

THE PIRCHEI SHOSHANIM SHULCHAN ARUCH PROJECT

Dayanus Shiur Three

Mareh Makomos for this shiur

Rambam, Laws of Sanhedrin 4:4-6

Gemara Baba Kamma 98b

Gemara Baba Kamma 56a

Gemara Baba Kamma 116b-117a

Gemara Baba Kamma 15b

Tosafos, Baba Kamma (D.H. V'ee)

Tur. this Siman

Rambam, Laws of Sanhedrin 5:17

Shulchan Aruch, Choshen Mishpat Simon 1 Seif 4-5

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Table of Contents

- 1. Seifim in the Shulchan Aruch and Rama Pertinent to This Lesson (including those cited by the Shach and Taz)**
- 2. Semicha Specifically in the Land of Israel**
- 3. Do Today's Courts Judge "Garmi" Cases?**
- 4. Defining "Garmi" as Opposed to "Gromma"**
- 5. The Law of "Mosair" in Our Times**
- 6. Authority of Today's Courts to Force Payments of Tzedaka**
- 7. Authority of Today's Courts Regarding "Conspiring" Witnesses**
- 8. Excommunication In Place of Payment of "Appeasement"**
- 9. Today, in Cases of Fines, If a Claimant "Grabs" To Cover His Loss**
- 10. In Cases of Fines, When a Damage Claimant Asks the Court for a Damage Appraisal So He Can Know How Much to "Grab"**
- 11. Early Acceptance of Testimony**
- 12. In Our Times, the Power of Admission in Cases of Fines: what if a Claim is "Grabbed" After the Accused Admits Liability?**
- 13. Excommunication to Coerce Payment of "Appeasement"**
- 14. Computing How Much Appeasement is Needed to Lift Excommunication**
- 15. Summary**
- 16. Review Questions**

Appointment of Dayanim



Simon 1 Seif 4 - 5

4 Cases of Garmi (10) are judged [even] by Dayanim who were not given Semicha in the Land of Israel. So, too, today's Dayanim can judge the law of a Mosair.

Rama: If witnesses lied [they are aidim zomimim – “conspiring witnesses”] but the court unknowingly used their testimony and took money from someone and it cannot be returned (11) [15], the court can judge these witnesses (12) and force them to compensate the loss (Mordechai, beginning of Perek HaChovel – Eighth Chapter of Baba Kamma). See Siman 29, Seif 2.

5 Although judges who lack Semicha in Eretz Yisroel are not authorized to collect fines (13), if someone according to the Torah deserves to be fined, the judges have the power to decree Niduy (excommunication) upon the guilty party until he appeases the person that he harmed (14). Once he pays the appeasement, according to the sum that the court deems proper [17], the court lifts the excommunication (whether the one who receives the payment is satisfied with the sum or not). Similarly, if, according to the Torah, someone deserves to collect a fine for damages, if he grabs the amount due him according to the Torah [he does (tefisa) --“taking hold” i.e. “collecting” on his own) the judges do not intervene (15) and he is allowed to keep what he grabbed (16).

Rama: And if the damaged party asks [the court], “Please assess for me my damages, so that I can know up to what amount I am allowed to grab,” (17) the court does not listen to him. Rather, if he already has grabbed on his own, they tell him (18), “This much is permitted [19] but any more you must return (Tur in the name of the Rosh, Perek HaChovel and end of the fist perek of Baba Kamma). All of this is relevant to fines written in the Torah [20]. On the other hand, where chachamim decide to charge a fine [21] for a purpose they deem constructive (See Seif 2) they can collect it (Mordechai, end of Perek HaSlolaiach).

Before explaining these Seifim, we would like to add a few words of explanation about “Semicha (ordination) in the Land of Israel.”

Receiving Semicha

SPECIFICALLY
IN THE LAND
OF ISRAEL

This concept was mentioned in the previous lessons and is mentioned in this lesson, too. In our times, no judges possess “*Semicha* in the Land Israel,” but one can wonder:

Even in the days when there was such Semicha, why should it have mattered whether it was given inside the Land of Israel or outside the Land of Israel?

If a judge has Semicha, and he is willing to bestow it upon someone else, what difference does it make where he is when he gives the Semicha?

The **Sma** (*Seif Katan 9*) asks these questions and cites the **Rambam** (*Mishnah Torah, Laws of Sanhedrin 4:4-6*) as the source of this law. Regarding a case of theft and the fine of *kefel* (“doubling” the principle), the Torah (*Shemos 22:7*) uses the word (*elohim*) to connote “judges.” Our Sages teach that (*elohim*) connotes judges who have *Semicha*.

