**YESHIVAT HAR ETZION**

**ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)**

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**TALMUDIC METHODOLOGY**

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**Shiur #02: *Bah Be-Machteret* and the Stolen Item**

The *gemara* in *Sanhedrin* (72a) discusses the guidelines governing someone known as “*bah* *be-machteret*,” a robber who enters someone’s home. Since we assume that a thief will murder the homeowner if confronted, he is assigned the status of *rodef*. A classic *rodef* can and should be eliminated if there is no alternate method of rescuing his potential victim. By extension, a *bah be-machteret*, who is considered a *rodef*, can be eliminated by those with the opportunity.

The *mishna* pairs this halakha with the general rule known as “*kam lei be-derabbah minei*” – the clemency shown to someone who is guilty of capital as well as lesser crimes. A person who is administered capital punishment (*onesh mita*) cannot be prosecuted for accompanying monetary restitution (*onesh mammon*). For example, if a person burns a field on Shabbat, he is administered *sekilah* (stoning) for the Shabbat violation but is not obligated to restitute the value of the field to the homeowner. By extension, Rava states, a *bah be-machteret* thief would be excused from any collateral monetary crimes committed while advancing toward the victim and his home. Since Halakha allows his neutralization, he is considered someone who is *chayav mita* and cannot be litigated for accompanying *mammon* payments. Damages while "in the act" of *bah be-machteret* cannot be prosecuted because of the *kim lei* exemption stemming from his de facto death sentence.

Rav cites a more intriguing position: not only is the thief exempt from paying for the stolen items, but he is even exempt for RETURNING undamaged stolen items. This position is puzzling since the stolen items **belong** to the original owner – the victim of the theft – and should be returned regardless of any *kim lei* dispensation. While *kim* *lei* exempts compensatory payments (such as damages and torts), it should not excuse the thief from returning an actual undamaged item! Whereas Rava's position that the thief is exempt from payment for the damaged stolen item conforms to the general notion of *kim lei*, Rav’s extreme position that undamaged stolen items may be retained by the thief is logically challenging.

It is true that there is a unique mechanism whereby a thief can achieve ownership of a stolen item while merely retaining an obligation to compensate its value. If a *ganav* alters the item – known as “*kinyan* *shinuy*” – he acquires ownership of the stolen item and remains obligated merely to compensate value alone. However, in our scenario, the *bah be-machteret* has not performed an alteration of *kinyan shinuy*. How does Rav allow him to acquire ownership without the classic *shinuy* event? Evidently the dynamic of acquiring stolen items through *shinuy* alteration must be reconsidered. The fact that we find a situation in which stolen items can be acquired WITHOUT *shinuy* forces us to redefine the actual role of *shinuy*.

Classically, *shinuy* is considered an act of *kinyan* uniquely available to a *ganav*. In ordinary situations, items are acquired through acts that physically demonstrate mutually agreed upon transfers of ownership. For example, small items are lifted by the purchaser (*hagba'ah*), an act that demonstrates newly achieved control. Larger items, such as animals, are physically relocated into the property of the purchaser; this act of *meshicha* demonstrates the new possession of the *lokei'ach*. Unlike purchasers who perform bilaterally agreed to actions of *kinyan*, a *ganav* performs a UNILATERAL act of acquisition by altering the item. By imprinting the item with a new identity, he unilaterally establishes his status as the new owner. Since he previously performed an act of *geneiva*, he is still obligated to compensate the value of the item to its original owner. However, the actual item cannot be legally extracted.

If this conventional model were true, our scenario would be logically difficult to understand. Evidently, the dynamics of *shinuy* operate differently. As R. Elchanan Wasserman articulates, a *ganav* achieves partial ownership from the MOMENT he removes the item from the possession of the victim. Since this act resembles the classic *ma'aseh kinyan* of *meshicha*, it confers partial ownership to the *ganav*, even though the act was not bilateral. In fact, several *halakhot* regarding a *ganav* indicate that he is considered a partial owner as a consequence of his act of *geneiva*. However, he can never achieve FULL ownership of the stolen item because he is continuously obligated to return the item to the victim. The Torah legislates a *chovat* *hashava*, the responsibility to return stolen items, and this mandate limits the *ganav*’s ability to achieve full ownership. A person cannot be considered an owner of an item that he is obligated to deliver to a different person.

