YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**GEMARA BAVA KAMA 5771**

**Shiur #23: *Shein in Reshut ha-rabim***

The next mishna initiates the discussion of *shein ha-mazik* - damages performed by an animal seeking to satiate its natural desires. After the initial treatment of an animal which eats or damages one item to 'reach' another item (which it plans to eat), the gemara addresses the question of *reshut ha-rabim*. The Torah conditions the obligation to pay for *shein* and *regel* damages by writing "'*u-bi'er bi-sdei acher*' - the animal will destroy in another's field. Based upon this *pasuk*, the gemara (BK 3a) derives an exemption for damages of *shein* and *regel* occurring in a public domain. The gemara in BK (20a) cites several intriguing exceptions which might better help us focus upon the nature of this exemption.

First the gemara cites the instance of an animal walking in *reshut ha-rabim* that stretches out its neck to eat food from the back of an animal walking alongside it. Though the damages clearly occurred in *reshut ha-rabim*, Ilfa obligates payment. How might we justify this exception?

 The plain reading of the gemara yields the following approach: The back of an animal might be considered a 'portable' *reshut ha-nizak*, floating within the overall sea of *reshut ha-rabim*. We find several parallel areas in halakha in which an animal's back can be considered a segregated 'zone' retaining its identity even in *reshut ha-rabim*. For example, the gemara in *Bava Metzia* (10b) considers the possibility of affecting *kinyan* *chatzer* by placing an item on the back of the buyer's animal. In general, a *kinyan chatzer* is defined as placing the item to be acquired in the domain of the potential buyer. If the gemara considers placing on top of an animal's back a possible *kinyan*, it would seem as if we are willing to visualize an animal's back as a *reshut ha-yachid* (private domain), even while the animal walks in a public area. The Rashba appears to adopt this view as indicated by his comparing and contrasting the back of an animal to a yard owned by two people (regarding which the gemara had already suggested (14a) that if one owner's animal damaged the property of another, no liability would exist, because we cannot consider this area the exclusive field of another). "If a jointly owned field is not considered '*sdei acher*,'" asserts the Rashba, "why should the back of an animal in the *reshut ha-rabim* be so considered?" By comparing these two cases, the Rashba indicates that he is willing to defend the status of the animal's back as a legitimate, halakhic or formal *reshut ha-nizak*.

 The Ramban, in his commentary *Milchamot Hashem*, takes a different stance regarding Ilfa's halakha. The Ramban claims that the payment exemption of *reshut ha-rabim* (at least according to Ilfa) applies only to cases in which the animal eats while walking in a NORMAL manner, from food which lies in the middle of *reshut ha-rabim* in a low area (which the animal can access without straining). In a case where the animal has to stretch to eat, payments are made even in *reshut ha-rabim*. Evidently, the Ramban is using Ilfa's halakha to illustrate his perception of the *reshut ha-rabim* exemption.

 To better understand the basis of the Ramban, we might inspect the Rif's comments and the Rosh's response regarding the overall *shein* exemption in *reshut ha-rabim*. The Rif writes that one is not liable to pay for *shein* and *regel* in *reshut ha-rabim* since they are *'urchei'* (perfectly normal and regular forms of damage). In other words, according to the Rif the *reshut ha-rabim* exclusion is not merely a formal 'loophole' derived from the phrase '*sdei acher*.' Instead, it can be seen as a logical clause: since it is natural and routine for animals to walk in *reshut ha-rabim* and damage/eat things which lie directly in their route, we cannot obligate the owner to pay for these damages; his level of negligence is insufficient to obligate payment. Recall the phrase of the gemara (19b) in defense of the *reshut ha-rabim* exemption: "*ve-chi yochazena bezenava ve-yeilech*" - should we demand that he walk in *reshut ha-rabim* grasping the tail of his animal in an attempt to prevent damages? Any form of damage which is perfectly 'natural' or 'normal' is excused from payment in *reshut ha-rabim*. The Rosh takes issue with the Rif's explanation, since the gemara itself bases the exemption upon the *pasuk* and not the Rif's logic.

 Apparently, the Ramban himself adopted the Rif's approach. Had the exemption of *shein* in *reshut ha-rabim* been purely formal - that it is not *sdei acher* - we would extend the exemption to any case of *hezek* which occurs in a formal *reshut ha-rabim*. In order to justify Ilfa's obligation to pay we would have to invoke the Rashba's claim: the back of the victimized animal is like a floating *reshut ha-yachid* and therefore no exemption applies. The Ramban understood that the *petur* for *shein* is based on its being a perfectly normal and expected form of conduct in *reshut ha-rabim* for which owners of animals are not obligated to pay. According to Ilfa, once the animal stretches out its neck, we cannot consider this as the "normal eating" which results from routine walking in *reshut ha-rabim*. A deviant case such as this is not included within the *petur* of *'urchei'* in *reshut ha-rabim*.

Interestingly enough, according to the Ramban, Ilfa would obligate payment only if the animal STRETCHED to eat the food off the other's back. If the animal carrying fruit was close to the ground, such that the *mazik* could eat food while it was walking without breaking its gait, there would be no payment for such an *urchei* case. The Rashba, by contrast, would see Ilfa as obligating payment anytime food is eaten off the back of another animal - since that back is defined as a portable *reshut ha-rabim*.

