

אין שמין לא לגנב ולא לגזלן –

We do not assess, neither for a גנב nor for a גזלן

OVERVIEW

The rule is that for נזקין we are שמין, and for גנב וגזלן we are not שמין. Concerning a שואל there was initially a doubt whether שמין or אין שמין. Our תוספות will first explain the meaning of שמין, and then explain the difference (in the ruling) between a גנב וגזלן and נזקין. This explanation will also apply to the one who maintains that a שואל is like a גנב וגזלן that אין שמין.

פירש הקונטרס¹ אין שמין הנבילה והשברים לבעלים שיחזיר הגנב הפחת -
explained that we do not assess the value of the carcass or the broken pieces (of the animal or items that he stole) to be considered as payment to the original owners, so that the thief should return only the depreciation.² We do not do this by a גנב or a גזלן -

אלא ישלם בהמה שלימה וכלים מעולים והשברים שלו³ -
But rather the גנב וגזלן must pay for a complete animal or for quality utensils (as they were worth at the time of the גזילה [before they were damaged]), and the broken pieces (or the carcass) belongs to the גנב וגזלן.

anticipates a difficulty:

ואף על גב דקיימא לן⁴ ישיב⁵ לרבות שוה כסף כסף ואפילו סובין -
And even though we have established the ruling that the פסוק ישיב includes that payment can be made with שוה כסף as well as with כסף and that includes even bran, so why cannot the גנב וגזלן return (at least) the broken utensil to the owner as (a partial) payment, and pay (with money) only the difference?!

responds:

גנב וגזלן שאני משום דכתיב⁶ אשר גזל כעין שגזל -
A גנב וגזלן are different from נזיקין, because it is written in the תורה concerning a

¹ בד"ה אמר שמואל. Some ראשונים maintain that the issue of שמין or אין שמין is only in regards to נבילה; however concerning the שברים themselves, even a ג"ג may return them as payment. תוספות, however, concurs with רש"י.

² This refers to the difference between the original value and the current value of the broken item.

³ Others maintain that even if the ג"ג do not have money, they are obligated to sell (the שברים or) whatever they possess to pay כסף to the בעלים.

⁴ לעיל ז, א ויש"נ.

⁵ שמות (משפטים) כא, לד.

⁶ ויקרא ה, כג.

גזילה **that he should return the גזל (which he robbed)**; we derive from these words that the object that he returns must be **כעין שגזל (similar to what he robbed)**

הלכך צריך להחזיר הגזילה או דמיה ולא טובין⁷ -

Therefore (since we interpret גזל אשר to mean שגזל) the גזלן **is required to return the stolen object** (if it is intact) **or the money** of this גזילה, and he cannot return טובין.

תוספות offers support for this contention

וכן משמע בירושלמי⁸ מנין שאין שמין לא לגנב ולא לגזלן -

And this is also indicated in תלמוד ירושלמי where he asks **how we know** this rule **that אין שמין לא לגנב ולא לגזלן -**

אמר רבי אבא בר ממל חיים⁹ שנים ישלם ולא מתים

explained; the פסוק states (he should pay two live ones [an extra one for כפל]), but not dead ones. This means he must pay the full value of the animal as it was when he stole it while it was alive.

The ירושלמי continues:

עד כדון גניבה גזילה מנין -

Until now we know concerning גניבה, that by גניבה the גנב must pay the full value,¹⁰ **how do we know** that by גזילה also, that אין שמין לגזלן -

אמר רבי אבא בר ממל והשיב הגזלה אשר גזל כאשר גזל -

and he shall return the הגזלה אשר גזל the פסוק states **אשר גזל** (and he shall return the גזילה which he stole) the words אשר גזל teach us that he must return the **equivalent of that which he stole**; he must return the entire object (or [if it is not intact] the entire value of the object without deducting the שברים).

continues to explain the difference between גנב וגזלן (where the rule is that אין שמין) and נזקין (where the rule is שמין):

והיינו טעמא¹¹ דגנב וגזלן קנו מיד כשהוציאו מרשות בעלים -

⁷ Returning the monetary value of the object is equivalent of returning the object (if the object is not intact) [for with the money he can replace the object]; however returning כסף (the שברים) which entails a certain bother (on the part of the בעלים) to sell them etc., is not the equivalent of returning the object.

