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YESHIVAS IYUN HALACHA
HILCHOS DAYANIM PROGRAM

HILCHOS DAYANIM

SHIUR 2

Siman 1 Se'if 1-3

Matters We Judge in Our Times

SECOND EDITION

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*In honor of
Naomi Hoffman נ"י*

*and in honor of
Irma Kramer נ"י*

*In loving memory of
S. David Hoffman ז"ל
and
Justice Herbert Kramer ז"ל*

תנצב"ה

Shining examples of honesty.

HILCHOS DAYANIM SHIUR 2

מראה מקומות

Siman 1 Se'if 1-3

Gemorah Bava Kama 84a (4 lines from the bottom)

צער 84b until ההוא תורא

Siman 1 Se'if 1

ד"ה כתובת אשה וד"ה וכן גולות *Bais Yosef*

Shulchan Aruch

Shach (se'if katan 2, 4)

S'ma (se'if katan 1, 3, 9)

Pischei Teshuva (se'if katan 1, 2)

Nesivos Hamishpat (Bi'urim se'if katan 1)

Se'if 2

Rambam Hilchos Sanhedrin 5:10

(*cited in Bais Yosef* ד"ה ומ"ש רבינו בשם הרמב"ם)

Tur from וכתב הרמב"ם אבל רפוי

ד"ה ומ"ש ומדברי אדוני אבי הרא"ש *Bais Yosef*

Shulchan Aruch, S'ma

Se'if 3

ד"ה בשן ורגל *Nemukai Yosef Baba Kama 30b*

ד"ה אי נמי *Tosefos Baba Kama 84b*

Shluchan Aruch

S'ma, Shach

Written by Dayan Yitzchok Oshinsky Shlit"א

Av Beis Din Rabbani Haifa

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SIMAN 1 SE'IF 1

The Shulchan Aruch writes:

In our times dayanim rule cases of admissions, loans, kesuvos of women, inheritances, presents, damage to possessions of others, as these are matters that constantly occur and involve a monetary loss. But matters that are not common, even if they involve a monetary loss, such as one animal damaging another, or matters that do not involve monetary loss even though they are common, such as the double payment of a thief, and all fines which the Chachomim instituted, such as one who blows (a horn) into his friend (*meaning, one who blows a horn loudly into his friend's ear and scares him*) or slaps his friend (*meaning, striking with his hand on his friend's cheek*) and anyone who pays more than he damaged, or one who pays half the damage, we will not judge these cases – only mumchim who received s'micha in Eretz Yisroel are allowed to judge it, besides for the half payment of tzroros (damage that occurs when one's animal kicked pebbles or the like) since it is a monetary payment and not a fine.

In this shiur we continue the topic of the previous shiur. We will first finish explaining se'if 1 and then we will explain the next seifim.

As we mentioned in the last shiur, in contemporary times bais din only has authority to judge cases that involve a monetary loss and are common.

SHULCHAN ARUCH

The Shulchan Aruch in this se'if cites many of the halachos that the Tur discussed in the beginning of this siman. We will divide this se'if into several sections and explain each one and also cite the sources from the Gemorah and Rishonim.

The Shulchan Aruch cites the rule that we explained earlier and adds on several examples.

The Shulchan Aruch begins with some examples of cases that we judge in our times: Admissions, loans, kesuvos of women, inheritances, presents (as stated in Tosafos Sanhedrin 3a, that kesuvah, inheritance, and presents have the same status as admissions and loans about which the Gemora states do not require mumchim), and damage to possessions of others. He then tells us what determines which cases we rule in our times: If they are matters which constantly occur and involve a monetary loss.

However, matters which are not common, even if they involve monetary loss, such as when one animal damages another (as stated in Bava Kama 84b), or matters which do not entail a monetary loss even if they are common, such as the double payment of a robber, and all fines which the Chachomim instituted (as stated in Bava Kama 27b), such as one

who blows (an instrument) into his friend (i.e. one who blows an instrument loudly into his friend's ear and scares him, as explained by the Rashba cited by the Prisha. In such a case he is required to pay a selah), or slapping his friend (i.e. striking his friend on the cheek) and anyone who pays more than he damaged (for example: the payments of double, four or five times, a fifth - S'ma), or one who is required to pay for only half the damage. All these cases may only be judged by mumchim who received s'micha in Eretz Yisroel.

The Shulchan Aruch concludes with an exception, that there is one who is required to pay half the damage even in our times: "Besides for the half payment of damage through pebbles, since it is a monetary payment and not a fine." The source of this halacha is in Bava Kama 15b, where it states that the half payment of tzroros (damage caused by items that were kicked by the animal as it walks - a unique type of damage which begins in one domain and damages in a different one) is considered to be a monetary payment and not a fine. Obviously we judge this type of damage in our times even though the dayanim do not have s'micha. (The reason is that dayanim are only not allowed to judge fines, but they may judge damages which are monetary obligations.)

