

THE PIRCHEI SHOSHANIM SHULCHAN ARUCH PROJECT

Dayanus

Shiur Two

Mareh Makomos for this Shiur

Tosafos, Sanhedrin 3a (D.H. Sh'lo)

Gemara Bava Kamma 84b

Nesivos HaMishpat, Biurim, S.K. 1

Rambam, Laws of Sanhedrin 5:10

Rosh, Bava Kamma, Perek HaChovel, Siman 2

Shulchan Aruch, Choshen Mishpat Simon 1: 1-3

**The Hebrew Version of this Lesson was written by
Rabbi & Dayan Yitzchak Zvi Oshinski Shlita**

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Rehov Kahanamin 54, Bnei Brak 03.616.6340
164 Village Path, Lakewood NJ 08701 732.370.3344 fax 1.877.Pirchei (732.367.8168)

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Learning to Be a Judge of Torah Law



Appointment of *Dayanim* in Eretz Yisroel and Abroad (cont.)

1 In our times (1), *Dayanim* are authorized to hear cases involving loans, inheritances and gifts, admission of debt, women's claims to their *Ketubah* and claims of damage to personal property [2]. These types of disputes arise very often and involve purported monetary loss to the claimant [3]. These are the two necessary criteria. Lacking one of them, the case is not heard.

Thus, today's *Dayanim* are not authorized to hear cases about types of disputes that do not arise so often, even cases which involve certain monetary loss to the claimant, such as [4] when someone's animal maliciously wounds someone else's animal (2). Similarly, even if something happens almost every day, if it not a matter of compensating monetary loss, the case cannot be heard. For example, if someone charges that his neighbor secretly stole from him, the *Dayanim* can rule on the theft itself, but they are not authorized to rule that the thief pay the Torah's fine for theft – *kefel* (paying double the principle) (3) [5].

No cases regarding fines instituted by our Sages can be heard either, such as where somebody shouts into his neighbor's ear and frightens him [6], for here, too, the claimant did not suffer monetary loss. So, too, if someone takes his hand and uses it to slap someone on the cheek, thereby causing his victim embarrassment, although Sages instituted that the aggressor must pay a fine, the case is not heard today.

The same applies to any case where, according to the law, the guilty party must pay more than the loss [7], or he need not compensate the loss completely (e.g. cases of half-damage payments). In all of the above, the only *Dayanim* who can hear and decide such cases are *Mumchim* (experts) [8] and

Semuchim (ordained judges) (4) [9], when their Semicha (ordination) was in the Land of Israel (today, however, there is no Semicha). The one exception is half damage payments in cases of Tzrororos (“pebbles” cases. See Shiur 1). The reason is that regarding Tzrororos, the payment of half the damages is not regarded as a fine, but as partial compensation for monetary loss.

2 If someone injures his fellow, judges who were not given Semicha in the Land of Israel (5) cannot collect from him (nezek – damage payments) [10], (tzar – payment for the victim’s pain), (pagam – payment for “blemish” to the victim), (boshess – payment for embarrassment) or (kofer – “redemption” if the victim died) (6). On the other hand, such judges are able to collect from him (shayvess – compensation for lost work time) and (Ripui – compensation for medical expenses resulting from the injury) (7) [11].

*Rama:*¹ *Some authorities maintain (the Tur in the name of the Rosh) that such judges (i.e. judges of today) cannot collect even medical expenses or compensation for lost work time. On the other hand, I have not seen that such is the custom [12]. Rather, the judges force the guilty party to monetarily appease his victim, by means of a fine of a sum that the judges deem appropriate (Darkei Moshe, explaining the Maharam in his halachic rulings, Siman 208), as seen further on, Seif 5.*

3 If an animal injures a person, judges who were not given Semicha in the Land of Israel cannot collect any damage payments from the animal’s owner, for such a case is not a frequent occurrence. If a person, however, injures someone else’s animal, he is made to pay full damages, regardless of where the incident took place. So, too, if an animal does damage by means of its (regel – foot, i.e. as it is walking normally) or its (shen – tooth, i.e. it eats something that it normally eats, or it does damage while taking some other physical pleasure). Payments are collected because such is the animal’s natural behavior, which makes cases such as these quite frequent. Accordingly, these cases are judged even by Dayanim who lack the Semicha in the Land of Israel. The same is so someone who is found to be a (ganav – thief) or a (gazlan -- robber). He is made to repay only the principle (8).

