YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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**Shiur #24:
Obligation to Pay for Unsolicited Dividing Walls (*Makif* and *Nikaf*)**

The *gemara* in *Bava Batra* (4b) introduces a fascinating question regarding a person whose field is positioned within the four surrounding fields of his neighbor. The *mishna* describes a scenario in which the outer neighbor independently constructs protective walls that also benefit the inner owner. At what point can the outer neighbor compel the inner one to pitch in for the costs of the unilaterally constructed walls? Presumably, the concern of *hezek re'iyah* does not obtain (as they are probably operating in a non-*hezek re'iyah* situation). Hence, the inner neighbor has no legal compulsion to contribute to the wall. Nevertheless, he is benefitting from the efforts and expenses of the neighbor. Can unsolicited benefit obligate payment? This strange case is the *gemara*'s method of probing this interesting issue.

The *gemara* provides several scenarios in which payment – at some point and to some degree – would be obligatory, but the *gemara* never explicitly explains the source of this obligation.

An interesting Ramban draws an association that may clarify the obligation. The *gemara* in *Bava Metzia* (101a) discusses someone who unilaterally improves another's estate (for example, by constructing a protective wall). Although the owner never requested this capital improvement, he must pay – in particular if the improvement was STANDARD for this type of field (known as a situation as “*sadeh ha-asuyah litah*”). The simplest way to understand this *chiyuv* (and the manner explicitly outlined by the Ritva in his analysis of *Bava Metzia* [101]) is that a person who provides an obvious service can be assumed to be a “*sokher*” to whom the owner is obligated even without explicit agreement. This concept, known as "*hitchayvut* through *umdana*," asserts that even in the absence of an outright agreement, a *hitchayvut* arrangement can be launched to obligate the owner to pay the worker. If the owner were present, he would have contracted this service; hence, even in his absence, the service can be delivered and payment obligated.

The Ramban – in his comments to *Bava Batra* (4b) and the case of the enclosed fields – explicitly compares the two cases and bases the ultimate obligation to contribute to the wall upon the *umdana* principle. Even though the inner resident never EXPLICITY contracted the construction of the wall, since it is such an obvious need, he is obligated to pay as if he agreed.

A different option would suggest that independent of any ASSUMED AGREEMENTS, benefit received is sufficient to obligate the recipient. Even without a specific *pasuk* or description in the Torah, it is obvious that if palpable benefit is delivered, payment at some level is required. An interesting Tosafot in *Bava* *Kama* (59a) and also in Ketuvot (107b) explicitly limits the payments of the *Bava Metzia* case to palpable improvement (as opposed to prevention of damage that does not provide capital improvement). If the obligation to pay were based on assumed agreement, it would be difficult to distinguish between palpable and intangible benefit. As long as the benefit is standard, the agreement should be assumed. However, if Halakha demands payment for any capital improvement, it would only obligate that payment if ACTUAL, palpable benefit were provided. Theoretically, (although Tosafot does not directly address this point), the *nikaf* (inner neighbor) would have to contribute to the wall, since he is receiving palpable benefit from the investment of the *makif* (outer neighbor).

To summarize, there seem to be two very different reasons for obligating the *nikaf* to pay for the wall that the *makif* constructs: Either Halakha assumes implicit contractual agreement or the capital improvement or *shevach* itself obligates even in the absence of any explicit or assumed agreement. The Ramban asserted the former reason while Tosafot claimed the second.

This question may generate multiple *nafka minot* about the type of payment in which the *nikaf* is obligated. In his comments to *Bava Kama* (20b), Rashi explains that the walls in question divide the inner estate from the surrounding estates. Tosafot and the Ramban both disagree with Rashi and claim that the discussion surrounds the OUTER walls separating the outer estates from the *reshut ha-rabim*. Without question, the *nikaf* would have to pay his share for the inner walls; the *gemara*’s discussion ALSO obligates him to pay for the outer walls.

Perhaps Rashi's refusal to obligate the *nikaf* for the outer walls stems from his viewing the obligation as rooted in ACTUAL benefit. Only if the walls are placed directly between the two estates has capital improvement occurred on the inner estate, and that improvement can obligate payment. Outer walls provide SERVICE for the inner estate, but INTANGIBLE benefit which may not be considered capital improvement and may not obligate payment. As Tosafot in *Bava Kama* notes, non-palpable benefit cannot constitute an obligation if payment stems from the actual *hana'ah*. In contrast, the Ramban and Tosafot in *Bava Kama*, who obligate payment for outer walls, may have defined the obligation as stemming from assumed agreement. Since everyone wants protection from the *reshut ha-rabim*, we can assume that the *nikaf* would agree to pay for that service, even if the walls aren’t located on his border and don’t provide palpable capital improvement.

A different question surrounds the conditions under which the *nikaf* must pay. The *mishna* in *Bava Batra* (4b) is very vague about this issue, only asserting that until the fourth and final wall is built, no payments are obligated. Since the seal isn’t complete, no benefit has been delivered. When the fourth wall is built, the *nikaf* must pay, presumably for his share in all the walls (although this issue is also debatable). Is the *nikaf* obligated only if HE HIMSELF builds the fourth wall or even if the *makif* constructs that fourth wall? The *gemara* ultimately asserts that this is the basis of a *machloket* *Tannaim* between R. Yossi and the *Chakhamim* (although the *gemara* is not certain which view obligates the *nikaf* only if he built the final wall and which always obligating the *nikaf*).

The option of obligating the *nikaf* ONLY IF HE HIMSELF BUILDS the fourth wall suggests that we require some INDICATION that the service is agreed upon. Obvious benefits, such as planting trees or building walls around stand-alone fields, (as described in the *gemara* in *Bava Metzia* 101a) can obligate the recipient even without indication of acquiescence, but walls separating neighbors may not be a service that obligates payment based upon assumed agreement. If, however the *nikaf* himself builds the fourth wall he is indicating interest and agreement and must pay based on assumed contractual obligation. If, however, the *nikaf's* obligation stems from the actual benefit received, it is irrelevant who build the final wall; once the wall rises, ACTUAL palpable benefit is delivered and payment is obligated.

A final issue revolves around how MUCH payment the *nikaf* must render. It is generally assumed that he must pay for his share in all four walls (although according to one opinion in the *gemara*, even this is debatable). However, must he pay his share in the ACTUAL walls, or can he claim that he would have sufficed with cheaper walls and he only should pay his share in that cost? The *gemara* cites a *machloket* between R. Huna and Chiya bar Yossef about this issue (and even suggests that R. Yossi and *Chakhamim* may have debated this point as well).

Again, this question may logically revolve around the source of the obligation. If the actual capital improvement obligates the *nikaf*, he should have to pay half of the actual value of the wall. If, however, his payment stems from the ASSUMPTION that he would have contracted out for that service, he may be able to claim that he would have sufficed with less quality, and we can only assume his acquiescence about 50% of that less superior quality.