♦ Damage done through fire or a pit in our times

The Shach writes (se'if katan 2) in the name of the Maharshal that in our times we also do not judge damages caused by an unwatched fire or pit.

However, the Pischei Teshuva (se'if katan 2) cites several Achronim who say that we will judge such cases in our times.

♦ Tools found in bais din

The S'ma (se'if katan 1) summarizes the words of the Tur and says that we do not have s'micha in our times. Instead, our dayanim act as messengers of the dayanim s'muchim of earlier generations. He then cites the words of Rav Hai that during judgment bais din must have available (in case they will be required) a stick for subduing, a whip for lashing, and a shofar for excommunicating. The S'ma therefore asks: Why doesn't the Shulchan Aruch cite this halacha?

Indeed, the Pischei Teshuva (se'if katan 1) cites Achronim who say that a bais din that wishes to have these items may do so, and it does not look like haughtiness.

Let us note that in our times these items are not found in bais din. The reason is that we do not whip or excommunicate people.

♦ The reason we judge these cases in our times

What is the reason why we are allowed to judge cases which involve a monetary loss and are common?

The S'ma (se'if katan 3) explains that it is in order to prevent "the door being closed in the face of borrowers." (Meaning, if we would not judge loans or similar cases people would stop conducting business deals and lending money. As a result, one who needs a loan would not be able to receive one.) Another reason is "to close the doors in front of evil-doers." (Meaning, if an evil person knows that in our times we do not judge these cases he will borrow money and not pay back.) Therefore, the Chachomim said that regarding these cases we act as messengers of the earlier dayanim who did have s'micha.

What other cases do we judge in our times (besides for those which are common and have a monetary loss)?

The S'ma writes that we also judge "great matters," meaning, things which are very important. Even though they do not have the aforementioned criteria, because of their importance we will judge them.

Which "great matters" is he referring to? The S'ma writes that one example is that we accept converts even though they are not common and do not involve a monetary loss. Another example is forcing a man to give a get (even though there is no monetary loss.)

This rule of the S'ma has ramifications elsewhere. The Nesivos Hamishpat (bi'urim, se'if katan 1) deliberates whether this authority to judge as messengers of earlier s'muchim is m'drabanan or min haTorah. One of his proofs is from the fact that we accept converts and force the giving of a get even in our times, as stated in the S'ma se'if katan 3. Since the rulings in these matters are valid min haTorah (as the Nesivos Hamishpat proves) it must be that the ability to judge as messengers of earlier s'muchim is min haTorah. However, later on he cites the view of the Ramban and Rashba who say that this authority is only m'drabanan. (For an explanation as to how they answer the aforementioned proof see the Nesivos ibid.)

♦ Who were the s'muchim of earlier generations (and what is s'micha)?

The S'ma and Shach discuss who were the s'muchim of earlier generations.

The S'ma (se'if katan 9) cites the words of the Rambam (Hilchos Sanhedrin, beginning of perek 4) who writes that s'micha began when Moshe appointed Yehoshua as his successor and gave him s'micha as it says: "ויסמוך ידיו עליו ויצוהו." Moshe did the same with the Elders and as a result the Shechina rested upon them.

The S'ma also writes that the s'micha performed in subsequent generations was not done through placing one's hands on the head of the musmach. Rather, they would begin referring to the musmach as "Rebbe" and proclaim: "Behold, you are samuch. You now have permission to judge all cases - even fines."

S'micha is only valid when it is received from one who himself received it person to person all the way back to Moshe and Yehoshua.

Another way to receive s'micha, says the S'ma, is if all the chachomim of Eretz Yisroel gather together and give s'micha (just as they did when they gave the Bais Yosef s'micha.)

The Shach (se'if katan 4) cites the words of the Rivash (siman 271) regarding the s'micha that the Ashkenazim used to perform. He adds that this s'micha of our times only allows one to be a dayan for chalitza and gittin, but does not allow him to judge fines.

SE'IF 2 - WHICH OBLIGATIONS WE COLLECT IN OUR TIMES

The Shulchan Aruch writes:

If one person injures another, dayanim who did not receive s'micha in Eretz Yisroel may not collect payment for the damage, pain, degradation (payment to a woman who was violated or seduced), embarrassment, and the atonement (payment by the owner of an ox which has gored a man to death). However, they do collect sheves (payment for lost work) and payment for healing.

