YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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GEMARA BAVA METZIA

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in honor of the yahrtzeits of our esteemed grandparents:

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**Shiur #11 - Daf 4b**

**Ein Nishba'in Al Kefirat Shi'abud Karka'ot**

**By Rav Eli Schorr**

Sources for "Ein Nishba'in 'Al Kefirat Shi'abud Karka'ot:"

1. בבא מציעא ד: ורש"י שם.

2. שבועות לז: "ר' יוחנן אמר .. תסתיים", תוספות בבא מציעא ד: ד"ה 'אין נשבעין'.

3. ר"י מיגש בבא בתרא קכח. (מצוטט גם בשיטה מקובצת בבא מציעא ד:), רמב"ן שבועות לז: ד"ה 'אלא', רא"ש שבועות ה', ג.

4. רמב"ם הלכות טוען ונטען פ"ד ה"ד-ה (עם מגיד משנה ולחם משנה ד'), פ"ה ה"ב (עם ראב"ד), הלכות אישות פט"ז הכ"ה (ראב"ד, מגיד משנה ולחם משנה), הלכות שבועות פ"י הי"א-י"ב ופ"ח הי"ג, חידושי ר' חיים הלוי על הרמב"ם בהלכות שבועות פ"ח הי"ג, אישות פט"ז הכ"ה, וטוען ונטען פ"ה ה"ב (בעיקר הפסקה האחרונה).

Questions to consider while learning the sugya:

1) How is the Halakha regarding shi'abud karka'ot related to the more general halakha of 'ein nishba'in al ha-karka'ot? Specifically, is a shia'bud considered to be actual karka for the purpose of shevu'ot (a subcategory, governed by the same principles) or is it an extension of separate halakha?

2) What role does the existence of karka need to play in order for the rule to take effect? Does karka need to be the source of the monetary obligation, or does it need to be the contested object itself? Does karka need to compose the entire claim, a significant portion, or even the most minimal component?

3) Would different categories of shevu'ot be effected differently by the above halakha?

The gemara (daf 4b) discusses the rule "ein nishba'in al kefirat shi'abud karka'ot" - there is no vow taken in the case of a denial of a monetary obligation on which there is a lein of land. According to this rule the Gemara suggests that, as a rule there can be no vow in the case of a shtar. This law will be the focus of our shiur this week.

Another example of the special status of shtar being shi'abud karka'ot with regard to hilkhot shevu'ot, is found in Shevu'ot 37b. There, the gemara discusses the laws of shevu'at ha-pikadon, a vow taken if ones denies having a petitioner's security. If one swears falsely in this case, it is considered an act of gezel (theft) and he must bring a korban (sacrifice), as well as pay the proper restitution according the laws governing such thefts. R. Yochanan is quoted as saying that if there are witnesses that the defendant owes money, then he must bring a korban, but if the source of proof is from a shtar, then he is exempt. Again, the reason given for this exemption is that a shtar involves shi'abud karka'ot, and one does not bring a korban if the subject of the vow was shi'abud karka'ot.

**A. What constitutes shi'abud karka'ot?**

Tosafot, in both Shevu'ot (s.v. Ve-ein) and Bava Metzia (the first s.v. Ein) raise a fundamental problem with this rule in light of the halakha of shi'abud karka'ot. According to R. Yochanan, who says that "shi'abuda de-oraita" (according to the Torah, a loan even without a shtar generates a lien on the property of the borrower), how can there ever be, a vow imposed in a monetary dispute mi-deoraita? Every case is automatically translated into a shi'abud karka'ot!? The classic cases of modeh be-miktzat (partial admission) and shevu'at ha-pikadon would be impossible with respect loans!?

The Tosafot in Shevu'ot answer that mi-deoraita those shevu'ot can exist only if the creditor waives the lien. This seems to be a rather extreme view as vows can exist on the de-oraita level only in one exceptional and artificial circumstance. Additionally, this answer fails to provide a fundamental distinction between an oral agreement and one backed up by a shtar, as the creditor can forgive the lien in the case of shtar just as easily (this difficulty is raised by the Maharam in Bava Metzia). The Tosafot in Bava Metzia obviate this difficulty by explaining that since Chazal cancelled all shi'abudim in oral loans (in order to protect people buying land, as in the absence of a shtar there is no way for them to know that a lien exists), we always view an oral loan as automatically involving forfeiture of the lien. Even so, the possibility of a chiyuv shevu'a exists only on a rabbinic level. Similarly, the Tosafot in Bava Metzia suggest that the shevu'a would apply if the borrower had no land to be meshu'abad.