*Kinyan shinuy* merely removes the obligation to return the stolen item. Only items bearing their original identity must be returned. Once the mandate to return an item has been lifted, the latent partial ownership achieved AT THE MOMENT OF *GENEIVA* can expand into FULL AND COMPLETE ownership. Thus, the *shinuy* does not CREATE the ownership transfer in the manner that classic acts of *kinyan* do. Instead, partial ownership is triggered during the original *ma'aseh geneiva*, and the *shinuy* eliminates the need to return the item, thus allowing for a full *kinyan.*

Conceivably, ANY mechanism that eliminates the *chovat* *hashava* should enable the expansion of the previously limited *kinyan*. A *bah be-machteret ganav* is excused from payments – including *chovat hashava* – through the *kim lei* exemption. Since the thief steals the item without absorbing a *chovat hashava*, he can acquire the item even WITHOUT a *shinuy*. If *shinuy* were a true mechanism of acquisition, it could not be replaced by *kim lei*. Since it is merely a *chovat hashava* removal system, it can be replaced by a different removal system – *kim lei* as it pertains to a *bah be-machteret*.

Presuming this logic to explain Rav’s extreme position, we need to reconsider Rava’s apparently intuitive position. If a *shinuy* merely REMOVES the limiting effects of a *chovat hashava*, allowing a *kinyan*, it indeed seems that *kim lei* should achieve similar success. Ironically, casting *shinuy* in this fashion frames RAV’S position as more logical. Why does Rava disagree, claiming that undamaged items must be returned by the *bah be-machteret*?

Perhaps Rav and Rava disagree about the fundamental role of *shinuy*. If *shinuy* were indeed merely a removal system of the *chovat hashava*, *kim lei* would produce equivalent results. If, however, *shinuy* is an autonomous ACT of *kinyan*, it is indispensable; a *ganav* can NEVER achieve ownership without executing a *shinuy* alteration. Rava maintains the latter view. Since the original act of *geneiva* was unilateral, it produces no elements of transferred ownership and the sole route toward achieving ownership is the act of *shinuy*. Since the *bah be-machteret* did not perform a *shinuy*, he cannot acquire ownership and must return an undamaged item. By contrast, Rav believes that *shinuy* functions as a removal system of the *chovat hashava*, allowing a partial *kinyan* achieved at the point of *geneiva* to fully expand. Since *kim lei* removes the *chovat hashava*, it can also enable the expansion of the *kinyan*. Thus, the argument between Rav and Rava essentially revolves around the nature of *shinuy.*

Alternatively, Rava may agree with Rav that *shinuy* is merely a *chovat hashava* removal system. However, he maintains that *kim lei* does not apply to payments such as a *chovat hashava*. If *kim lei* does not remove a *chovat hashava*, it cannot be considered equivalent to a *kinyan shinuy* and the thief cannot achieve ownership of the item. Classically, *kim lei* exempts compensatory payments, such as damages. Can it also exempt contractual payments? A well known position stated in the name of the *Chachmei* *Tzarfat* (medieval French *Rishonim*) – see Shitta Mekubetzet *Bava Kama* (91) asserts that it cannot. A person would be obligated to pay contractual obligations even if the contract entails a violation yielding capital punishment. If *kim lei* DOES NOT exempt contractual obligations, perhaps Rava claims that it similarly cannot eliminate a *chovat hashava*. The obligation to return the actual stolen item may not be punitive. If the item is lost, the *ganav* must repay its value, and this payment is clearly a punishment for having stolen the item. However, if the item is undamaged, it must be returned simply because it belongs to a different person (known in Halakha as "*mammoni gabach*," the claim of a person who identifies his item in the possession of another person). Although the nature of this payment is not contractual, it certainly isn’t penal. If *kim lei* only eliminates penal obligations, it would not cancel the obligation to return a stolen item. Consequently, the *chovat* *hashava* remains; even if a latent *kinyan* exists, it cannot expand as it would through a *shinuy*.

From this perspective, Rav and Rava fundamentally disagree about the extent of the principle of *kim lei*. Rav claims that *kim lei* cancels ALL payments and therefore eliminates the *chovat hashava*, thereby enabling the expansion of the latent *kinyan* and allowing the *ganav* to retain the stolen item while offering only monetary payment. Rava, in contrast, believes that *kim lei* DOES NOT exempt non-punitive payment and therefore does not impact the *chovat* *hashava*. The enduring obligation of *chovat hashava* hampers any potential *kinyan* expansion for the *bah be-machteret*, who must therefore return any undamaged items. If this is true, Rav and Rava fundamentally disagree about the nature of *kim lei*.