The Rama writes:

Some say that we also do not judge sheves and healing (Tur in the name of the Rosh) and I have not seen anyone being careful about this, rather they force the one who damaged to appease the victim and fine him as they see fitting (Darkei Moshe according to the Maharai in his rulings, siman 208) as will be explained shortly in se'if 5.

THE SOURCE

We cited the source of this halacha above. There we explained that in our times we do not collect payment if one man hits another, nor may dayanim without s'micha judge matters of damage, pain, degradation (cases of women being violated or seduced are not common, as stated in the S'ma se'if katan 10), embarrassment, or atonement. (These are types of fines which are not common or do not involve monetary loss.)

♦ Obligations of healing and sheves

Let us now discuss if in our times bais din may judge the obligation to pay for healing and sheves. (Sheves is the disability payment to the victim, that now he is unable to work).

The Tur in this siman cites a disagreement regarding this:

1. The opinion of the Rambam (Sanhedrin 5:10) is that even in our times we judge healings and sheves (meaning, the one who damaged must pay them). The Gaonim rule likewise. The Rambam adds that it is quite common to collect healings and sheves in Bavel. The reason for this ruling is that these obligations involve a monetary loss. (Meaning, we are reimbursing the victim for his monetary loss - Bais Yosef ibid.)

2. However, the opinion of the Rosh (Bava Kama, Perek Hachovel) is that in our times even these cases are not judged, and we do not obligate the one who damaged to pay them. (The Bais Yosef explains that even though there is monetary loss, nevertheless, we do not judge any damages of one man to another in our times. See his words.) The Bais Yosef adds that the Rif (Bava Kama 30b) rules likewise.

The Bais Yosef writes that the halacha follows the view of the Rambam and not of the Rosh and Rif. Usually, when the three "pillars of halacha" - the Rambam, Rif, and Rosh, do not agree on a matter, the Bais Yosef (and accordingly the Shulchan Aruch) follows the majority opinion. In this case, since the Rif and Rosh disagree with the Rambam, the Shulchan Aruch should have followed their opinion, as they are the majority. Nevertheless, in this case the Bais Yosef follows the view of the Rambam for two reasons: First, the Rambam states his opinion clearly, as opposed to the Rosh and Rif that only write in more general terms. Second, the Rambam writes that this was the custom of the Gaonim.

SHULCHAN ARUCH AND RAMA

The Shulchan Aruch in this se'if rules that in our times we do not judge matters of damage, pain, degradation, embarrassment, and atonement. In regards to the aforementioned disagreement, the Shulchan Aruch follows the view of the Rambam that in our times we judge sheves and healing.

However, the Rama argues and follows the view of the Rosh and Tur that we also do not judge healings and sheves in our times.

The Rama adds: "I have not seen anyone being careful about this." (Meaning, we do not collect them in our times.) Rather, we force the one who damaged to appease his victim and we fine him as bais din sees fitting. (We also obligate him to pay his medical treatment - based on the S'ma, se'if katan 12.)

The S'ma (se'if katan 11) asks on the opinion of the Rambam (who says that also in our times we collect sheves and healings) that there are types of injuries which are not common, such as one who severs another person's hand. Why do we judge such cases? He answers that since the obligation to pay sheves and healings is usually found in cases of common injuries, we do not differentiate between different types of injuries.

SE'IF 3 - THE LAWS OF AN ANIMAL THAT DAMAGES

The Shulchan Aruch writes:

If an animal damages a person, dayanim who did not receive s'micha in Eretz Yisroel cannot collect payment since it is something that is uncommon. But if one damages the animal of his friend, he pays complete damage in all places. Also, if an animal damages when eating or walking, since they have a tendency to damage in such a manner, it is a common damage and even dayanim who did not receive s'micha in Eretz Yisroel may collect them. Also, if one stole or robbed we only collect the principle.

The Rama writes:

Some say that this is only the case regarding types of robberies which are common, such as one who denies a deposit or the likes, but a full-fledged robbery is not common and therefore we will not judge it. However, if the stolen item still exists we will obligate him to return it (Nimukei Yosef in Perek Chovel).

THE SOURCE

The source of this halacha is Bava Kama 84a where Rava says that if an animal damages a person, since it is uncommon, we will not collect payment for the damage in our times. But if a person damages an animal, or if an animal damages an animal, we will judge such cases.

SHULCHAN ARUCH AND RAMA

The Shulchan Aruch in this se'if rules the above, that if an animal damages a person, dayanim who did not receive s'micha in Eretz Yisroel cannot collect payment since it is something that is uncommon. But if one damages the animal of his friend, he pays complete damage in all places. Also, if an animal damages when eating or walking, since they have a tendency to damage in such a manner, it is a common damage and even dayanim who did not receive s'micha in Eretz Yisroel may collect them.