There are two very important assumptions being made in these comments of the Tosafot. The first is that according to the Torah, a shi'abud of an oral agreement is identical to that of a written one (shtar); the only difference between them is the product of a rabbinic enactment. The second is that the defining factor of shi'abud karka'ot is the land serving as a form of payment. This seems to indicate an understanding of the halakha of shi'abud karka'ot as being a natural extension of the halakha that there are no vows taken in matters regarding land. Both of these issues are the subject of much debate and impact greatly on how this halakha is to be understood.

**B. Different types of shi'abudim**

Many Rishonim agree with Tosafot that shi'abudim through oral and written loans are fundamentally the same. Thus, they deal with the problem raised by the halakha of shi'abuda de-oraita along the same lines.

The Ramban (Shevu'ot 37b s.v. Ela), however, raises possibilities for distinctions between the different shi'abudim. He quotes an opinion stating that although there exists shi'abud karka'ot in the case of a loan conducted before witnesses (but without use of a shtar), there is also a lien on mobile objects and therefore there can be a shevu'a. With a shtar, however, there is no shevu'a as the purpose of the shtar is specifically to facilitate collecting from land and not from portable property. Therefore, when the creditor makes a claim based on a shtar, his claim is focused on the land! The Ramban even goes so far as to say that with a shtar it is as if the creditor has taken possession of the land – "ke-man de-tafis lehu dami." The Ramban then rejects this approach and proposes a conceptually similar, but less extreme, analysis. He states that since with a shtar it is relatively easy to collect land, even if, for instance, it has been sold to someone else, the land becomes the primary focus of his claim. Without a shtar, however, it is relatively more difficult to seize the land, and hence the shi'abud is focused on that which is most likely to be collected, the movable property.

The person who more fully developed the differences between shi'abudim is Rav Chaim Soloveitchik (Chidushei Rabbeinu Chaim Ha-Levi, Ishut 16:25; Shevu'ot 8:13). He submits that a shtar generates a completely different type of shi'abud than a loan made by oral agreement. He describes the two types by using the terms shi'abud nekhasim (a lien on the property) and shi'abud ha-guf (an obligation falling on the debtor himself). The personal responsibility of shia'bud ha-guf transfers to the debtor's property but it is not a description of a means of payment, and therefore there is no kefirat shi'abud karka'ot in the case of a loan made before witnesses and no exemption from a shevu'a, even according to the position that an oral loan allows collection from land. According to Rav Chaim, since practical methods or means of payment are not important in such a case, but rather the type of lein on the theoretical level, even if the debtor owns land subject to payment, he can still be obligated in a shevu'a (unlike Tosafot).

**C. Can a shi'abud exist even on a theoretical level?**

The question of whether the rule of shia'bud karkaot is based on practical payment or the theoretical nature of the lein, is the subject of a debate among the Rishonim. The Ri Migash quoted in the Shita Mekubetzet) discusses a case where the dispute is over a loan made with a shtar, but the shtar is lost. Even though the debtor admits to borrowing money with a shtar, the Ri Migash claims that since the creditor has no practical way to collect the debtor's land, this cannot be considered a case of kefirat shi'abud karka'ot. The Ramban (ibid.) quotes this ruling and argues on very technical ground. He maintains that even though the shtar is lost, it potentially might be found and reinstate the creditor's ability to collect based on the shi'abud karka'ot, negating the chiyuv shevu'a. The Rosh (Shevu'ot 5:3), however, takes a very different view. He asserts that even if the shtar is lost, the shi'abud karka'ot remains unaffected. The shi'abud is an objective fact and is not based on the existence of a shtar or witnesses.

