

TALMUDIC METHODOLOGY
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**SHIUR #11: THE EXEMPTION FOR SHEIN AND REGEL IN
RESHUT HA-RABIM**

PART 1- THE REASON BEHIND THE EXEMPTION

Perhaps one of the most important leniencies in the entire *Bava Kama* system entails the exemption from *shein* and *regel* payments if the damage occurred in a *reshut ha-rabim*. When describing the payment for *regel* and *shein*, the Torah writes, (Shemot 22;4) "*u-bi'er be-sdei acher*" (the animal will destroy food in a different field). This makes payment conditional on the location of the damage; if the damage occurs in the *reshut ha-rabim*, no payments entail whereas damages performed in *reshut ha-yachid* are collectable. This series of *shiurim* will explore the rationale behind this exemption.

The simple reading of the *gemara* suggests that this is a formal exemption. As stated in previous *shiurim*, the Torah did not impose full liability in situations of *nizkei mammon*, when one's property causes damage. Such stringency would choke potential entrepreneurs and discourage industry. On the contrary, the Torah allocated exemptions to encourage ownership. The exemption "offered" to *shein* and *regel* in the exclusion from payment if the damages occurred in a *reshut ha-rabim* is a purely formal and systemic exemption and is not a reflection of any major difference in the act of damage based on its location. Two *gemarot* (*Bava Kama* 14a and 21b) discuss the exemption and each attribute it to the *gezeirat ha-katuv* of "*Bisdei acher – ve-lo be-reshut ha-rabim.*"

The Rif, however, appears to identify an independent logic for this exemption. He claims that damages occurring in *reshut ha-rabim* are too natural and expected to entail compensation. Since animals have the right of travel through a *reshut ha-rabim*, it is almost inevitable that food left in public areas will

be eaten or stepped upon. Since these are so natural and unavoidable, damages cannot be collected from the animal's owner. As the *gemara* exclaims (19b), "Should we force an owner to walk after his animal in *reshut ha-rabim* holding his tail so that no damages will occur?" It is reasonable to demand that owners prevent their animals from trespassing into *reshut ha-yachid* and devouring the victims produce; such situations are actionable. Demanding the same vigilance against activities in a *reshut ha-rabim* is too stifling to animal owners, and therefore no payments are demanded.

The Rosh (1:1) cites the Rif but disagrees. He maintains that the *reshut ha-rabim* exemption is formal and based upon the *gezeirat ha-katuv*, not the logic of the Rif. The Rosh cites an interesting distinction between his position and that of the Rif's: should an owner pay if an animal steps upon a long beam located in *reshut ha-rabim*, thereby crushing an item resting in *reshut ha-yachid*? According to the Rosh, as long as the actual damage (to the crushed item) occurs in *reshut ha-yachid*, *shein* or *regel* payments are mandated. However, according to the Rif, since the animal merely walked through *reshut ha-rabim* – in a completely normal fashion – no guilt exists and no payments are expected.

Another possible difference between the Rosh and the Rif may revolve around an animal that does not normally circulate through *reshut ha-rabim*. The *mishna* (15b) claims that wild non-domesticated animals (bears, snakes, etc.) are obligated in full payment from the first offense. Tosafot (16a, s.v. *ve-ha-nachash*) claim that these *mazikin* are considered *shein* and *regel*, and therefore do not enjoy the *tam* dispensation of *keren* and *chatzi nezek*. As a subcategory of *shen* and *regel*, Tosafot claim that damages of wild animals in a *reshut ha-rabim* would not be collectable. Presumably, Tosafot would adopt a more formal definition of the *reshut ha-rabim* exemption. It would be strange to exempt damages from wild animals in *reshut ha-rabim* because their transit through *reshut ha-rabim* is routine and normal. After all, most people do not own predatory animals, and it is not unrealistic to expect those that do to carefully guard these beasts if and when they walk with them through *reshut ha-rabim*. The very fact that Tosafot extended this exemption to wild beasts may indicate that they (like the Rosh) viewed the exemption as purely formal: ANY *regel* or *shein* damage is exempt from payment in *reshut ha-rabim*.

A further expression of the Rif's approach may be evident in an interesting qualification of Shmuel, who claims (16b) that if a lion tramples its prey and devours it in a *reshut ha-rabim*, no payments are required, presumably because this is a *shein* situation which is *patur* in a *reshut ha-rabim*. However, if the lion were to first kill its prey and only subsequently devour it, payments would indeed be rendered even in a *reshut ha-rabim*. This is strange; presumably, both instances are *shein* categories and each should therefore be exempt in *reshut ha-rabim*. Perhaps the Rif's logic can best explain this phenomenon. The exemption in *reshut ha-rabim* only covers absolutely normal and routine forms of eating. Once the animal deviates from its routine, damages may be assessed. Lions typically eat their prey without first killing it; if a lion were to act unnaturally, the exemption would not apply.