As mentioned, the Gemorah explains that we do not judge in our times cases of animals damaging humans because they are not common. The S'ma (se'if katan 13) explains that the reason it is not common is that a person has "mazal," which usually protects him from being harmed. Rashi explains that mazal means intelligence and knowledge how to protect himself.

♦ Do we judge cases of thefts and robberies in our times?

The Tur in our siman writes that we also judge cases of robberies in our times. The source of this ruling is the Rosh (Sanhedrin perek 1 siman 1) and Tosafos (Bava Kama beginning

of Perek Hachovel (ד"ה א"נ) who write: "It is an everyday occurrence that we judge cases of robberies." The reason is that these are common cases and involve a loss to the one who was robbed.

The Shulchan Aruch follows the opinion of these Rishonim and rules that if one stole or robbed we only collect the principle and nothing more. (The Shach in se'if katan 8 cites a disagreement as to whether or not we also collect the shevach. Shevach is the amount that the stolen item went up in value before the owner gave up hope of getting it back.)

However, the Rama differentiates between different types of robberies. He follows the ruling of the Nimukei Yosef in Bava Kama that only robberies which are common, such as one who denies a deposit or the likes do we judge in our times, but a full-fledged robbery (for example, if he grabbed it from his friend) is not common and therefore we will not judge it. However, if the stolen item still exists we will obligate him to return it.

The Shach (se'if katan 9) discusses the words of the Shulchan Aruch regarding which robberies we collect today.

The aforementioned opinion of Tosafos is that we judge all robberies in our times besides for robberies which occurred through fighting. (Meaning, two people were hitting each other and then one of them grabbed something away from the other one.) The S'ma (se'if katan 14) understood that this is the opinion of the Shulchan Aruch. However, the Shach (se'if katan 9) asks that the Shulchan Aruch simply writes without differentiating that we judge all robberies? Therefore the Shach concludes that the Shulchan Aruch does not follow the Tosafos. Rather, he rules like the Rambam (Hilchos Sanhedrin, perek 5) who says that we judge all types of robberies in our times. He then proves that there are other Rishonim who have the same opinion.

REVIEW QUESTIONS

1. Which matters does bais din have the authority to judge?
2. Do we judge in our times cases of loans or woman's kesuvos?
3. Do we judge in our times cases of double payment or fines?
4. Do we judge in our times cases of tzroros, and why?
5. Do we judge in our times cases of damages through fires and pits?
6. Which tools must be kept in bais din?
7. If bais din wishes to keep these tools in their possession does it look like haughtiness?
8. Do we keep these tools in bais din in our times?
9. Which other matters does bais din deal with in our times?
10. How did they use to perform s'micha in the past?
11. Do we judge in our times cases of healings and sheves?
12. How does the Rama actually rule?
13. If an animal injures a person, will we judge that case in our times?
14. If a person injures an ox will we judge that case in our times?
15. If a person stole or robbed, will we collect the principle from him?
16. Which type of robberies do we judge in our times?

ANSWERS

1. Bais din only has power to judge matters which involve monetary loss and are common.
2. In our times dayanim rule cases of admissions, loans, kesuvos of women, inheritances, presents, and also one who damages the possessions of his friend.
3. Only mumchim who received s'micha in Eretz Yisroel may judge cases of double payment of a robber, payment for damage performed by one animal to another, and all fines which the Chachomim instituted.
4. The half payment for damage through pebbles is collected by bais din in our times since it is a monetary payment and not a fine.
5. The Achronim disagree as to whether the damage through fire or pit are judged in our times.
6. Some say that during the proceedings of bais din they must have available a stick to subdue with, a whip for lashes, and a shofar for excommunicating.
7. A bais din that wishes to have these items is allowed to and it does not look like haughtiness.
8. In our times these items are not found in bais din.
9. In our times bais din also deals with "great matters" such as conversion and forcing gittin.
10. In the past, those who had s'micha received it in the presence of all the Chachmei Yisroel, or from one who himself received it person to person all the way back to Moshe and Yehoshua.
11. The Rishonim disagree as to whether in our times we judge healings and sheves.

12. The Rama rules that it is not our custom to judge these cases. Rather bais din forces the one who damaged to appease the victim and they fine him as they see fitting.

13. We do not collect payment for the damage of an animal to a human in our times.

14. In our times we will judge a case of a human damaging an ox, or of an ox damaging an ox.

15. The Shulchan Aruch rules like the Rishonim who say that if one stole or robbed we only collect the principle.

16. The Rama rules that we only judge types of robberies which are common, such as one who denies a deposit.