The position of the Ri Migash (and even that of the Ramban) reflects an opinion that shi'abud karka'ot acts as some sort of practical guarantee, and cannot exist once the guarantee is gone. The Rosh, however, views the original implementation as having lasting significance with regard to shi'abud karka'ot even in the absence of a practical guarantee. I heard Rav Michael Rosensweig suggest in the name of Rav Soloveitchik zt"l that the two approaches reflect two variant readings of a gemara in Bava Batra (176a). One version reads, "mi-sh'at ketiva mesha'abed nafshei" – the shi'abud takes effect with the initial writing; and the other reads "mi-sh'at ketuva mesha'abed nafshei" – the shi'abud is a result of the final written product. According to the first reading, the shtar CREATES a shi'abud. In other words, at the point that the borrower writes and hands over the shtar to the lender, he is transferring to the lender his lands for the purpose of paying back the loan. The shtar functions as a shtar kinyan, which is not compromised by the loss of the shtar (like the understanding of the Rosh). According to the second version, which indicates that the lein is a function of the existence of the shtar as a written proof of the loan (which of course is nonexistent if the shtar cannot be produced - Ri Migash).

The Sma (CM 88:51) explains that the exemption created by a shtar exists even if the debtor owns no land, and hence there can be no practical payment from land. Nevertheless, the shtar itself is considered like land for the purposes of shevu'ot since the purpose of a shtar is to enable payment from land. Clearly, the Sema is of the opinion that a shia'bud can exist even on a theoretical level. However, this is a step beyond the position of the Rosh. The Rosh rules that a shi'abud karka'ot can exist in the absence of an available shtar, whereas the Sema claims that shi'abud karka'ot can exist even in the absence of karka itself! His position is well grounded in the language of the Shulchan Arukh (88:28) who states that "shtar havi kemo karka keivan she-hu al shi'abud karka'ot" – a shtar is like land since it is based upon shi'abud karka'ot. The Shakh (88:49), however, limits the ruling of the Shulchan Arukh to cases where there is actual land to collect from, as the Tosafot and others rule in explicit terms. How, then, do we explain the logic of the Sma?

Another possibility to explain a theoretical shi'abud can be based on the Rambam (Hilkhot To'en ve-Nit'an 5:2). There he deals with a case of damage done to one's land where there is a dispute between the two parties as to the extent of the damage and how much the defendant must compensate. The Rambam rules that even in a case of a partial admission or the plaintiff's being aided by one witness (classic cases of biblically prescribed shevu'ot), there is no shevu'a mi-deoraita. The Ra'avad argues and limits the exemption to a specific claim to physically repair the damage done to the land itself. According to the Rambam, why is there no shevu'a if the two parties are arguing about how much money is owed? How can cash be viewed as karka? Many Acharonim use this view of the Rambam to explain that a claim made on the basis of karka can be viewed as karka even if the subject of the claim is metaltelin or money. One might, therefore, be able to extend this logic from karka to shi'abud karka'ot and explain that even if the means of payment do not include karka, as long the basis of the claim is a shtar (which, as the Shulchan Arukh explains, is like karka) there can be no shevu'a.

**D. Position of the Rambam**

Where, exactly, the Rambam stands in his explanation of "ein nishba'in 'al kefirat shi'abud karka'ot," as well as his interpretation of the gemara in Bava Metzia, have been the subject of much discussion among the Rishonim and Acharonim. The following specific rulings are very significant to understanding his general approach:

\* Shevu'ot 8:13 – This is a straightforward presentation of the halakha of R. Yochanan from Shevu'ot 37b. One who denies a debt created by a shtar is exempt from shevu'at ha-pikadon as it is tantamount to denying land due to the shi'abud karka'ot.

\* To'en 4:4 – This halakha appears to be based on Bava Metzia 4b. There cannot be a shevu'a of a partial admission unless the subject of the admission is something that could have been denied and withheld by the debtor. If one claims that he is owed 100, 50 from a loan through means of a shtar and 50 by oral agreement, and the debtor admits only to the loan of the shtar, there is no modeh be-miktzat. The reason stated is that it is impossible to deny money obligated by a shtar, "she-harei kol nekhasav meshu'abadin" – because all of his possessions are under a lien – and even had he denied the debt he would have been required to pay it. The ruling seems to fit well with our gemara, but the Rambam explains it only on the basis of the first reason given by the gemara – the aid provided by the shtar. What about the explanation of "ein nishba'in 'al kefirat shi'abud karka'ot?"