⁸ פ"א ה"א.

⁹ The פסוק in בבב, reads: שנים ישלם עד שה חיים שנים ישלם (משפטים) כבב, in פסוק.

¹⁰ The פסוק חיים שנים ישלם is discussing a גניבה, where there is a כפל; however by גזילה where there is no כפל the ruling may be that אין שמין לגזלן.

¹¹ See 'Thinking it over' # 1. Others explain that טעמא היינו is referring to the rule of גזלן נבילה (see footnote # 1). See אות שי"ז בד"ה והנה and תוספות רבינו פרץ.

And this is the reason for the difference; **for a גנב וגזלן acquired ownership**, of the object they stole,¹² **immediately,¹³ when they took it away from the possession of the owners.** Therefore, since they stole and acquired the entire object (illegally), they are required to make full restitution (regardless of the condition of this item).¹⁴

אבל מזיק לא נתחייב אלא כמו שהזיק -

However the damager was never liable for the entire object (he did not acquire the object), **but rather** his liability is limited to the **amount he damaged.** Therefore all he pays for is the difference in price of what the object was worth originally, and what its present value is. That is the entire extent of his liability.

תוספות uses this explanation to clarify an additional issue:

והיינו טעמא דמאן דאמר¹⁵ אף לשואל -

And the aforementioned is (also) the reason for the one who maintains that also by a שואל the rule is that אין שמין (just as by a גנב וגזלן).

כיון דחייב באונסין נמצא שקנאו¹⁶ משעה שהוציא מיד הבעלים -

For since a שואל is liable for אינסין, it turns out that the שואל acquired the ownership of the borrowed item from the moment he removed it from the possession of the owners -

והדמים הוא דנתחייב כמו גנב וגזלן:

And the שואל is liable for the full monetary value of the item he borrowed, just like a גנב וגזלן who are liable for the item they stole.

SUMMARY

ג"ג means that they have to pay for the entire גניבה with money. We derive this from the פסוקים שלם and חיים שנים אשר גזל and והשיב את הגזילה אשר גזל. A ג"ג (and a שואל) acquires ownership in the גזילה, and that distinguishes them from a מזיק.

¹² This does not mean that the ג"ג actually own the stolen item; for they cannot be מקדיש it, and they are also required to return it to the owner if it is intact. Rather it means that they own it to the extent that they are obligated to pay for it even if it was destroyed באונס (similar to a שואל; see later in this תוספות).

¹³ The obligation of a ג"ג to pay does not begin when they damaged the item (as by a מזיק; which is a חיוב תשלומין); but rather as soon as they stole it (for there is a חיוב השבה). Therefore they are required to restore a complete item (or its value) as it was when they stole it. See following footnote # 14.

¹⁴ The גנב וגזלן stole an item. They are obligated to return the item the way it was when it was stolen. If the item itself is intact, they must return the item itself. However if it was damaged and they cannot return the item itself, they must return the money which the item was worth when it was stolen. The obligation of a ג"ג to pay, may be similar to the obligation of a לוקח or a לווה who must pay in cash only. See footnote # 7.

¹⁵ This refers to רב who maintains (later in the גמרא) that the שואל is required to pay a מעליא. See 'Thinking it over' # 2.

¹⁶ See previous footnote # 12.

THINKING IT OVER

1. תוספות explains the difference between a גו"ג and a מזיק.¹⁷ Seemingly there is no need for an explanation. There are פסוקים which teach us that אין שמין לגנב ולגזול. Why does תוספות require an explanation?!¹⁸

2. How do we explain the view¹⁹ (which is the הלכה) that לשמין לשואל?

3. According to the מ"ד that אין שמין לשואל, what is the ruling in regards to the other שומרים?

¹⁷ See footnote # 11.

¹⁸ See אמ"ה.

¹⁹ See footnote # 2.