

Chapter One

Mishnah As explained in the introduction, our chapter deals with the laws of *hazamah*. The basic rules of *hazamah* will be introduced in the Mishnahs that follow. Our Mishnah cites cases that are exceptions to the general rule of *hazamah*:^[1]

מעידין אנו באיש פלוני שהוא בן גרושה – **In what manner do witnesses become *zomemin*?** כפיצד העדים נעשים וזממין – **If they said, “We testify about this-and-this person [a certain man who was until now presumed to be a qualified Kohen] that he is the son of a divorced woman” or “the son of a *chalutzah*,” and they are found to be *zomemin*,**^[2] או בן חלוצה – **we do not say, “Let this [false witness] be relegated to the status of the son of a divorced woman or the son of a *chalutzah* in his place,”** i.e. in case the false witness is himself a Kohen, we do not disqualify him from the Kehunah as he intended to do to his victim.^[3] אין אומרים ועשה זה בן גרושה או בן חלוצה תחתיו – **Rather, he receives forty lashes.**^[4]

The Mishnah cites another case in which *zomeim* witnesses do not receive the punishment they intended to inflict on their victim but receive lashes instead:

מעידין אנו באיש פלוני שהוא חייב לגלות – **If they said, “We testify about this-and-this person that he is liable to exile”** because he killed someone inadvertently, and they are found to be *zomemin*,^[5] אין אומרים ויגלה זה תחתיו – **we do not say, “Let this [false witness] be exiled in his place,”** although this is the punishment that he intended to make his victim suffer. אלא לוקה ארבעים – **Rather, he receives forty lashes.**

Gemara The Gemara notes two difficulties with the Mishnah's opening question:

הא כפיצד אין העדים נעשים וזממין מיבעי ליה – **Seemingly, [the Mishnah] should have stated, “In what manner do witnesses not become *zomemin*,”** since the Mishnah proceeds to present cases in which the false witnesses do *not* receive the penalty they sought to impose on their victim! ועוד – **Moreover,** the very question of the Mishnah appears unnecessary, (מ)דקתני לקמן – **for [the Mishnah] teaches below:**^[6] אכל אמרו להם – **BUT IF THEY [a second set of witnesses] SAID TO THEM [the original set]:**

– הויאך אתם מעידין – **“HOW CAN YOU TESTIFY about this event WITH US ON THAT DAY [the day you say the incident occurred] IN THIS-AND-THIS PLACE!”** (מכלל דאלו אין וזממין) – **THESE [the original set] ARE *ZOMEMIN* and are subject to the reciprocal punishment. Since that Mishnah teaches the mechanics of *zomeim* witnesses, there is no reason for the Tanna here to ask the very same question, “In what manner do witnesses become *zomemin*?” – ? –**

The Gemara replies:

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1. The Gemara will explain why the Tanna begins the tractate with these exceptional cases.

2. A Kohen is forbidden to marry a divorcee, as it is stated (*Leviticus* 21:7): *and a woman who has been divorced from her husband they shall not marry*. Additionally, he is Rabbinically forbidden to marry a *chalutzah* (see *Kiddushin* 78a), because of her similarity to a divorcee. (When a man dies without children, his widow remains legally bound to his brothers to allow for one of them to marry her in *yibum*. If they refuse to marry her, one of them must perform the ceremony of *chalitzah* to free her to remarry anyone else – see *Deuteronomy* 25:5-10 and Tractate *Yevamos*. The widow who has undergone *chalitzah* is known as a *chalutzah*.) A child born from the marriage of a Kohen and a divorcee or a *chalutzah* (or any other woman forbidden to a Kohen) is called a *chatal*. He does not have the sanctity of a Kohen and is in all respects like an ordinary Yisrael (e.g. he is forbidden to eat *terumah* and [in the case of a divorcee's son,] is permitted to become *tamei* to a corpse).

In the present case the witnesses testify to having seen the mother of this Kohen divorced by a previous husband [or to have undergone *chalitzah* from a previous husband's brother] before she married this Kohen's father, so that the witnesses are in effect testifying that this person is a disqualified Kohen (*Rashi*). A second pair of witnesses then come forward and testify that on the very day that the first pair claim to have seen the man's mother accept a *get* or undergo *chalitzah* in location A, they [the second pair] were with the first pair in location B, so that the first pair could not possibly have seen what they claim to have witnessed. This new testimony renders the first pair *zomemin*.

3. As per the Torah's instruction regarding the *zomeim* witness (*Deuteronomy* 19:19): *You shall do to him as he planned to do to his brother* (*Rashi*).