Outside of the Land of Israel

The **Rambam** writes (*Halacha 4*), “No court is called (*elohim*) except one whose judges all received *Semicha* in the Land of Israel. These are the *Chachamim* who are qualified to judge, for the *Beis Din* of *Eretz Yisroel* examined them, appointed them and gave them *Semicha*.” The **Rambam** continues (*Halacha 6*), “One does not give *Semicha* outside of the Land of Israel, even if the one who would bestow the *Semicha* received his *Semicha* in the Land of Israel, and even if he now is in the Land of Israel. If the one to receive the *Semicha* is outside the Land of Israel (i.e. the *Semicha* would be sent by letter or would be performed by a messenger) it is not *Semicha*. All the more so in the opposite case (the one who would bestow the *Semicha* is outside of the Land of Israel and the one to receive it is in the Land of Israel). Only if both are in the Land of Israel is it *Semicha*, and even if the two are not in the same place...”

We see that just having *Semicha* is not sufficient; the *Semicha* must be in the Land of Israel.

Today's Courts Judge "Garmi" Cases

The source of this law (required reading in the *Mareh Makomos*) is in the *Gemara* in *Bava Kamma* (98b), for there it is evident that cases of *Garmi* were judged in *Bavel*.

Garmi vs. Gromma

Sometimes a person or a person's property will do direct damage to another person's property. All opinions agree that in such cases, the guilty party must pay compensation to the one that suffered the damage. Often however, damage is done in an indirect manner. In these cases, sometimes the responsible party must pay and sometimes he is exempt.

Bava Kamma 56a

Examples of *Gromma*

Clearly indirect damage is called *Gromma* – "causal" damage. In the *Gemara* (*Bava Kamma* 56a), we find a few examples of *Gromma*.

- 1) For one, "He who makes an opening in a fence that confines his fellow's animal." If the animal goes out through the opening and gets lost, the one who created the opening is exempt from paying for the animal, for his act represented "causal" rather than direct damage to the animal's owner.
- 2) Another example is where a fire is making its way across an open area, but someone "bends over the standing grain of his neighbor into the fire's path," so that the grain is destroyed.
- 3) Or, someone hires people to give false testimony against someone and thereby causes him financial loss.
- 4) Or, two people have court litigation and a third person has testimony that will win the case for one of the litigants and thereby help that litigant financially, but the third person abstains from coming forth to testify.

In all these cases, which are called *Gromma*, the courts have no power to force the guilty party to pay for the damages that he caused. He is obligated to pay only according to (*dinei shamayim*) – the laws of Heaven. (We must stress, however, that the guilty party

has no reason to rejoice that the courts are unable to make him pay for what he did, for as far as the main judgment is concerned, the judgment in Heaven, he must pay).

Garmi – Indirect Damages

Damages that come about less indirectly are called *Garmi*, such as when somebody burns someone else's I.O.U. In cases of *Garmi* the guilty party is obligated according to the "earthly" law. That is, he must pay according to (*dinei odom*) – the laws of man. The ways of distinguishing between cases of *Gromma* and cases of *Garmi* are discussed at length in the **Shach**, Choshen Mishpat *Siman* 386. In the **Shulchan Aruch** there, one can find additional illustrations.

Mosair: Handing Over a Fellow Jew

The **Tur** adds (*Siman* 1) that today's courts also are authorized to judge the law of "*Mosair*," despite the fact that this case is not one where the guilty party's act does direct damage to the victim or the victim's property. A *Mosair* does damage only through his power of speech. He reveals to non-Jews the identity of a wealthy Jew so that the non-Jews are able to confiscate some of the wealthy Jew's property. Thus, in an indirect way, he "hands over" (*Mosair*) his fellow Jew's property and causes its loss. Even in our times, courts have the power to make the *Mosair* compensate his victim. (With HaShem's help, we will learn this law in more detail when we learn *Siman* 368).

J U D G I N G
W I T H O U T
S E M I C H A

The source of this law, too, is the *Gemara Bava Kamma* (116b-117a), which tells of several Sages of the Amoritic era who judged this type of case, despite the fact that these Sages did not have *Semicha* from the Land of Israel.

The **Shulchan Aruch** rules that in our times, too, although judges of today lack *Semicha* from the Land of Israel, they are authorized to judge cases of *Garmi*, and also cases of *Mosair*.

In *Siman* 1, the **Shach** says (*Seif Katan* 10) that it is worthwhile to note a question that he raised elsewhere. One can wonder whether the payment that the guilty party must make in cases of *Garmi* is strictly a monetary payment. If so, it goes without saying that today's courts have jurisdiction. Perhaps, however, the payment is only a fine. If this is so, we would have to explain that here is yet another special important matter where courts are given jurisdiction.

