “*Kol ha-omer i efshi* *be-takanat Chakhamim, shomin lo*” – is well documented and empowers a person to deny the benefits of *takanot* that are usually advantageous but can sometimes be counterproductive. If *daled* *amot* has nothing to do with a newly defined *chatzer*, it may be dependent upon each and every isolated employment; every person can choose whether or not to implement the benefit of the *takana*. If, however, the *takana* rezones the area as a semi-permanent *chatzer*, it would be institutionalized and independent of the choices of particular potential beneficiaries.

To summarize: The scope and implementation of *daled* *amot* may reveal the nature of the *takana*. If the *takana* is narrowly defined, its scope may be limited (merely to acquiring *hefker* items), but it would apply to both moving and stationary individuals. However, if the area is rezoned as a semi-permanent *chatzer*, we may broadly apply the *kinyan* beyond the case of *hefker* (as discussed in the previous *shiur*), but may only apply it to someone who has established a presence. This question would also affect the role of the previous owner and whether his very presence impedes the processing of *kinyan daled amot*.

This question, which was articulated very clearly in the various positions of the *Rishonim*, may have been the basis for an interesting *machloket AMORAIM* about WHERE *daled* *amot* can operate successfully. R. Sheshet addresses the aforementioned issue of why the person who falls upon a lost item does not pre-empt the latter *kinyan* since he arrived in the *daled* *amot* radius first. He claims that *daled* *amot* will only operate in marginal areas, such as *simta*, which are officially considered part of *reshut ha-rabim* but are not frequented by many pedestrians. In REAL PUBLIC areas, classic *reshut ha-rabbim* zones, the *takana* of *daled* *amot* is inoperative. The *mishna* describing the faller and the *kinyan-* maker was describing a lost item in a conventional public area of *reshut* *ha-rabim*. Since the *takana* of *daled* *amot* is not effective in such a case, the first person to fully execute a *kinyan* *ma’aseh* obtains the item.

If the *takana* were geared primarily to averting conflicts, R. Shehset’s limitation would be counterproductive. The more public the area, the GREATER CHANCE of hostility and the GREATER NEED for a *takana* to preserve security and safety. By limiting *daled* *amot* to peripheral areas of *reshut ha-rabim* and not to central areas, R. Sheshet is effectively siding with the *Rishonim* who claim that *Chazal* rezoned the area as a *chatzer* even though it is not formally owned by the *kinyan* seeker. Semi-public areas can be rezoned by *Chazal’s takana*, but central areas through which everyone passes defy such rezoning and can NEVER be considered temporary *chatzers*. R. Sheshet clearly viewed the *takana* in this manner, compelling him to significantly circumscribe the *takana*.

Not all *Amoraim* agree to R. Sheshet’s limitation of *daled* *amot* to peripheral areas and not *reshut ha-rabbim* proper. R. Yaakov bar Idi (who first raises the *daled* *amot* concern in the *mishna* describing the faller and the *kinyan-* maker) answers the question differently and presumably believes that *daled* *amot* could operate EVEN in TRUE public areas. He may view the *takana* in the classic fashion – as a narrow award of the *hefker* item to the first arriver to avoid aggression. As such, not only would a classic *reshut ha-rabim* be included within the *takana*, it should be the primary context of the *takana*!