4. This is the penalty known as *malkus*. [The penalty is always referred to as “forty lashes” or “the forty,” as per the verse (*Deuteronomy* 25:3): *Forty he shall strike him*. Nevertheless the Sages derive that the penalty actually consists of only thirty-nine lashes – “forty-less-one” (*Ritva*; see Mishnah on 22a).] The Gemara will explain why in fact the ordinary punishment for the *zomeim* witness is not administered here [or in the Mishnah's next case] (*Rashi*).

[Some authorities assert that the Biblical penalty of *malkus* can only

apply to witnesses who attempted to impose a *Biblical* disqualification on a Kohen, but not if the disqualification is only *Rabbinic* in nature. Thus, if witnesses testified that a Kohen was the son of a divorced woman – a Biblical disqualification – they are subject to *malkus*. But since the son of a *chalutzah* is disqualified only by Rabbinic law (see note 2), the false witnesses cannot be subject to this Biblical penalty. The Mishnah mentions the two together only because they are similar and are generally coupled, but they do not share the penalty of *malkus* (*Ramban, Ritva*).

Rambam (*Hil. Eidus* 20:8), however, seems to rule that the penalty applies in the case of the *chalutzah* as well. It has been suggested that he holds that although the disqualification is only Rabbinic, since their false testimony has the *practical effect* of disqualifying the Kohen accused of being a *ben chalutzah* from the Kehunah, their testimony is significant even on the *Biblical level* (no less than testimony regarding a personal debt). Their *hazamah* on this account therefore subjects them to the Biblical penalty of *malkus* (see *Aruch LaNer* and *Teshuvos R' Akiva Eiger* vol. 1 §179).

It should be noted that *Rashi* to a later Mishnah in our tractate (13a) indicates (ד"ה גרושה וחלוצה) that there is a Tannaic view that a *chalutzah* is *Biblically* forbidden to a Kohen, and that that Mishnah follows that opinion. (Such a view is set forth by *Tos. Yeshanim* to *Yevamos* 44a ד"ה הכתוב.) Accordingly, it may be that the present Mishnah too follows that opinion.]

5. [The Torah decrees a sentence of גלות, *exile*, for unintentional killing. This exile is served in one of the six cities of refuge (or one of the forty-two Levite cities). The laws relating to this penalty of exile form the subject of Chapter Two of this tractate.] The witnesses testified that the person killed inadvertently (*Rashi*; cf. *Ramban*) on such-and-such a day in such-and-such a place, and therefore is required to go into exile. Subsequently, a second pair of witnesses came forward and rendered the first pair *zomemin* by testifying that the first pair were with them in a different place on the day they claim to have seen the killing.

6. Below, 5a. [The prefix מ in the word מִדְקַתְנִי, as well as the phrase מְקַלְל appearing in parentheses at the end of this paragraph, appear in the standard editions of the Gemara but do not seem to have been in *Rashi's* text, as noted by *Maharam*. We have explained the Gemara according to *Rashi's* commentary. Cf. *Tosafos* ועוד *Ritva* and *Ritva*.]

תנא הנתם קאי – The Tanna of our Mishnah is referring back to there, the last Mishnah of the previous tractate,^[7] which states: כָּל הַזֹּמְמִין מְקַדְמִין לְאוֹתָהּ מִתָּה – ALL ZOMEMIN WITNESSES ADVANCE [i.e. are led out forthwith] TO THAT very FORM OF EXECUTION that they sought to inflict on their victim, חוץ לַדָּוָהּ – EXCEPT FOR THE ZOMEMIN WITNESSES OF THE DAUGHTER OF A KOHEN AND THE MAN WHO COHABITED WITH HER, שֵׁאִין מְקַדְמִין לְאוֹתָהּ מִתָּה אֲלָא לְמִיתָה אַחֲרָת – who do not advance to that form of execution, but rather to another form of execution.^[8] וְיֵשׁ עֵדִים וּזְמִמִּין אַחֲרֵיהֶן שֵׁאִין עוֹשִׂין בְּהֵן דִּין הַזְּמָה כָּל – As a sequel to that ruling, the Tanna of our Mishnah notes: And there are yet other *zomemin* witnesses to whom we do not apply the rule of *hazamah* punishment at all, אֲלָא מְלָקוֹת אַרְבָּעִים – but rather the punishment of forty lashes. בְּיַד – IN WHAT MANNER do such witnesses become *zomemin*? – If they said, “WE TESTIFY ABOUT THIS-AND-THIS PERSON THAT HE IS THE SON OF A DIVORCED WOMAN OR THE SON OF A CHALUTZAH,” and they are found to be *zomemin*, אֵין אוֹמְרִים יַעֲשֶׂה זֶה בֶּן גְּרוּשָׁה אוֹ בֶּן חַלּוּצָה – WE DO NOT SAY, “LET THIS [FALSE WITNESS], if he is a Kohen, BE RELEGATED TO THE STATUS OF THE SON OF A DIVORCED WOMAN OR THE SON OF A CHALUTZAH IN HIS PLACE”; אֲלָא לֹקֵה אֶת הָאֲרָבַעִים – RATHER, HE RECEIVES THE FORTY LASHES.^[9]