¹ Rama – R’ Moshe Ben Yisrael Isserlis - **Born:** Cracow, Poland, 1525. **Died:** Cracow, Poland, 1572. **Notes:** Talmudic commentator and Halachist. Descendent of a wealthy and illustrious family from Cracow, he served as Rabbi of Cracow where in 1552 he founded a prestigious Yeshiva that he led until his death. Leader of Polish Jewry he is a major halachic authority for the Ashkenazic world. Author among others of **Darchei Moshe**, glosses on the Beit Yosef, **Shaalot u’ Teshuvot HaRama**, a compendium of Responsa, **Toras Chatos**, a compendium on the dietary laws, **Torat Ha-Olah**, a work on the symbolic meaning of the sacrifices, as well as several works on Kabbalah, including a commentary on the Zohar. Arguably his most famous work is **Mapah**, Glosses on the **Shulchan Aruch**, where he brings the Ashkenazic views into what is otherwise mostly a Sephardic work thereby making it into a universal Code of Jewish Law. His tombstone bears the inscription “From Moses to Moses there was no one like Moses”, the first Moses referring to the Rambam and indeed sometimes he is referred to as the Rambam of the Polish Jewry.

Rama: Some maintain (Nemukei Yosef, Baba Kamma, Perek HaChovel) that only frequently occurring cases of robbery (g'zeilos) are heard, such as when someone entrusts his fellow with money or some other object of value, and afterwards the one who was given the thing denies that he has it. Cases of out and out robbery, however, are not judged, for they do not arise frequently. Even cases of actual robbery, however, if the seized money or item is still in the robber's possession, the court does obligate the robber to return what he stole (9) [14].

SIMAN 1:1

Introduction

We stress again that in our times, courts are authorized to judge only cases that arise frequently and involve monetary loss to the claimant. In Seif 1, the Shulchan Aruch sets forth several laws discussed by the **Tur** at the start of this Siman. Let us divide the rulings of the Shulchan Aruch into subject areas and discuss each area separately.

Our Limitations

The Shulchan Aruch first cites examples of cases where judges of today do have jurisdiction:

- A) Such cases about loans.
- B) Inheritances and gifts.
- C) Admission of debt.
- D) Women's claims to their Ketubah.

This reflects the ruling of **Tosafos** (*Sanhedrin* 3a), that loans, inheritances and *Ketubah* have the law of "gifts." The **Shulchan Aruch** also mentions claims of damages to personal property and immediately cites the guiding principle that the case must be one that arises frequently and involves monetary loss to the claimant.

Fines

On the other hand, if a case does not arise frequently, even if it does involve monetary loss, today's judges have no jurisdiction, such as when someone's animal wounds someone else's animal (See *Baba Kamma* 84b). Similarly, even if something happens almost every day, if it is not a matter of compensating monetary loss, the court has no authority. Therefore, in cases of theft, courts cannot order the thief to pay the fine of (*kefel*). Neither can the courts charge fines instituted by our Sages, such as (*tokei'ah*)

l'chaveiro), which means, according to the **Rashba**² (cited by the **Prisha**), someone shouts into his neighbor's ear and frightens him. Our Sages instituted that the *tokei'ah* pay a fine of one *Selah*, but today this fine cannot be collected. So, too, if someone slaps somebody across the face, thereby causing his victim embarrassment, although the Sages instituted that the aggressor must pay a fine, today's judges are powerless to charge the fine.

Similarly, any case where, according to the **Torah**:

The guilty party must pay more than the loss, such as the *kefel* payment, or the fine of “four or five times the principle,” or the fine of the “added fifth,” the courts have no authority (See the **Sma**).

So, too, where the guilty party need not compensate the loss completely, such as cases of (*keren* – “the horn of the ox”) i.e. **half-damage payments**, the only *Dayanim* who can hear and decide such cases are *Mumchim* (experts) and *Semuchim* – the *Semicha* having been attained in the Land of Israel.

Half Damage

The **Shulchan Aruch** concludes that the one exception is half damage payments in cases of *Tzroros* (“pebbles” cases, where an animal walking normally in the public domain steps on a pebble which shoots out from beneath the animal's foot and causes damage to property in a private domain). In such a case, the payment of half damages is considered partial compensation for monetary loss (not a fine) so even judges of today have jurisdiction, for although today's judges do not have jurisdiction over fines, they do have jurisdiction regarding damages.

² Rashba – R' Shlomo Ben Avraham Ibn Aderet - **Born:** Barcelona, Spain, c. 1235. **Died:** Barcelona, Spain, c. 1310. **Notes:** Student of Rabbeinu Yonah Gerondi and the Ramban. Rabbi of Barcelona and leader of the Spanish Jewry. Author of **Chidushei HaRashba** commentary on the Talmud. Author of **Teshuvot HaRashba**, 8 volumes containing about 16,000 Responsa, the most extensive of any Rishon, which are of great importance to psak halacha and lay the foundation of the later codes like the Tur and **Shulchan Aruch**. He also wrote a commentary on rabbinical legends, works on the laws of Shabbat and festivals. He defended the Rambam in renewed controversies over his philosophy but opposed excessive rationalism or mysticism. He allowed secular studies but issued a ban on such studies until age 30. His students include the Ritva and Rabbeinu Bachya.

