

אין שמין לא לגנב ולא לגזול –

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

Overview

שמין we are not גנב וגזול and שמין we are נזקין. 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 גנב וגזול and נזקין. This explanation will also apply to the one who maintains that a שואל is like a גנב וגזול 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 depreciation². We do not do this by a גנב or a גזול –

אלא ישלם בהמה שלימה וכלים מעולים והשברים שלו –

But rather the גנב וגזול 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 וגזול³.

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 ישיב פסוק includes that payment can be made with שוה כסף as well as with כסף and that includes even bran, so why cannot the גנב וגזול return (at least) the broken utensil to the owner as (a partial) payment, and pay (with money) only the difference?!

responds:

גנב וגזול שאני משום דכתיב⁶ אשר גזל כעין שגזל –

A גנב וגזול are different from נזקין, because it is written in the תורה concerning a גזילה that he should return the גזל אשר 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 סובין –

¹ Some ראשונים maintain that the issue of שמין or אין שמין is only in regards to נבילה; however concerning the שברים themselves, even a גזול 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 גזול 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 וש"נ.

⁵ שמות (משפטים) כא,לד.

⁶ ויקרא ה,כג.

Therefore (since we interpret גזל 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 סובין.⁷

Tosfos 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 **חיים שנים ישלם** (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 value¹⁰, **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 גזילה which he stole the words אשר גזל teach us that he must return **אשר גזל that which he stole**; he must return the entire object (or the entire value of the object without deducting the שברים).

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

והיינו טעמא דגנב וגזלן קנו מיד כשהוציאו מרשות בעלים –

And this is the reason for the difference¹¹; for a גנב וגזלן acquired ownership, of the object they stole¹², immediately¹³, when they took it away from the possession of the owners. Therefore, since they stole and

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 אם המצא תמצא בידו הגנבה משור עד חמור עד שה חיים שנים ישלם: reads שמות (משפטים) כב,ג 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 והיינו טעמא is referring to the rule of גזלן לגזלן (see footnote # 1). See בל"י אות שי"ז בד"ה והנה ותוספות רבינו פרץ.

¹² This does not mean that the גנב 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 גנב 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 it is a השבה (חיוב). Therefore they are required to restore a complete item (or its value) as it was when they stole it. See following footnote # 14.

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.

Tosfos 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 וגזול).

כיון דחייב באונסין נמצא שקנאו משעה שהוציא מיד הבעלים –

For since a שואל is liable for אונסין, it turns out that the שואל acquired the ownership of borrowed item¹⁶ from the moment he removed it from the possession of the owners -

והדמים הוא דנתחייב כמו גנב וגזול:

And the שואל is liable for the full monetary value of the item he borrowed, just like a גנב וגזול 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 of חיים שנים ישלם and גזל וזלזל את הגזילה אשר גזל. A ג"ג (and a שואל) acquires ownership in the גזילה, and that distinguishes them from a מזיק.

Thinking it over

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

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

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

¹⁴ The גנב וגזול 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 לוה 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.

¹⁶ See previous footnote # 12.

¹⁷ See אמ"ה.