Forcing Payments of Tzedaka

We would like to add the words of the **Ketzos HaChoshen** here (*Seif Katan* 4), who cites a ruling of the **Avi'assaf**:

*Even today, courts have the power to force a man to pay for food
for his sons and daughters who are still minors.*

While his children are minors, the father has this responsibility according to the laws of (tzedaka) – charity (*Gemara Kesubos*). Such a ruling is not a fine (for courts of today lack authority to charge fines) for we see in the *Gemara* that Rava forced people to give tzedaka (and Rava, who lived in Bavel, did not have *Semicha* from the Land of Israel).

“Conspiring” Witnesses

Let us say that two (or more) witnesses testify:

“Person X committed such and such a crime on such and such a day.”

Later, if two (or more) other witnesses appear in court and testify:

“Those two were with us in a different place at that time.”

The second set of witnesses is believed. The first testimony is considered false.

**THE PENALTY
FOR PERJURY**

How is the first set of witnesses punished? Whatever they were trying to do to Person X (through the court system) is done to them. This, in brief, is the law of (*aidim zomimim*) – “conspiring witnesses.” If the first set of witnesses was trying to use the court system to make Person X lose money, the court makes them pay Person X the sum that they were trying to make him lose. If they testified that he committed a crime that warrants the death penalty, so that they wanted the court to put Person X to death, the court gives them the death penalty.

The **Rama** cites the ruling of the **Mordechai**¹ (start of *Perek HaChovel*) about a case where such lying witnesses managed to make the court force Person X to pay out money from his pocket, and only afterwards did the second set of witnesses come. If the money paid out cannot be returned, writes the **Mordechai**, even courts of today can make the lying witnesses pay the damages that they caused, just as in any case where a litigant, because of false testimony, unjustifiably lost money.

¹ Mordechi – R’ Mordechai Ben Hillel HaKohen Ashkenazi – Born: Germany, 1240 Died: Nuremberg, Germany, 1298. A relative of the Rosh, son-in-law of R’ Yechiel of Paris, brother-in-law and student of the Maharon M’Rottenberg and a student of Rabbeinu Peretz. Murdered with wife and five children in the Rindfleisch Massacres. Author of the **Mordechai**, halachic digest of the Talmud and early authorities following the format of the Rif.

One Gets What He Tried to Give

In cases of “conspiring witnesses,” where the first witnesses, for example, seek to have the court put someone to death, the witnesses “*get what they were trying to dish out*” only if they didn’t succeed in having the court act on their words.

The verse applies:

“And you shall do to them (the liars) as they conspired to do to their brother,”
but not as they did.

Nesivos HaMishpat

If their conspiracy succeeds, the court cannot give them the death penalty because their victim, having been put to death, no longer can be called “their brother.” This limitation, however, does not apply when the conspiring witnesses cause the court to force someone to pay out money, as is explained by the **Nesivos HaMishpat** in our *Siman, Seif Katan 3*).

The Sma

The **Sma** (*Seif Katan 16*) explains that all this applies only when the court relied on the testimony of the conspiring witnesses and made the litigant pay money out of his pocket. On the other hand, if the second set of witnesses comes before the court acts on the basis of the first set, the court has no authority to make the first set of witnesses pay anything. This is so because the law of “conspiring witnesses” is essentially a fine, and judges of our times have no jurisdiction over cases of fines.

The **Sma** adds that only in cases of “conspiring” witnesses must the witnesses pay for the monetary loss that they caused (if the money is not recoverable), but not if the first set of witnesses is simply “contradicted.”

“Contradicting” Witnesses

In cases of “contradiction,” after the first set of witnesses testifies, other witnesses come, but they do not say about the first set of witnesses, “They were with us then, so therefore their testimony is false.” Rather, the second set of witnesses simply contradicts the first set, such as by saying that Person X, the accused, was with them at the alleged time, in a different place entirely. In such cases of (*bachasha*), “contradiction,” as opposed to (*bazama*), the first set of witnesses is exempt from having to pay, for how can the court know which of the two sets of

witnesses is telling the truth? Only regarding conspiring witnesses (*bazama*) is the first set made to pay (if the money paid out on the basis of their testimony cannot be recovered). Specifically in this case does the Torah decree that we know who is lying (the second set of witnesses is assumed to be telling the truth and the first set is considered to have lied).

Niduy: Excommunication

Although judges who lack *Semicha* in *Eretz Yisroel* are not authorized to collect fines, if someone according to Torah Law deserves to be fined, the judges have the power to decree **Niduy** (excommunication) upon the guilty party until he appeases the person that he harmed.

If a Claimant “Grabs” to Cover His Loss

Similarly, we learn from the *Gemara* (*Bava Kamma* 15b) that when someone according to Torah Law deserves to collect a fine for damages, if he grabs the amount due him [he does (*tefisa*) – “taking hold” as if to collect on his own] the judges do not intervene. He is allowed to keep what he took from the one who caused him harm.

In this *Seif* in the **Tur**, the **Tur** speaks of cases of (*tefisa*) before he speaks of courts using **Niduy** as “leverage.” Although in our times, he writes, courts have no authority to judge cases of fines, still, if someone according to the Torah deserves a fine and he “grabs” from the guilty party in order to recover his loss, the *tefisa* (grabbing) helps.