***Tzidey Ha-rechava***

 A similar question arises within the gemara's discussion regarding '*tzidey ha-rechava*' - the sidewalk. The gemara (21a) suggests that according to Rav, if an animal turns its head and eats food from a storefront which presumably extended into the public domain, it is obligated to pay. Rav, as well, might have been subscribing to the Rif's definition of the *reshut ha-rabim* exemption. Natural eating or damage while walking is excused, while deviant forms are payable.

Shmuel argues with Rav and obligates only if the animal departed from *reshut ha-rabim* and ate food from a storefront actually located in the *tzidey ha-rechava*. As Tosafot (*s.v*. *u-vemichazeret*) explain, Shmuel might have viewed this marginal sector of *reshut ha-rabim* (the sidewalk - designed for pedestrians or storefronts) as an appended part of *reshut ha-yachid*. Seemingly, Shmuel insists on formal location in determining the payment of *shein*, while Rav emphasizes the NATURE of the act of damage. They might have been disputing the Rif's point - whether the exemption is based on location of damage or the anatomy of the act of damage.

***Kofetzet***

 Having established two different approaches toward understanding Ilfa's view, we might return to Rav Oshaya (who argues with Ilfa). Rav Oshaya demanded *'kofetzet'* - the animal jumping - in order to obligate the payment. Which system was he working with, and in what manner is *kofetzet* a 'superior' or greater cause for liability than the mere stretching of the neck? The Ramban's explanation of Rav Oshaya is intriguing especially when held up to his analysis of Ilfa. When discussing Ilfa, the Ramban seemed completely disinterested in the 'location' of the damage but rather in the structure of the damage (routine or atypical). Subsequently though, while assessing Rav Oshaya's position, he explains that the scenario of an animal merely stretching to eat troubled Rav Oshaya in that the animal's feet remain firmly planted in *reshut ha-rabim*. By demanding that the animal jump and place its hind legs upon the back of the victim, Rav Oshaya assures that the attacking animal has completely 'left' the territory of *reshut ha-rabim*. This explanation is based upon the notion that location really DOES influence the obligation and we require not only that the eating take place in a *reshut ha-yachid*, but also that the *mazik* be situated in that reshut. Could this question of "*reshut*" or "structure of attack" lie at the heart of the machloket between Ilfa and Rav Oshaya? Could the former have adopted the Rif, while the latter was more concerned with location and therefore required both the eating and the animal to be situated within a *reshut ha-yachid*?

 The issue itself as to whether the location of the animal must also be within *reshut ha-yachid* or merely the act of eating, arises within a different context. The gemara introduces the situation of *'mitgalgel'* - food which is rolling. Many Rishonim offer different explanations as to what the gemara actually refers to. The Ra'avad, in his second explanation, claims that the gemara is referring to a situation in which the animal - situated at the *reshut ha-rabim* side of the border between *reshut ha-rabim* and *reshut ha-yachid* - eats food lying in *reshut ha-yachid*. This is an example of eating which occurs within *reshut ha-yachid* by an animal located in *reshut ha-rabim*. Further discussions of the *reshut ha-rabim* exemption might clarify the gemara's concern for a complete *reshut ha-yachid* setup - both in terms of location of damaged item as well as placement of animal.

 Returning to Rav Oshaya, we might have explained his position in a different manner. He might have agreed to Ilfa's basic premise (according to the Ramban) - that location is not as significant as form and structure of attack. *Shein* is exempt from any action which cannot be considered routine or normal. According to Ilfa, any slight deviance - such as food raised above the eye or mouth level of the attacking animal - is sufficient to classify the eating as atypical. According to Rav Oshaya, however, only eating which can be achieved through the animal's JUMPING is considered a deviation from urchei. In theory, they both might accept the same definition of the *shein* exemption; they differ as to the barometer used to gauge this deviance.

 To be sure, Rav and Shmuel's *machloket* might also have been more of a technical one and not a fundamental one. Instead of arguing about the nature of the *shein* exemption, they each might have claimed that it was based on the Rif's notion of *urchei*. In order to be liable, the animal must "depart" from the normal routine; they debate exactly what is considered a departure. According to Rav, any eating which forces the animal to turn its head is a sufficient deviation from *urchei* to obligate payment. Shmuel argues and claims that only if the animal is forced to change its path and walk on the sidewalk to reach the food can it be considered as executing an atypical form of eating.

Sources for next week's shiur

Sources

BK (21a) "*amar Rav... mishna*" (21b)

Tosafot *s.v. ki pligi*

BK (20a) "*mitgalgel*," Rashi *s.v. kegon, mai*

Ra'avad *s.v. mitgalgel*

BK (55b) mishna

BK (58b) "*keitzad... tarti*"

Questions:

1) How does the gemara initially understand the exemption of *mekatze makom* according to Rav (see Rashi and Tosafot)?

2) What new principle regarding the *reshut ha-rabim* exemption is introduced by the gemara's subsequent explanation?

3) Why should we place emphasis upon the location of the fruit rather than the position of the animal (see Ra'avad)?

4) How does the gemara BK (58b) read the term '*bisdei acher*?'

5) Why should we stress the seizure of the fruits rather than the consumption?