\* Ishut 16:25 – A dispute between a husband and wife with regard to the amount guaranteed to her by her ketuva is subject to a shevu'a of modeh be-miktzat. The Ra'avad objects, saying that this is a case of kefirat shi'abud karka'ot and, therefore, there is no biblically mandated shevu'a. Here, the Rambam seems to completely reject the halakha of "ein nishba'in 'al kefirat shi'abud karka'ot!"

\* Shevu'ot 10:11-12 – There can be shevu'at ha-eidut about a ketuva if the ketuva could have been collected from metaltelin, but not if the woman could have only collected from land. Here he recognizes a level of kefirat shi'abud karka'ot, but with a qualification not seen in Shevu'ot 8:13. What position emerges from this array of seemingly conflicting sources?

Many commentators deal with specific ketuva-related issues to understand the last two rulings (see, for example, the Maggid Mishneh, as well as Chidushei R. Chaim Ha-levi, Hilkhot Ishut 16:25, where he offers a specific explanation and goes into great detail trying to explain the general position of the Rambam). However, even if we define the latter two as isolated aberrations, we are still left with the first two sources, where one clearly endorses the halakha of "ein nishba'in al kefirat shi'abud karka'ot," and the second completely ignores it.

How does the Rambam understand the gemara in Bava Metzia, if kefirat shi'abud karka'ot is not a consequential reason? The Nimukei Yosef explains that according to the Rambam, the gemara in Bava Metzia is only giving the reason of shi'abud karka'ot as an explanation according to R. Chiya, who holds that "heilakh" (a case where the admission is accompanied by immediate payment) does not exempt one from a shevu'a (see last week's shiur) and would disagree with the first reason in the gemara, "that the shtar helps him." This reading implies that the shtar "helps" the creditor, in that the debtor cannot deny it, and not, as Rashi understands, that the shtar helps the debtor. This reading can be dismissed, however, if inability to deny the claim (an absence of admission, in essence) is considered to be distinct from "Heilakh."

Rav Chaim Soloveitchik and Rav Yisrael Gustman (Kuntresei Shi'urim, Bava Metzia 6) both offer explanations for the contradiction in the Rambam. Rav Chaim (Shevu'ot 8:13) explains that shevu'at ha-pikadon is fundamentally different than other types of shevu'ot with regard to shi'abud karka'ot. Since alongside shi'abud karka'ot there is a general shi'abud which includes all types of property, when if one denies his obligation, it is a complex denial which can be broken down to a denial of metaltelin as well as a denial of karka. Therefore the shevu’a can imposed on the non-karka component of his denial. However, a violation of shevu'at ha-pikadon is an act of theft (gezel). Therefore, it can only be considered theft if and only if all of the debt in its entirety is denied, and therefore the denial must include the karka component, which undermines the possibility of shevu’a.

Rav Gustman offers an explanation based on the Rambam we saw above in To'en 5:2. There, as many understand it, the Rambam is of the opinion that the status of land is applied to a claim if the source of the claim is rooted in land. Rav Gustman notes that when it comes to a shevu'a of partial admission, the Torah refers to the episode as "ki yiten" - when one shall give an object to another. This transfer of the item, money or general metaltelin is at the root of the chiyuv shevu'a, not the land. However, when it comes to shevu'at ha-pikadon, the Torah uses the term "ve-khichesh" - and he contradicts. The emphasis here is not on the original transaction, but rather on the theft accomplished by denial through the shevu'a. In the case of a shtar, the denial includes shi'abud karka'ot.

**Sources and Questions the next shiur.**

מקורות

1. ד: "מתיב מר זוטרא …מחייב".

2. רש"י ד: ד"ה 'פטור', תוספות ה. ד"ה 'אי נמי', 'והודה'.

3. בבא קמא לה: "גופא … לגמרי".

4. שבועות מ. "ואמר רב נחמן … אדמון היא", כתובות קח: "הטוען … לא טענו".

Questions:

1. Why, according to Rashi, is "hoda be-karka ve-kafar be-keilim exempt from a shevu'a?

2. Why is "ta'ano chitin ve-hoda lo be-se'orin" not considered modeh be-miktzat? (Try to explain this even assuming that we reject Raba bar Natan in B.K.)

3. What is the debate regarding "ta'ano chitin u-se'orin ve-hoda lo be-se'orin? How is this case different than one who claims full jars of oil, and is countered by an admission of empty jars?