**After stating this principle, the Tur cites differing opinions of *Rishonim* about this law. Let us note these different opinions briefly, and add some explanation in light of the words of the *Bels Yosef*.
When Does “Grabbing” Help?**

When Grabbing Helps

1. According to **Rabbeinu Tam** (brought by **Tosafos**, *Bava Kamma* 15b, *V’Eee*) grabbing helps only when the one who suffered a loss takes the thing that actually caused him the loss. For example, someone’s ox unexpectedly goes his neighbor’s horse and the horse’s owner takes possession of the ox to help him to recover his loss.
2. In addition, the seized object can be kept only when it is seized right when the loss occurred (above, before the ox returned to its owner’s hands: **Beis Yosef**).
3. The **Prisha** explains that at the time when the damage is suffered, the one who suffers the loss is naturally upset, so only then are the Sages lenient with him. In the case above, only if he just then takes the ox is he allowed to keep it.

TODAY, IN
CASES OF
FINES:

According to **Rabbeinu Tam**², explains the **Beis Yosef**, if the one who suffered the loss were allowed to “take hold of” *other* belongings of the one who harmed him, and he could do so even on the next day, he is likely to seize whose worth exceeds what really was coming to him according to the Torah. Even if he did so, he would be allowed to keep what he seized, for in our times, courts do not rule in cases of fines. As a result, injustice could result.

Further on, we shall see that the **Rosh** deals with the question, “How could **Rabbeinu Tam** think that the one who was harmed would be able to grab things worth more than the amount due him according to the Torah and still keep them? In such an event, no longer would the case be considered a case of a fine. Rather, at this point, it would be a mere matter of taking things that are someone else’s property, so why should the courts not be able to make the person return whatever he took over and above what was permitted?”

Grabbing too Much!

THE COURT
MAKES THE
GRABBER
RETURN THE
DIFFERENCE

According to the **Rosh**, if the one who was harmed takes *any* object that belongs to the one who caused him the harm; the court lets him keep it. Due to the above question that he asks on the words of **Rabbeinu Tam**, however, the **Rosh** adds that if the damaging party claims that the other party “grabbed” from him something whose value exceeds what the damaged party was due according to the Torah, the court makes an assessment of the original damage. Then, if the court determines that the value of the “grabbed” item(s) exceeds the sum that the damaged party would have collected in the days when there were *Semuchim*, the court makes the “grabber” return the difference. Such does not constitute judgment of a case of a fine (as **Rabbeinu Tam** seemed to say) for compensation was already collected, by virtue of the ruling of the Sages that if the damaged party “grabs” in such a case he can keep what he grabs. *What remains at issue is only the difference, and that is not a matter of a fine.*

Appraising Damages

A person comes to court and claims that he suffered damages at the hands of so and so. He knows that, according to the mandate of Torah Law, the guilty party owes him only a fine and he also knows that courts today do not hear cases of fines. Accordingly,

² Rabbeinu Tam – R’ Yaakov Ben Meir – Born: Ramperupt, France, c. 1100. Died: Troyes, France, 1171

“Our Perfect Rabbi” from the verse “Yaakov ish Tam”. Halachist. A grandson and the most famous descendent of Rashi and one of the most quoted **Tosefists**. Leading halachic authority for Ashkenazic Jewry of his day he convened several Rabbinic Councils to enact rulings binding on French Jewry. His disagreement with Rashi over the correct order of the verses in Tefillin led to the custom of wearing two pairs. Author of **Sefer HaYashar/The Book of the Righteous** which collects Responsa and new insights on 30 Talmudic tractates.

he asks the court to make an assessment of his damages, so that he can “grab” from the one who harmed him and the court will let him keep what he grabbed. Does the court grant his request?

Rif vs. Rosh

It sounds from the **Rif**, writes the **Tur**, that if the damaged party asks the court:

“Please assess for me my damages, so that I can know up to what amount I am allowed to grab.”

The court grants his request. The **Tur** notes that this is how the **Rosh** understands the words of the **Rif**.

For his part, however, the **Rosh** disputes this ruling and the **Tur** rules like the **Rosh**, his father. About the words of the **Rif**, the **Rosh** writes, “This is not correct. The court makes no such appraisal. Rather, if the damaged party already has grabbed on his own, they tell him:

“This much is permitted but any more you must return.”

According to the **Rosh**, the law of “grabbing” is only (*bdi’aved*) – “after the fact,” so never should a court provide anyone with information would help him to grab (*l’chatchila*) – “in the first place.” The **Rama** rules like the **Rosh** and the **Tur**.