Fire and Uncovered Holes

1. The **Shach** (*Seif Katan 2*) cites the opinion of the **Maharshal**³, that in our times, the courts also have no jurisdiction over damages that result when someone lights a fire or digs a hole.
2. The **Pischei Teshuva**, however (*Seif Katan 1*), cites several latter day authorities who dispute this ruling and maintain that cases of monetary damages stemming from fires and holes can be heard today.

Tools of Modern Day Courts

The **Sma** briefly discusses points made by the **Tur**, that today, there is no *Semicha* (ordination of judges -- *Dayanim*), and in our times, when *Dayanim* make their rulings, they are acting as mere “emissaries” of *Dayanim* of the past who did have *Semicha*.

Afterwards, the **Sma** cites **Hai Gaon**, who rules that nevertheless, courts of today must keep on hand a rod or a staff for striking those who warrant physical punishment, and so, too, straps for administering lashes. Also on the court premises there must be a *shofar*, to blow in the event that someone is sentenced to (*Niduy* – excommunication). The **Sma** asks, “Why doesn’t the **Shulchan Aruch** mention this law?”

The **Pischei Teshuva** adds (*Seif Katan 1*) in the name of several **Achronim** (latter day authorities) that if a *Beis din* of today wants to keep such implements on hand, it is permitted and is not considered (putting on airs – making oneself out as being more than one really is). We should note, however, that today, such implements are not kept on the court premises, for according to custom, the court does not excommunicate people or administer physical punishment.

Today’s Cases

Let us explain why, in our times, although there is no *Semicha*, judges have jurisdiction over cases that arise frequently and involve purported monetary loss to the claimant.

Money Lending

Regarding cases involving money lending, the **Sma** (*Seif Katan 3*) cites a reason found in the *Gemara*.

³ Maharshal- R’ Shlomo Ben Yechiel Luria **Born:** Brisk, c. 1510, **Died:** Lublin, 1573 **Notes:** Talmudic and halachic scholar. Rabbi of Lublin. A relative and close friend of the Rama. Author of **Yam Shel Shlomo** and **Chachmas Shlomo**, commentaries on the Talmud. **Chidushei Maharshal** contains emendations of the Talmud, Rashi, and Tosefot, included in traditional editions of the Talmud.

He says that courts have jurisdiction over cases involving money lending;
“so that the door is not closed to people who need to borrow money.”

That is, were the courts to lack such jurisdiction, no one would be willing to lend money, out of fear of never getting it back, so people who truly need loans would be unable to attain them. The effect on society and business would be disastrous.

Regarding money lending as well as the other cases that today’s courts can hear, the **Sma** writes:

The courts must have jurisdiction for an additional reason;
“To close the door on those who would sin.”

That is, it would be intolerable if unscrupulous people would be able to take loans having no intent to pay them back, knowing from the start that the courts are powerless to force repayment. So, too, the court must have power to rule in cases where a woman claims her *Ketuba*, for when a man takes a wife he signs a *Ketuba*, which, among other things, obligates him to pay her a sum of money if he divorces her. When a husband divorces his wife, the door cannot be left open to him to claim that he already paid her the *Ketubah*, knowing that he didn’t so that one “door” is not closed and other “doors” are not opened, our Sages instituted that, regarding some cases, today’s judges, all of whom lack *Semicha*, are “emissaries,” acting on behalf of judges of the past who did have *Semicha*.

Matters of Major Importance

Also there, the **Sma** writes of additional cases that today’s courts can hear, besides those that arise frequently and involve monetary loss to the claimant. These additional cases are characterized by the **Sma** – *“as matters of major importance”*. That is, the courts are given jurisdiction over certain important matters, despite the fact that the two key criteria – **frequency** and **monetary loss** – are not met.

Conversion

For example, explains the **Sma**, we see that courts today handle cases of: Conversion, though conversion is not a frequent occurrence, and neither is any loss of money involved.

Divorce

Similarly, we see that when a woman legally is entitled to a divorce, but her husband refuses to give her a (*get*) – the writ of divorce – today’s courts

intervene by taking various measures to force him to divorce her even in cases where no monetary loss is involved.

Court intervention in these areas, writes the **Sma**, is proof that in certain areas of significant importance, courts have jurisdiction, even when the two aforementioned criteria are not satisfied.

By What Authority

This principle set forth by the **Sma**, along with his two proofs to it, are discussed by the **Nesivos HaMishpat**⁴ there (*Biurim, Seif Katan 1*) with regard to another question. When we say that in our times, regarding certain cases, today's judges, although they lack *Semicha*, act as "emissaries" of judges of the past who did have *Semicha*, is this a Torah law, or is it only Rabbinic? Is the authority to act as emissaries given to the judges by the Torah or not?