The Gemara gives the Biblical source for the rule that witnesses do not become disqualified from the Kehunah as a reciprocal punishment:

אָמַר רַבִּי – From where are these [laws] derived? מִנְהֵי מִיָּלֵי – יהושע בן לוי (אָמַר רַבִּי שְׁמֵעוֹן בֶּן לָקִישׁ) – R' Yehoshua ben Levi said (in the name of R' Shimon ben Lakish):^[10] דָּאָמַר קָרָא – For Scripture states:^[11] “וְעָשִׂיתָם לוֹ כַּאֲשֶׁר זָמַם” – And you shall do to him as he planned, which implies: לוֹ, וְלֹא לְזָרְעוֹ – to him, but not to his offspring. But if we were to disqualify him as a Kohen, the disqualification would apply to his children as well.^[12]

The Gemara asks: וְלִיִּפְסְלוּהוּ לְדִידֵיהּ וְלִיִּפְסְלוּ לְזָרְעֵיהּ – But let us disqualify him and not disqualify his offspring. In this way there would be no impediment to applying the law of reciprocal punishment! – ? –

The Gemara answers: בְּעֵינֵינוּ, כַּאֲשֶׁר זָמַם לַעֲשׂוֹת – For the punishment to be reciprocal we need to do to him exactly as he planned to do, and this is lacking if we do not disqualify his offspring, since his false testimony would have disqualified the victim's offspring as well.^[13]

The Gemara offers another source for the Mishnah's rule that the *zomemin* witnesses are not punished reciprocally by being

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7. *Sanhedrin* 89a. In the order in which the chapters of Tractate *Sanhedrin* (the tractate that precedes *Makkos*) appear in the Gemara, that Mishnah concludes the second to last chapter. In the order found in the standard texts of Mishnayos, however – and which apparently was the order possessed by the Gemara here – that chapter is arranged last, so that the Mishnah about the *zomemin* of a Kohen's daughter is the last Mishnah of Tractate *Sanhedrin* and immediately precedes this first Mishnah of Tractate *Makkos*. Accordingly, the Gemara explains that our Mishnah (in *Makkos*) continues the topic of that immediately preceding Mishnah.

8. The daughter of a Kohen who commits adultery as a *nesuah* is executed by שְׂרִיפָה, burning (*Leviticus* 21:9, Mishnah *Sanhedrin* 75a), a more severe form of execution than the regular penalty for adultery, which is קָדָק, strangulation (Mishnah *ibid.* 84b). However, whereas in the ordinary case of adultery both the man and the woman are executed in the same manner, i.e. through strangulation, in the case of the daughter of the Kohen the man is not executed by the same method as she, i.e. through burning, but rather through the usual method (strangulation). This is derived (*Sanhedrin* 90a) from the verse regarding the daughter of a Kohen (*ibid.*): *she profanes her father, in fire she shall be burned*, from which the Gemara derives: *She is executed through the special method of burning, but the man with whom she cohabited is executed through the usual method.*

The last Mishnah in *Sanhedrin* teaches that if witnesses testified that a certain man and the *nesuah* daughter of a Kohen committed adultery and those witnesses were found to be *zomemin*, then although the witnesses plotted to have two people killed, the man and the woman, and the form of execution she would have received would have been more severe than his (and there is a rule that when someone is liable to two forms of execution he is put to death with the more severe form – Mishnah *Sanhedrin* 81a), the witnesses are in fact put to death with his form of execution, which is the less severe form. This is derived from the verse regarding the *zomeim* witness: *And you shall do to him as he planned to do to his brother*, which implies: to his brother but not to his sister [i.e. in a case in which the witnesses conspired to have a couple put to death for a sin of illicit cohabitation and his form of death differs from hers, the witnesses are punished with his (their “brother's”) form and not hers] (*Rashi*, as explained by *Ritva*; cf. *Rashi* to *Sanhedrin* 90a ר"ה ובעולה). Thus, the immediately preceding Mishnah to ours discussed a case in which the law of reciprocal punishment for *hazamah* is modified somewhat, in that the witnesses are not made to suffer the full extent of the punishment they sought to inflict on their victim.