Appraise before Seizing

Similarly, it might happen that the damaged party comes to the court and says to the judges:

“Accept testimony (about the sum of the damages and how the damage happened) so that today or tomorrow, if I seize something from him you will not require me to give it up.”

In such a case, rules the **Rosh**, the Beis Din is not obligated to accept the testimony, “for courts in Bavel have no jurisdiction over cases of fines.”

On the other hand, if the damaged party already has seized something from the one who damaged him, and the other person complains to the court, the court does intervene. The judges tell the one who “grabbed” to present witnesses as to the sum of the damages and how exactly his damages were incurred. If the court decides that the (*tefisa*) – the “taking hold” – was justified, they tell the one who did the damage:

“We are not judging that you owe him a fine. If you like, you can redeem what he took from you by paying him such and such a sum.”

If the damaged party had seized something worth more than the amount of damages that he suffered, the judges tell him to return the difference. If he does not present witnesses to substantiate his claim the judges tell him to return what he seized.

It is important to point out that although the damaged party can seize and keep belongings of the other party, the worth of what he seizes cannot exceed the sum of the fine that he would have collected from judges who have *Semicha*. So, too, according to the opinion that the one who suffers damage in such a case can ask the court to appraise his damages, because he wants to “to cover his loss” by seizing something from the other party, his “loss” is not necessarily the actual damage that he suffered. On the contrary, it is no more than the fine that he could have collected were the judges “ordained.” Likewise, regarding the opinion cited by the **Shulchan Aruch** that courts can use the tool of *Niduy* to coerce payment of the sum “that is fit to be paid” to the one who was damaged. This sum must take into account how much would have been paid were judges of today to have jurisdiction over fines.

If an Ox Gores a Racehorse

**\$3,000 FOR
AN \$80,000
HORSE?**

By way of illustration, let us say that Shimon owns a very valuable racehorse, but one day it is gored by the ox of Reuven. Before the goring, the horse was worth \$100,000 but afterwards it was worth only \$20,000. The damage, therefore, is \$80,000. According to the Torah, however, because Reuven’s ox did not have a history of goring, Reuven must pay only half-damages, and this payment is only a fine. Certainly therefore, in our times, Shimon would not be allowed to seize property worth \$80,000. One would think, however, that he is permitted to seize from Reuven items worth \$40,000.

This is not always the case however, for in instances of goring, where the ox is not known as an ox that gores, the fine on its owner can never be more than the value of ox. If the ox, therefore, was worth only \$3,000, then Shimon would be permitted to seize not \$40,000 worth of goods from Reuven. He would be permitted to seize only \$3,000 worth of goods, for if the same case had happened when there were judges with *Semicha*, Reuven’s fine would have been \$3,000.

Summary

In short, when courts of today appraise the loss of the one who is damaged, and they compute how much property he can seize and keep, they allow him to keep no more than the sum of the actual fine that a court of *Semuchim* would have awarded him. They do not appraise his actual loss and let him seize property whose value equals his actual loss, for if that were the procedure, he would profit from the fact that in our times, judges do not have *Semicha*. These considerations also come into play when placing and lifting *Niduy*, according to the opinion that courts of today can use *Niduy* to coerce “fit” payment.

When Admitting Helps

According to the Torah, if someone or his animal does something that warrants payment of a fine to a fellow Jew, yet before a claim is entered in court, the guilty party comes to court and admits to the fine, his admission serves to exempt him.

In the *Gemara*, it is asked whether the same applies if after the admission, witnesses come and testify that the event that would have warranted the fine actually happened. According to Rav and such is the Halacha, the prior admission still serves to create an exemption, despite the witnesses. All of the above is during times when courts have jurisdiction over cases of fines.

We can wonder, however, how this law applies in our times, when courts have no jurisdiction over cases of fines:

Let's say that in our times, someone comes to court and makes such an admission, and afterwards witnesses come, as above, but then, in order to recover his loss, the one who was damaged seizes some object from the one who damaged him and admitted to it.

The Tur

The **Tur** cites the opinion of the Raved who says that because of the prior admission, the (*tefisa*) does not help and the item must be returned. Similarly, the Raved rules that if the damaged party “grabbed” before the admission, and then, in fact, the responsible party admitted to the fine, even here the law is that the admission exempts. The court orders that the seized item be returned to one who made the admission. In this case, according to the Raved, the seizing is not regarded as having been done prior to the admission. Rather, it is as if the admission came first, then witnesses came, and then came the seizure, so here, too, the admission creates exemption.

THE SEIZED
ITEM MUST
BE RETURNED
TO THE ONE
MAKING THE
ADMISSION

The Ramban

The **Ramban**, however, disputes this whole line of reasoning. According to the **Ramban**, since courts in our times have no jurisdiction over cases of fines, no admission of a fine is admissible in court, so it cannot stave off (*tefisa*). Even in

times when courts do have jurisdiction over fines, admission does not exempt unless the admission is made in court. In our times, reasons the **Ramban**, since courts lack jurisdiction over fines, admission to a fine is like admission out of court. It has no legal standing. Therefore, even if the one who is liable admits his liability, if the one who was damaged seizes property to recover his loss, the court does not intervene. **He can keep what he took**, whether he seized the item before the admission or afterwards.