Torah Emissaries

The **Nesivos** starts by saying that it would appear that today's judges are "emissaries" according to the Torah, and his major proof is that today, courts perform conversions, and as noted by the **Sma**, they also intervene when unfit husbands refuse to divorce their wives. According to the Torah, a **writ of divorce** given as a result of coercion is invalid, so the marriage remains in effect, so if courts today use coercion, it would appear that in this matter, which has great importance, today's judges are "emissaries" according to the **Torah**. Otherwise, the marriage, which went into effect with the force of the **Torah**, could not be dissolved by a "forced (*geit*)."⁵ Similarly, **conversion** to Judaism is a matter of **Torah law**, so how could today's courts make non-Jews into Jews unless today's judges, regarding this important matter, are "emissaries" according to the **Torah**?

Rabbinical Emissaries

Afterwards, however, the **Nesivos** notes that according to the **Ramban**⁵ and the **Rashba**, when today's judge's act as "emissaries" of judges of the past, it is only on

⁴ Nesivos HaMishpat – R' Yaakov Ben Moshe of Lissa – Born Loberbaum Poland 1759 – Died 1832

⁵ Ramban – R' Moshe Ben Nachman - **Born:** Gerona, Spain, c. 1194. **Died:** Israel, c. 1270. **Notes:** Also known as Nachmanides. Great Biblical and Talmudic commentator, Kabbalist, and Jewish leader, and a physician and linguist by trade. Scion of a renowned rabbinical family, he was a relative of R' Yonah of Gerona, and was a student of R' Yehuda ben Yakar. R' Natan ben Meir and a disciple in Kabbalah of R' Meir Abulafia, R' Ezra of Gerona, and R' Ezriel of Gerona. He opposed the rationalism of the Rambam while not opposing his halachic rulings. Participated in the Disputation of Barcelona in 1263 in the presence of King James I of Aragon and wrote **Sefer HaVikuach**, with a detailed account of this disputation. Banned from Spain in the aftermath of the disputation, he settled in Eretz Yisrael in 1267. Having been the first major authority to pronounce the resettlement of the land of Israel as a Biblical commandment, he spent the last years of his life trying to rebuild Jewish life, which had been devastated by the Crusades. He is the author of a major commentary on Chumash, printed in the Mikraot Gedolot, which integrates

the strength of a Rabbinic enactment. The Torah does not give them jurisdiction, for they lack *Semicha*. [As to how, according to the **Ramban** and **Rashba**, courts today can perform conversions and force unfit husbands to divorce their wives, see the **Nesivos** there]. **Procedures of Semicha**

The First Semicha

The **Sma** and the **Shach** discuss how, in the past, *Semicha* was performed. The **Sma** (*Seif Katan 9*) cites the words of the **Rambam**⁶ about *Semicha*.

*The first Semicha, writes the **Rambam**, was given by Moshe Rabbeinu to Yehoshua, as the verse says (Bamidbar 27:23), “And he leaned his hands upon him and commanded him.”*

A Physical Act

Moshe Rabbeinu also gave *Semicha* to selected elders of his generation, by leaning his hands upon them. When *Moshe* leaned upon them this way, intending to empower them to serve as *Dayanim*, the *Shechina* came to dwell upon them.

The Certificate

According to the **Sma**, the *Semicha* for *Dayanim* of succeeding generations was not given by means of “*laying of hands*.” Rather, the candidate for receiving *Semicha* would simply be called “*Rebbe*” by *Dayanim* who already had *Semicha*. Afterwards, the *Dayanim* bestowing the *Semicha* would add, “You are now ordained and have permission to judge even cases of fines.”

Passing Semicha On

Semicha could be attained only from *Dayanim* who already had *Semicha*. In this way, *Semicha* – “ordination” -- was transmitted “mouth to mouth,” from one generation to the next, and each **Dayan** could trace his *Semicha* back to the *Semicha* given by *Moshe Rabbeinu* to *Yehoshua* and the other elders of *Moshe*’s generation.

midrashic and kabbalistic elements, a commentary on the Talmud, **Milchamot Hashem**, a halachic work in defense of the views of the Rif, and **Toras HaAdam**, on the laws of the sick and dead. His students include the Raah and the Rashba.

⁶ Rambam – R’ Moshe Ben Maimon - **Born:** Cordova, Spain, 1135. **Died:** Cairo, Egypt, 1204. **Notes:** Also known as Maimonides. Great Talmudic commentator, Halachic codifier and philosopher. Born in Spain, he had to flee right after his Bar Mitzvah and lived most of life in Egypt. A physician to the Caliph. Author of **Peirush HaMishnayot**, commentary on the Mishna, **Sefer HaMitzvot**, an enumeration of the 613 commandments and an introduction to **Mishneh Torah**, a monumental and original code of Jewish Law also known as **Yad Chazakah**, *Yad* having the numerical value of 14 the number of parts in this work, and **Moreh Nevuchim/Guide for the Perplexed**, a philosophical treatise. Possibly the most important halachic authority among Rishonim and the greatest Jewish scholar ever. His epithet reads “From Moses to Moses there is no one like Moses”, the first Moses referring to Moses Rabbeinu.