A more subtle analysis of these positions may yield a THIRD approach to the *machloket*. Perhaps Rav and Rava agree that *kim lei* only cancels punitive payments, but they debate whether the obligation to return an undamaged stolen item is punitive or – as suggested earlier – automatic. Must a *ganav* return a stolen item independent of the punitive obligation to reimburse the victim? The Torah requires payment EVEN if the item is missing/damaged, and clearly this is punitive and subject to *kim lei* exemption. But if the item is undamaged, is the obligation to return it based on its belonging to the victim, the original owner? Or – as implied earlier – does the item no longer fully belong to the original owner, so that there is no independent obligation to return it? According to the latter view, the return of the item is merely the preferred method of the penalty imposed by the Torah. The Torah penalizes the thief and obligates him to repay the victim; it also mandates the return of the stolen item, assuming that it can be returned in its original state.

Perhaps Rava claims that an autonomous payment obligation exists independent of the penal factor. This autonomous, non-punitive obligation is not eliminated by *kim lei*, and therefore no expansion of the *kinyan* can occur. By contrast, Rav may believe that no independent *chovat hashava* exists. Returning the item is solely an expression of the punitive compensation obligation. *Kim lei* eliminates this punitive *chovat hashava* and allows the nascent *kinyan* to expand. From this third perspective, Rav and Rava disagree about the nature of the *chovat hashava* – is it a stand-alone obligation that is impervious to *kim lei*, or is it merely a manifestation of the punitive obligation to repay the victim?

An interesting comment of Rashi in *Eiruvin* (13) implies that the *chovat hashava* is not autonomous, but rather stems from the punitive obligation to repay the victim of the theft. Rashi claims that an undamaged item stolen from a gentile can be retained by the thief. Since the thief has no biblical obligation to pay the non-Jewish victim, he similarly has no obligation to restore the original item. If there were an independent obligation to restore the original item, it would apply even in the absence of the punitive component and would obligate the return of the item to a non-Jewish victim of theft as well.

To summarize - Rav and Rava debate a seemingly technical issue surrounding the obligation of a *bah be-machteret* to return undamaged stolen items. However, they may be debating any of three fundamental questions, each in its own right a central question in its respective halakhic domain. Perhaps they debate the mechanism of *kinyan shinuy* and whether *kim lei* can simulate it. Alternatively, they may debate the applicability of *kim lei* to non-punitive payments. Finally, they may debate whether restoration of undamaged stolen items is punitive.

Not surprisingly, there is a fourth manner in which to analyze this *machloket*. The original logic of Rav's principle was based on the idea that the original act of *geneiva* creates a partial *kinyan*, which remains stifled until the *chovat hashava* is eliminated. Since the *bah be-machteret* is exempt from punitive payments, the *chovat hashava* is eliminated and the latent *kinyan* expands. Perhaps Rava subscribes to this model as well. In theory, an authentic *ganav* would acquire a partial *kinyan*, which would then expand upon elimination of the *chovat hashava*. However, the *bah be-machteret* *ganav* faces a more powerful effect of *kim lei*. He isn’t merely excused from payments or *chovat hashava*; his entire act of act of *geneiva* is “erased.”

The *kim lei* “effect” may be more powerful than simply excusing the lesser of two penalties. After all, the well-known position of *Tanna* *De-Bei* *Chizkiya* asserts that monetary payments are excused through *kim lei* even if the more severe capital violation was performed *be-shogeg* (unintentionally). In a *shogeg* scenario, the death sentence is not administered, yet monetary payments are still excused. Evidently, the dynamic of *kim lei* affects the nature of the CRIMINAL ACT. An act that is severe enough to yield capital punishment cannot be defined as a civil offense. Even if the death penalty does not apply in practice, the act is still defined as a severe felony violation, and that same act cannot be defined as a monetary offense.

This question of whether *kim lei* simply excuses the lesser payment or actually alters the definition of the crime is the cornerstone of the halakhic discussion of *kim lei* and may serve as the basis for the debate between Rav and Rava. As stated earlier, Rav believes that the act of *geneiva* of the *bah be-machteret* nets a partial *kinyan*, which expands upon the *kim lei*-based removal of the *chovat* *hashavah*. Rava may contest this position based on his perspective of *kim lei* as MORE potent; it erases the act of *geneiva* as if it never occurred. If a person is “hunting” his friend (and every murderous *machteret* stalker is considered a *rodef*), he isn’t also considered a thief! Since he has not affected an act of *geneiva*, he achieves no partial *kinyan* and can never own the stolen item. According to this theory, Rava may agree with Rav in theory about the dynamic of *kinyan* *shinuy* as well as the nature of the *chovat hashava*, but he may have viewed *kim lei* as more potent, so that no act of *geneiva* – and therefore no possible *kinyan* – occurred at all.