THE
PROPERTY
DOES NOT
HAVE TO BE
RETURNED!

Coercion – An Effective Persuasion Method

The **Rif** writes (and so, too, the **Rambam**, *Laws of Sanhedrin 5:17*) that it is “the custom in yeshivos” that in our times, although courts (even in cases of damage) do not collect fines, they can decree **Niduy** (excommunication) upon the responsible party until he financially appeases the other party. Once he pays the appeasement, according to the sum that the court deems proper, the court lifts the excommunication immediately, whether the one who receives the payment is satisfied with the sum or not.

The **Ravad**, cited by the **Tur**, rules similarly, but adds that if, according to the Torah, the fine is a fixed amount (such as in cases of seduction) the excommunication remains in effect until the guilty party pays precisely the fixed amount. Some *Gaonim* hold this view.

Is Shamta and Niduy different or the same?

The **Rosh**, however, seemingly accepts none of these rulings. He writes that if a person is placed in (*Shamta*) until he pays appeasement, “there is no greater form of [forced] collection.” Apparently, the **Rosh** maintains that since today, courts are not authorized to collect fines they have no power to collect “indirectly” by means of coercion. (See the **Prisha** who notes that the **Rosh** speaks out only against the use of (*Shmata*), while the **Ravad**, who allows coercion regarding fine cases, mentions only **Niduy**. According to the **Ravad**, (*Shamta*) and **Niduy** are two different things, and (*Shamta*) is the more severe of the two. The **Tur**, however,

seems to understand that the **Rosh** argues with the **Ravad** and the other *Rishonim*, in that according to the **Rosh**, coercion in fine cases is forbidden, and (*Shamta*) and *Niduy* are the same thing).

Appeasement Is Needed

Shrira Gaon used excommunication to extract payments of appeasement, in fine cases involving both property damage and bodily injury. He agreed that judges today have the power to use this tool, but he further explained the practice. In cases where the tool already has been used, he also set forth how to compute how much appeasement payment is necessary to lift the excommunication.

As cited in **Piskei HaRosh** (*Perek HaChovel, Siman 3*), **R' Shriria Gaon** writes that in the Talmud, we find precedent for this practice only in order to coerce someone to remove something of his that *threatens to cause* damage:

For example, someone has dug a hole in the public domain, or he has left an object there that presents a danger to passersby. On the other hand, we do not see in the Talmud cases where excommunication is used regarding “damage which is not before our eyes for it already happened.” Nevertheless, latter day authorities, *Chachamim* and *Roshei Yeshiva* adopted the practice even when the damage is already done, “for they saw that great harm was being caused by the fact that in our times, courts have no jurisdiction over cases of fines.”

Computing Reimbursement

How is the amount of required reimbursement computed? He writes:

“It was decreed that courts could excommunicate someone who injured another Jew “until he made an approximate reimbursement (close to the exact value) for it is not the way (it is unfitting: **Prisha**) to be precise and say, ‘Such and such we fixed as your requirement. Such and such you have to pay him, and this other person, too, we determined should take that much,’ for such would amount to a collection of fines. Rather, the judges (privately) in their hearts estimate an approximate amount but they do not reveal it (to the responsible party) and they place the responsible party into *Niduy* until he appeases the one who he injured. The judges then see how much he (the responsible party) pays him (on his own). If the sum is close to the one that the judges had in their hearts, but the person who was injured is not satisfied, the court says to him, ‘It is not in our power to

keep him in *Niduy* any longer.’ If the sum is far lower than the sum that the judges had in their heart, they do not lift the *Niduy* until things get closer to that amount (until the sum paid approaches what the judges felt was proper).”

In the next lesson, we will discuss the rulings of the Shulchan Aruch and the Rama in this Seif. (One should note that in the Tur, the laws of cases of *Tefisa* are discussed before the law about using *Niduy* in order to force payment of appeasement. In the Shulchan Aruch the order is reversed. The law regarding *Niduy* comes first, which is why in this lesson, Seif 5 is entitled, “Excommunication In Place of Payment of Appeasement).

A Qualifier about Seizing Property as “Collection”

THE WORTH
OF WHAT ONE
SEIZES
CANNOT
EXCEED THE
SUM OF THE
FINE

It is important to point out that although the damaged party can seize and keep belongings of the other party, the worth of what he seizes cannot exceed the sum of the fine that he would have collected from judges who have *Semicha*. So, too, according to the opinion that the one who suffers damage in such a case can ask the court to appraise his damages, because he wants to “to cover his loss” by seizing something from the other party, his “loss” is not necessarily the actual damage that he suffered. On the contrary, it is no more than the fine that he could have collected were the judges “ordained.” Likewise, regarding the opinion cited by the **Shulchan Aruch** that courts can use the tool of *Niduy* to coerce payment of the sum “that is fit to be paid” to the one who was damaged. This sum must take into account how much would have been paid were judges of today to have jurisdiction over fines.