The Bais Yosef's Semicha

The **Sma** mentions another manner of *Semicha*, the type received by the **Beis Yosef**, author of the **Shulchan Aruch**. This *Semicha* requires an assembly of all the acknowledged *chachamim* of the Land of Israel, who together confer the *Semicha*, as was done for the **Beis Yosef**.

The **Shach** (*Seif. Katan. 4*) notes the words of the **Rivash**⁷ (Siman 271), who spoke of the *Semicha* given in the *Ashkenazic* community. The **Shach** adds that this *Semicha* does not empower *Dayanim* to judge cases of fines, only divorce and *chalitzah*.

SIMAN 1:2

Five Infrequent Cases

As noted, today's judges cannot preside over cases where someone claims that his fellow Jew injured him, because no judges of today attained *Semicha* in the Land of Israel. Lacking *Semicha*, today's judges have no authority to require the alleged assailant to pay in the following case because they are not frequent:

1. *Nezek* – (damage payments)
2. *Tzar* – (payment for the victim's pain)
3. *Pagam* – (payment for “blemish” to the victim)
4. *Boshess* – (payment for embarrassment)
5. *Kofer* – (redemption if the victim died)

The **Sma** writes in (*Seif Katan 10*) that regarding “blemish” payments, such as those arising from rape or seduction, since these cases, too, do not arise frequently, judges have no authority to require these payments. Regarding embarrassment charges or “redemption” (*Kofer*), these are fines, not compensation for purported monetary loss, and neither are such cases frequent.

⁷ Rivash – R' Yitzchak Ben Sheshet Perfet - Born: Barcelona, Spain, 1326. **Died:** Algiers, 1408. **Notes:** Talmudic and halachic scholar. A student of the Ran. Lived in Spain most of his life presumably until around the time of the Spanish Massacres of 1391. Settled in Algiers where he became the Chief Rabbi. Author of commentaries on the Talmud preserved as part of the Shita Mekubetzet, as well as responsa. He warned against the study of philosophy and Kabbalah. His students included the Rashbatz.

The Rif, Rosh, Rambam

Worker's Compensation

On the other hand, in alleged cases of assault, should the claimant's be verifiable through witnesses, the question arises whether judges can rule on the issue and require that the assailant compensate his victim for lost work time (*Shayves*) and medical expenses (*Ripui*).

The **Tur** writes that the answer to this question is a matter of dispute:

1. According to the **Rambam** (*Mishnah Torah, Laws of Sanbedrin 5:10*), judges of today are authorized to hear these two types of claims and collect the payments. He writes that the **Gaonim** ruled similarly, and they added that in *Bavel*, it was common that such cases were heard and the payments were collected.
2. According to the **Gaonim** and the **Rambam**, it is enough that were the courts not to have jurisdiction, the claimant would suffer monetary loss, for due to his injury he loses work time and has to pay for medical treatment.
3. According to the **Rosh**⁸, however, even these two types of claims are not heard today and today's judges lack authority to charge the payments. The **Beis Yosef** explains that according to the **Rosh**, although the victim does suffer monetary loss, and injured people often lose work time and suffer medical expenses, still, anything connected to assault is not judged today, because the incident itself is not a frequent occurrence. The *Rif*⁹ rules like the *Rosh*.

⁸ Rosh – R' Asher Ben Yechiel - **Born:** Germany, c. 1250. **Died:** Toledo, Spain, 1327. **Notes:** Talmudist and Halachist, one of the most important in Jewish history. He was a descendent of the Meor HaGolah and a leading student of the Maharam M'Rottenberg and his successor as the leader of Germany. Left Germany in 1303 in the aftermath of the Rindfleish massacres and was welcomed by the Rashba in Barcelona. Became Rav and Av Bet Din of Toledo in 1305 and became the leading authority in Spain after the death of the Rashba. In this capacity he introduced in Spain the methods of the Tosefists and Ashkenazic minhagim. Opposed any attempt to give precedence to secular learning having prohibited such studies less than 25 year of age. Author of a commentary on the Mishneh, **Peirush HaRosh**, a commentary on the Talmud patterned after the Rif, **Hilchos HaRosh** (also known as **Piskei HaRosh**), a compilation of halachahs which is the basis for subsequent compilation including the Tur, **Tosefot HaRosh**, where he clarifies the Tosefot, Teshuvot Ha Rosh, a compilation of his responsa, and **Orchos Chaim**, on Ethics. Among his students are his on, the Tur.