9. The Gemara's two questions concerning our Mishnah are thus

resolved. The first question was that instead of saying, “In what manner do witnesses become *zomemin*?” the Mishnah should have stated, “In what manner do witnesses not become *zomemin*?” The answer is that having mentioned in the previous Mishnah a case in which the reciprocal punishment is modified somewhat, the Tanna proceeds in our Mishnah to discuss a case in which the rule of reciprocal punishment is not applied at all. The Mishnah therefore asks, “In what manner do witnesses who are not punished according to the law of reciprocal punishment become *zomemin*?”

The second question was that since the Mishnah on 5a gives the procedure for becoming *zomemin*, why does our Mishnah ask the same question, “In what manner do witnesses become *zomemin*?” Again the answer is that the Mishnah is not explaining how witnesses ordinarily become *zomemin*. Rather, it is explaining how witnesses who are not subject to the usual law of reciprocal punishment become *zomemin* (see *Rashi*; cf. *Ritva*).

[In light of this explanation that our Mishnah is a sequel to the last Mishnah in Tractate *Sanhedrin*, we have the answer to another, rather glaring question. Why does the Mishnah speak of a case in which the witnesses testified that someone was the son of a divorcee or a *chalutzah*, which is an invalidity that applies uniquely to a Kohen? It could have spoken of a case in which the witnesses testified that the man was a *mamzer* (which is an invalidity that applies to Kohanim and Yisraelim alike), for the law of the Mishnah applies there as well! The answer is that since the Mishnah had previously been discussing the *zomeim* witnesses of the daughter of a Kohen, it continues to discuss a matter related to Kohanim in particular (*Tosafos* (א) ט"ה מעידין; cf. *Ramban*.)]

10. Other texts do not have the parenthesized words (see *Maharatz Chayes* for the reason).

11. *Deuteronomy* 19:19.

12. A man disqualified from the Kehunah because his mother was unfit to marry a Kohen is known as a *chalal*. This disqualification is passed to the *chalal*'s children (*Rashi*; see Mishnah *Kiddushin* 77a, *Rambam*, *Hil. Isurei Biah* 19:14).

13. Thus, it is not possible to apply the reciprocal punishment.

[In order for testimony to be accepted by the courts, there is a general requirement that it be subject to the possibility of *hazamah* and its reciprocal penalty (עדות שאינה יכול להיזמא). *Tosafos* ד"ה מעידין (א) therefore ask how the testimony of witnesses in our case can be accepted in the first place if they can never be punished with the reciprocal *hazamah* penalty.

Tosafos give two answers: (a) The lashes are considered a *substitute* for the usual *hazamah* penalty and thereby satisfy this requirement.

disqualified from the Kehunah:

בַּר פַּדָּא אָמַר – **Bar Padda says:** קַל וְחוֹמֵר – The source for the Mishnah's ruling is a *kal vachomer*: וְיָמָה הַמְחַלֵּל אֵינוֹ מִתְחַלֵּל – **Now if one**, i.e. a Kohen, **who disqualifies** the offspring he produces from a woman forbidden to him, **does not become disqualified himself** as a result of this forbidden union,^[14] הָבָא לְחַלֵּל וְלֹא הֵחֵל אֵינוֹ דִּין שְׁלֵא יִתְחַלֵּל – **then one who seeks to disqualify but did not disqualify**, i.e. a *zomeim* witness, who

only wanted to disqualify a Kohen through his testimony but did not succeed because his testimony was discredited, **is it not logical that he should not become disqualified?**

This explanation is questioned:

מִתְקִיף לָהּ רַבִּינָא – **Ravina challenged this *kal vachomer* argument** on the following grounds: אִם כֵּן בְּשִׁלְתָּ תוֹרַת עֵדִים – **If so, you have annulled the very law of *zomeim* witnesses** by the same logic:

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(b) Since the Torah excludes such testimony from the standard *hazamah* penalty, the Torah also implicitly excludes it from the general requirement that it be susceptible to all the rules of *hazamah*.]

14. A Kohen who cohabits with a woman forbidden to a Kohen does not become disqualified as a result, though the child of this union is a *chatal* (see *Kiddushin* 77a).