By way of illustration, let us say that Shimon owns a very valuable racehorse, but one day it is gored by the ox of Reuven. Before the goring, the horse was worth \$100,000 but afterwards it was worth only \$20,000. The damage, therefore, is \$80,000. According to the Torah, however, because Reuven’s ox did not have a history of goring, Reuven must pay only half-damages, and this payment is only a fine. Certainly therefore, in our times, Shimon would not be allowed to seize property worth \$80,000. One would think, however, that he is permitted to seize from Reuven items worth \$40,000. This is not always the case; however, for in instances where the ox is not known as an ox that gores, the fine on its owner can never be more than the value of ox. If the ox, therefore, was worth only \$3,000, then Shimon would be permitted to seize not \$40,000 worth of goods from Reuven. He would only be permitted to seize \$3,000 worth of goods, for if the same case had happened when there were judges with *semicha*, Reuven’s fine would have been \$3,000.

Conclusion

THE VICTIM
CANNOT GRAB
MORE THAN
HIS ACTUAL
LOSS

In short, when the courts of today appraise the loss of the one who is damaged, and they compute how much property he can seize and keep, they allow him to keep no more than the sum of the actual fine that a court of *Semuchim* would have awarded him. They do not appraise his actual loss and let him seize property whose value equals his actual loss, for if that were the procedure, he would profit from the fact that in our times, judges do not have *Semicha*. These considerations also come into play when placing and lifting *Niduy*, according to the opinion that courts of today can use *Niduy* to coerce “fit” payment.

Shiur Summary

1. The **Rambam** emphasizes that *Semicha* must be in the Land of Israel.
2. Damages that come about completely indirectly are called *Gromma*. In such cases the perpetrator of the damages is exempt according to the laws of man but according to the laws of Heaven he is accountable.
3. Damages that come about in a less indirect fashion but are still not direct are called *Garmi*. In these cases the perpetrator of the damage is accountable even according to the laws of man.
4. Even today’s courts judge cases of *Garmi*.
5. Even today, if someone is accused of being a *Mosair*, and damages are claimed, the case is heard, despite the fact that the damages caused by a *Mosair* come about indirectly, through his power of speech.
6. Today’s judges are allowed to force a man to pay expenses to feed children so long as they are minors, for this obligation is part of the mitzvah of giving *Tzedaka*. It is not a fine.

7. If “conspiring” witnesses (*aidim zomimim*) cause the court to force someone to pay out money from his pocket and the money cannot be recovered, even today’s courts have the authority to force the witnesses to compensate their victim.
8. In the above case, however, if the testimony of the first set of witnesses is invalidated because another set of witnesses comes along and simply contradicts the first testimony, the first set of witnesses is exempt from paying anything to the person against whom they testified.
9. Although in our times, because there is no *Semicha*, courts do not judge cases of fines, nevertheless, if someone suffers damage from someone and according to the Torah, all he is due is a fine, his (*tefisa*) helps. That is, if he “takes hold of” something that belongs to the one who caused him the damage, intending to keep the item as payment for his loss, the court does not intervene. He can keep what he took.
10. According to **Rabbeinu Tam**, such “taking hold” helps only if the damaged party seizes the very object that caused him his loss, and only if he seizes it immediately after the damage is inflicted, before the owner regains hold of the damaging object. Otherwise, the court requires that the seized object be returned.
11. According to the **Rosh**, and so rules the **Shulchan Aruch**, the one who suffered damage can seize anything that belongs to the one who is responsible for the damage. If, however, the responsible party claims that the worth of the seized object exceeds the sum that the damaged party was legally due, the court appraises the damage. If the court determines that the seized object’s worth exceeds the sum that is due to the damaged party (i.e. it exceeds the fine that he could have collected in the days when there were *Semuchim*), the court requires the one who did the seizing to return the difference.
12. In cases of fines for damage, where the damaged party asks the court to appraise the damage, for he plans to recover his loss by seizing belongings of the other party, the *Rishonim* differ as to whether today’s courts can grant his request.