⁹ Rif – R' Yitzchak Ben Yaakov HaKohen Alfasi - **Born:** Kila Chamad, Algeria, 1013. **Died:** Lucena, Spain, 1103. **Notes:** Talmudist and first halachic codifier. Student of R' Chananel and R' Nissim in Kairouan. Active in Fez, Morocco until age 75, when he fled to Spain. Settled in Lucena where he founded a yeshiva. He was instrumental in bring Jewish knowledge into Spain as he was the first major Rabbi there. Author of hundreds of Responsa in Arabic, author of **Sefer HaHalachos**, a Talmudic code representing the early rulings on the discussions of the Talmud and which was a primary source for the Rambam and the focus of great rabbinical studies in the following centuries.

The Mechaber

The **Beis Yosef** writes that in this instance, it is proper to follow the ruling of the **Rambam**, against the **Rif** and the **Rosh**. According to the general principles for deciding *Halacha*, when two “pillars of *halacha*” such as the **Rif** and the **Rosh** agree, and only one “pillar” stands against them, the opinion of the two wins out. Here, therefore, one would expect that the *Halacha* should be like the **Rif** and the **Rosh**. According to the **Beis Yosef**, however, our case is an exception, for the **Rambam** himself explained why, in his opinion, such claims should be heard even today, and the *Gaonim*, too, ruled as the **Rambam**, although the *Gaonim* did not explain their reasoning.

Accordingly, in *Seif 2*, the **Shulchan Aruch** begins by saying that in our times, judges do not hear assault cases with respect to claims of (*nezek*), (*tzar*), (*pagam*), (*boshess*), or (*kofer*). Regarding the above dispute, however, he rules like the **Rambam**, that today’s judges do deal with assault cases as far as claims for (*Shayvess*) and (*Ripui*).

The Rama

The **Rama**, however, argues with the ruling of the **Shulchan Aruch** and rules like the **Rif** and the **Rosh** that even (*Shayvess*) and (*Ripui*) claims are not judged today.

The **Rama** adds that according to **Darkei Moshe**, the **Maharam** wrote in his halachic rulings (*Siman 208*), “I have not seen that such is the custom (that is, *Shayvess* and *Ripui* are not collected today). Rather, the judges force the guilty party to monetarily appease his victim, by means of a fine of a sum that the judges deem appropriate.” (The **Sma** explains that besides paying an appeasement fine the assailant is also made to see that his victim has the necessary medical care that will restore his health).

The Sma

The **Sma** (*Seif Katan 11*) asks about the **Rambam’s** view that *Shayvess* and *Ripui* are collected in our times even in cases such as where someone cuts off another person’s hand. Such a case hardly ever occurs, so why should today’s judges be granted jurisdiction? The **Sma** explains that other types of assault cases do occur frequently,

Composed on Moed, Nashim, and Nezikin and tractates Berachos and Niddah. His students include R’ Yehuda HaLevi and R’ Yosef Ibn Migash. He was considered with Rashi as the two leading Torah giants of the period.

and in these instances quite often the victim loses work time and also incurs medical expenses. Since today's judges can collect *Shayvess* and *Ripui* payments in those assault cases, they can collect such payments in all assault cases, without distinction between incidents which are frequent and incidents which are infrequent. According to the **Rambam**, explains the **Sma**, "one does not distinguish between one injury and another."

Normal vs. Abnormal

Personal Injury: Abnormal

We already mentioned above the law about when someone's animal causes injury. The source of this law is a passage in **Bava Kama** (84b): If the victim is a person, says the **Gemara**, judges of today have no jurisdiction, for such incidents are relatively rare.

Damages to Animals: Normal

On the other hand, if someone's animal is the victim, such as when one man's ox, due to normal animal behavior, causes injury to another man's ox, the case is heard today, for such incidents are frequent. So, too, if a man injures someone else's animal, courts of today have jurisdiction, for this, too, is considered a frequent occurrence, and were the case not heard, the claimant would suffer monetary loss.

Tooth and Foot Cases

Regarding a claim that someone's animal did damage to someone else's animal or other belongings, the case is heard, however, only regarding (*shen*) or (*regel*) – the "tooth" or the "foot" – cases which involve animal behavior that is normal and expected, as explained above.

For example, if someone's animal wanders into a neighbor's field and starts to eat from the produce there, or steps on it in the course of walking, today's courts have jurisdiction, for such is a common occurrence and there is monetary loss to the owner of the field. In the language of the **Shulchan Aruch** (*Seif 3*) cases of this category are called (*behaima sh'bizika*) – an animal that damages." Because cases such as this are considered frequent occurrences, and the payments, which are *full* damage payments, are to prevent monetary loss, today's courts can hear such cases.

On the other hand, if the claimant says, for example, that his animal sustained injury because *abnormal* behavior of the other animal, such as in an alleged goring (*keren*, the "horn") or some other unexpected behavior, the courts lack jurisdiction. The reason is that such cases are not frequent, and according to

the Torah, the payment, which is never more than half of the damages, is a fine, not compensation for monetary loss. In the language of the **Shulchan Aruch** (*Seif 1*), cases of this category are called (*behaima sh'chanla*) – an animal that (maliciously) injures” (See *Beer Heitev Seif Katan 3*).