13. In our times, in cases of fines for damage, the damaged party sometimes tries to “lay groundwork” before his does (*tefisa*) – seizure of belongings of the other party. He comes to the court and says to the judges, “Accept testimony about the sum of the damages and how the damage happened so that today or tomorrow, if I seize something from the one who damaged me, you will not require me to give it up.” Courts of our times do not adhere to such a request.
14. Since in our times, courts have no jurisdiction over cases of fines, if someone comes forward and admits to a court that he or his animal did something that obligates him to pay a fine, his words have no effect. It is as if he made his admission out of court. The admission creates no exemption for him. Therefore, if the one, who, according to the Torah was owed the fine, seizes something of value from him in order to collect the fine, the courts do not intervene.
15. Although today’s courts have no power to collect fines, some authorities maintain that if someone or his property does damage to another person or another person’s property but the only charge, according to the Torah, would be a fine, courts can use coercion so that the loss (i.e. the fine) is recovered. Specifically, the court can excommunicate the damaging party, until he financially appeases the other party. Once the appeasement is paid the excommunication is lifted immediately, whether the other party is pleased with the sum or not.
16. The **Rosh**, however, says that today’s courts cannot use such coercion, for in his view, the practice, in effect, would give the courts unlawful jurisdiction over cases of fines.
17. See (at lesson’s end) the approach of **R’ Shrira Gaon** as to how today’s courts can use excommunication as a “lever” in cases of fines for damages. See the lengths to which he goes so it will not appear (as what the **Rosh** says) that the courts are taking jurisdiction in an area where legally they have no power.

Review Questions

1 In the days when there was *Semicha*, where was it performed?

The **Rambam** emphasizes that it was performed only in *Eretz Yisroel*.

2 What is *Gromma*?

Gromma is damage caused in a completely and clearly indirect fashion. In such cases, the person who causes the damage is exempt according to the laws of man but is responsible according to the laws of Heaven.

3. What is *Garmi*?

Garmi is damage that is caused in a less indirect fashion but is still not direct. In these cases the perpetrator of the damage is accountable even according to the laws of man.

4. Do today's courts have jurisdiction over alleged cases of *Garmi*?

Yes

5. In today's courts, if someone is accused of being a *Mosair*, and damages are claimed, is the case heard?

Yes, the case is heard, despite the fact that the damages caused by a *Mosair* come about indirectly.

6. Are today's courts empowered to force a man to pay expenses to feed his children who are minors?

Yes, the courts have this power, for this obligation is part of the mitzvah of giving *tz'edaka*. It is not a fine.

7. Do today's courts judge the law of "conspiring" witnesses (*aidim zomimim*)?

They do, when the witnesses cause the court to force someone to pay out money from his pocket and the money cannot be recovered.

8. What is the law in the above case if the first set of witnesses is simply contradicted?

The first set of witnesses is exempt from having to make payment.

9. If someone who claims to have suffered damage from someone but according to the Torah can collect only a fine, if he “takes hold of” something that belongs to the one who allegedly caused him the damage (does -- *tefisa*), in order to collect the fine, can he keep what he took? .

In our times, because there is no *Semicha*, although courts cannot judge cases of fines, *tefisa* helps. The courts do not intervene and the one who seized the object can keep it.

10. Under what conditions does such “grabbing” help?

The *Rishonim* differ on this matter. According to **Rabbeinu Tam**, such “taking hold” helps only if the damaged party seizes the very object that caused him his loss, and only if he seizes it immediately after the damage is inflicted, before the owner regains hold of the damaging object. Otherwise, the court requires that the seized object be returned. According to the **Rosh**, and so rules the **Shulchan Aruch**, the one who suffered damage can seize anything that belongs to the one who is responsible for the damage.

11. What if the person who claims damage in such a case takes hold of belongings worth more than the fine that he could have collected in the days when there were *Semuchim* and such cases were judged by the courts?

According to the **Rosh**, if the party guilty of damaging submits a claim that the worth of the seized object exceeds the sum that the damaged party was legally due, the court appraises the damage. If the court determines that the worth of the seized object exceeds the sum of the fine that the damaged party could have collected in the days when there were *Semuchim*, the court requires the one who did the seizing to return the difference. So rules the **Shulchan Aruch**.

12. In a case such as the above, if the party who alleges that he suffered damage asks the court to appraise the damage, for he plans to recover his loss by seizing belongings of the other party, do today’s courts can grant his request?

The *Rishonim* differ about this matter.

13. Sometimes, the person who alleges being owed a fine for damage comes to court and says, “Accept testimony about the sum of the damages and how the damage happened. Please do so in order that today or tomorrow, if I seize something from the one who damaged me, you will not require me to give it up.” Are courts of today obligated to comply to such a request?

Today’s courts are not obligated to comply.

14. If someone causes damages to his fellow Jew but is obligated according to the Torah only to pay a fine, do today’s courts place him into *Niduy* until he financially appeases the other party?

According to some, today’s courts have this power. Once the appeasement is paid the *Niduy* is lifted immediately, whether the other party is pleased with the sum or not.

15. Does the Rosh agree with the opinion cited above?

No. In his opinion, such coercion would give the courts unlawful jurisdiction over cases of fines.