A Person has Mazal

The **Shulchan Aruch** rules that this passage of the **Gemara** reflects the law. Thus, when the claim that a person did damage to personal property, the case is heard. So, too, when the claim is that an animal did damage to personal property, but only in cases of (*shen*) or (*regel*), which are considered frequent [as opposed to (*keren*) (“horn”) cases]. In cases of (*shen*) or (*regel*), only when the damaged party is a person is the case not heard. The **Gemara** explains that such cases are not frequent, “**because a person has mazal.**” According to **Rashi**, the **Gemara** means that very rarely will a person sustain injuries because of the actions of an animal, because people, due to their intelligence, are able to protect themselves and easily can avoid such injury.

Theft and Robbery

The **Tur** writes that in our times courts also have jurisdiction over cases of theft and robbery. Words of the **Rosh** are the source of this ruling:

ACCORDING TO **TOSAFOS** (*BAVA KAMA* 84B):

“We see every day that the courts judge cases of robbery.”

The reason is that robbery and theft are frequent occurrences, and there is monetary loss to the person whose property was taken.

No Penalty Payment

The **Shulchan Aruch** rules like the **Rishonim** mentioned above, that today’s courts have jurisdiction over cases of robbery (and theft) but if someone is found guilty of this crime, never must he pay back any more than the value of the principle. If the object or money is still in his possession, of course he must return it, for such is repayment of the principle.

The **Shach** (*Seif Katan 8*) notes that a dispute exists regarding cases where the stolen object goes up in value while in the thief’s hands, before the owner has

given up hope of getting the item back. According to some authorities, today's courts have the power to make the guilty party pay the added value, though some say, no, for such would be considered payment over and above the principle.

The **Rama**, however, rules like the **Nemukei Yosef**¹⁰, who in his commentary on *Bava Kama* there makes a distinction between different types of robbery. Today's judges, rules the **Rama**, have jurisdiction only over common cases of robbery, such as where someone claims to have entrusted his friend to guard some of his money or a valuable object, and the other party denies the claim. Regarding "robbery" cases such as these, today's courts have jurisdiction, for such incidents happen frequently. On the other hand, today's courts lack jurisdiction over allegations of outright robbery, where someone is said to have openly snatched away another person's money or belongings, for robbery of this sort is not frequent. On the other hand, if what was robbed is still in the robber's possession, the courts step in and require him to return it.

The Shach

According to **Tosafos** (*Sanhedrin 3a, Sh'lo*) judges of our times have jurisdiction over all cases of robbery, except for robberies which also involve assault. According to the **Sma** (*Seif Katan 14*), this is the view of the **Shulchan Aruch**, too. The **Shach**, however (*Seif Katan 9*), disputes this interpretation of the words of the **Shulchan Aruch**, for the **Shulchan Aruch** writes simply (*Seif 3*), without any qualification, that in our times:

"If someone robs or steals, the courts collect from him only the principle."

This wording seems to imply that today's courts have jurisdiction over *all* cases of robbery. Accordingly, concludes the **Shach**, the **Shulchan Aruch** rules not like **Tosafos** (or the **Nemukei Yosef**) but like the **Rambam**, who maintains that today's courts can judge all types of robbery. The **Shach** goes on to prove that other

¹⁰ Nemukei Yosef – R' Yosef Chaviva - **Born:** Spain, late 1300s. **Died:** Spain, 1400s. **Notes:** **Nemukei Yosef** is a commentary on Hilchos HaRif, which is included in the traditional edition of the Talmudic volumes for which no Ran exists, including Moed Katan, Yevamos, Bava Kamma, Bava Metzia, Bava Basra, Sanhedrin and Makkot.

Rishonim share the view of the **Rambam**. Accordingly, he says, we are safe in saying that such is the ruling of the **Shulchan Aruch**.

Summary of the Shiur:

1. As stressed above, courts of our times are authorized to rule only cases that arise frequently and were the courts to lack jurisdiction, there would be financial loss to the claimant.
2. In our times, therefore, *Dayanim* are authorized to hear cases involving loans, inheritances and gifts, admission of debt, women's claims to their *Ketubah* and claims of damage to personal property.
3. On the other hand, when someone claims that his animal was maliciously wounded by someone else's animal; the courts cannot hear the case. Not only is such a claim infrequent, even if the claim is true, the claimant can collect only a fine, and only judges who received *Semicha* in the Land of Israel can judge cases of fines. Similarly, judges of our times cannot collect the Torah's fine of *Kefel* – double payment – in cases of theft. Neither are they authorized to collect fines instituted by our Sages.
4. Claims of damage resulting from (*Tzroms*), however, are heard today. The reason is that here, payment of half the damages is not regarded as a fine, but as partial compensation for monetary loss. (The damage to property results from a normal activity of an animal, not from something like goring).
5. The authorities differ as to whether in our times, judges have jurisdiction over cases where the claim is that there was personal property damage stemming from a fire that someone lit or from a hole that someone dug.

Enforcing the Law

Some maintain that courts of today must keep on hand a (*Makel*) – a rod or staff for striking those who warrant physical punishment, and so, too, straps for administering lashes. Also, according to this opinion, there must be a *shofar* on the court premises, in order to blow it in the event that someone is sentenced to (*Niduy* – excommunication). If a *Beis Din* of today desires to keep such implements on hand,

it is permitted and is not considered (putting on airs – making oneself out as being more than one really is).

According to custom, however, today's courts do not keep these implements on hand.

Conversion

Courts of today also have jurisdiction of matters of great importance, such as conversions and forcing unfit husbands to give their wives a divorce if the woman desires.

In the past, when *Semicha* was given, it could be given only by judges who already possessed *Semicha*, or by an assembly of all the generation's **Chachamim**.

The authorities differ as to whether in our times, the courts have jurisdiction to collect (*Shayves*) and (*Ripui*) – compensation for work loss or medical expenses where someone allegedly injures his fellow.

Technically speaking, rules the **Rama**, courts today lack such authority. It is customary, however, that the courts force the guilty party to financially appease the person that he injured. The court charges him a fine, according to a sum that the court deems appropriate.

If an animal is said to have maliciously injured a person, today's courts are not authorized to hear the case.

If a person is said to have damaged someone's animal, or someone's animal is said to have damaged another person's animal (through behavior that is normal for an animal) today's courts are authorized to hear the case.

The Halacha

The **Shulchan Aruch** rules like the **Rishonim** who maintain that if someone commits robbery or theft, today's courts have authority to collect the principle from him.

According to the **Rama**, courts of today are authorized to hear only "frequent" cases of robbery (but "outright" or "open" robbery), such as when someone claims that he deposited a belonging of his with his neighbor, entrusting the object to his neighbor's care, but the neighbor denies the claim.

Review Questions & Answers

1) Over what types of cases do today's courts have jurisdiction?

Only cases that arise frequently and involve monetary loss to the claimant.

2) Do today's courts judge money lending cases or women's claims to their *Ketubah*?

Yes. They also judge inheritance cases and cases where someone or his property damages another person's belongings or property.

3) Do courts today judge claims of *kefel* or other fines?

A. No. If someone's animal maliciously damages someone else's animal, since the claimant according to the Torah can collect only a fine, today's courts have no jurisdiction. For this reason, they cannot judge cases of claims of *kefel*. So, too, they cannot judge cases of fines instituted by our Sages. Only judges who attained *Semicha* in the Land of Israel can judge such cases.

4) Do today's courts judge cases of damage said to have been caused by Tzroros? Why?

Yes, because this charge of half-damages is not a fine.

5) Do today's courts judge cases of damage allegedly caused by someone's hole or his fire?

The Achronim differ about this matter.

6) What implements need to be on the court premises in our times?

Some maintain that the courts must keep on hand a rod or staff for striking those who warrant physical punishment, and so, too, straps for administering lashes. Also on the court premises there must be a *Shofar*, to blow in the event that someone is sentenced to (*Niduy*).

- 7) If courts keep such implements on hand, does it smack of haughtiness? Does it appear as if they are trying to make themselves out to be more than they are?

No, and courts are permitted to keep these implements on the premises.

- 8) Is it the custom today to keep these implements on the court premises?

No

- 9) Over what other matters do today's courts have jurisdiction?

Over matters of significant importance such as conversions and forcing unfit husbands to divorce their wives.

- 10) In the past, how was *Semicha* performed?

It was handed down from one *Dayan* to another, or it was given by a gathering of all the *Chachamim* of Israel.

- 11) In cases where someone is said to have injured his fellow Jew, do today's courts hear claims for lost work time (*Shayvess*) and or medical expenses (*Ripui*)?

The Achronim differ about this matter.

- 12) How does the Rama rule about the above question?

He rules that the courts technically have no authority but the custom is that they force the guilty party to appease the other party monetarily, according to a sum that the court deems appropriate.

- 13) If someone's animal is said to have caused injury to a person, do today's courts hear the case?

No, because such a thing does not happen frequently.

14) If a person is said to have injured another person's animal, is the case heard today?

Yes, such a case is heard today. So, too, if someone's animal is said to have done damage to someone else's animal or property, if the alleged damage was not malicious but a result of normal animal behavior.

15) In cases of alleged robbery or theft, if the claim is just for the principle, is the case heard?

The Shulchan Aruch rules like the Rishonim who say that courts do have the power to hear such cases and force the guilty party to compensate his victim for the principle.

16) What alleged cases of robbery are heard today?

According to the Rama, only robbery cases that happen frequently, such as when someone claims to have deposited belongings by his friend, and the friend denies possession.