



## Babba Kama Daf 79

### CHIYUV ONSIN FOR A THIEF BY DOING A KINYAN

בבבא קמא דף ע"ט. במשנה, גנב ברשות הבעלים, וטבח ומכר חוץ מרשותם, או שגנב וטבח ומכר חוץ מרשותם, משלם תשלומי ארבעה וחמשה. אבל גנב וטבח ומכר ברשותם, פטור. היה מושכו ויוצא, ומת ברשות הבעלים, פטור. הגביהו או הוציאו מרשות בעלים, ומת, חייב. נתנו לבכורות בנו או לבעל חוב לשומר חנם לשואל לנושא שכר ולשוכר, והיה מושכו ומת, ברשות הבעלים פטור. הגביהו או שהוציאו מרשות הבעלים ומת, חייב.

ובגמ', בעי אמימר, תיקנו משיכה בשומרים, או לא. אמר רב יימר, תא שמע, נתנו לבכורות בנו, או לבעל חוב, לשומר חנם ולשואל לנושא שכר ולשוכר, היה מושכו ויוצא ומת, ברשות הבעלים פטור. מאי לאו שומר, ושמע מינה תיקנו משיכה בשומרינן.

- א -

### The parameters of *kinyanei gezeilah*

*A thief is not liable for onsin unless he makes a kinyan that would work for regular purchases / A thief does not acquire the stolen item through shinuy unless he goes through the motions of a kinyan / That which a thief obtains somewhat of a kinyan in the stolen item is a gezeiras hakassuv / Whether it is considered as if there is willingness of the makneh or whether it is considered as if the thief acquired it from hefker that has no owner / Whether a child who steals acquires through shinuy / Whether a child who steals becomes liable for onsin when he comes of age / Although a kinyan agav normally works when there is willingness from the makneh, it works for gezeilah*

-רבי עקיבא איגר, נתיבות המשפט-

א. It is learned in the current Mishnah that a *ganav* or a *gazlan* does not become liable for *onsin* unless they

go through the motions of making a *kinyan*. Therefore, just as *meshichah* does not acquire a purchase when it is done in the domain of the owner, it is also not considered a *kinyan* for a thief to become liable for *onsin*. However, if the thief picks up the item in the domain of the owner and it then dies, he will be liable because just as *hagbahah* acquires in the domain of the owner for regular purchases. [1]

The sefer *Ksav V'chosam*,<sup>1</sup> by Rabi Akiva Eiger, writes that it seems that the halachah that a thief acquires the item through *shinuy* (a change made in the stolen item) is also said only if the thief originally made a *kinyan*, or at least went through the motions of making a *kinyan*,

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*Whether an act of kinyan on a stolen item has all the halachos of kinyanim that are said regarding purchases*

-גמרא, תוספות-

[1] A dispute is found among the Rishonim regarding whether all the halachos of *kinyanim* that apply to purchases apply also to *kinyanei gezeilah*. In *Kesubos* daf 31b, Rav Acha and Ravina disagree about whether a thief who does a *meshichah* into a *reshus*

*harabim* acquires the item for *onsin* or not. Rav Acha holds that if he pulls it into a *reshus harabim*, he will not become liable for *onsin*, while Ravina holds that he will become liable through such a *meshichah*. Two approaches in the Rishonim are found to explain this dispute.

Tosfos in *Kesubos*<sup>13</sup> writes, quoting the Ri, that all agree that *kinyanim* for purchases and gifts cannot be made by a *meshichah*

by doing *meshichah* or *hagbahah* or bringing it into his *chatzer*. Since the Torah establishes the ownership of the item regarding *onsin* with the thief and, in this respect, it has left the domain of the owner, he can acquire it through *shinuy*. However, if he did not acquire it through a *kinyan* previously, for example, he did mesh in the domain of the owner, he will not acquire it through *shinuy* in the same way as he does not become liable for *onsin*.

Rabi Akiva Eiger<sup>2</sup> writes that the fact that a thief acquires *kinyanei gezeilah* in a stolen item is a *gezeiras hakassuv*, but logically, it is impossible that there should be any kind of *kinyan* on another person's item without the owner's knowledge and willingness. He explains this in two ways. It could be suggested that the *gezeiras hakassuv* is that one who acquires something without the willingness of the owner is considered as if the *kinyan* was done with the willingness of the owner and the *koneh* thus acquires the item in respect to *onsin*. It could also be explained that the *gezeiras hakassuv* is that it is viewed as if there are no owners of this item, and the thief obtains *kinyanei gezeilah* like one who acquires something from *hefker*.

He writes that the ramifications of these two approaches can be seen regarding a child who steals an item that then undergoes a *shinuy*. A child can normally acquire an item only with the active willing participation of the *makneh* [*daas makneh*] and cannot acquire something from *hefker*. If so, if it would be explained that a thief obtains *kinyanei gezeilah* because it is considered as if there was willing participation from the *makneh*, this

would apply also to a child who steals. Since it is considered as if there is *daas makneh*, the child would also obtain *kinyanei gezeilah*. Although the child would be exempt from *onsin* if the item would become damaged before he comes of age, this is only because liabilities are not relevant to a child. However, when he grows up, he will be liable for *onsin* even if he did not do a further *kinyan* because he has already obtained *kinyanei gezeilah* through *daas makneh*. If so, if the stolen item undergoes a *shinuy*, even if it changes when the thief is still a child, he will acquire it because the stolen item is in his domain. [2]

However, concludes Rabi Akiva Eiger, if it would be explained that the halachah that a thief obtains *kinyanei gezeilah* without the willingness of the owner is because it is seen as if it is a *hefker* item that has no owner, it would emerge that a child does not obtain *kinyanei gezeilah* and he would not acquire it through *shinuy*.

The Nesivos Hamishpat<sup>3</sup> writes that the reason that a thief obtains *kinyanei gezeilah* in respect to the liability for *onsin* is that the owner is happy that the thief should have a *kinyan* in this regard. The owner wants the thief to be liable for *onsin*, and it is considered as if there is *daas makneh*.

He explains, based on this, a Gemora on daf 118a. The Gemora states that if one steals a field and there was a cow in the field, he will be liable for *onsin* both on the field and on the cow according to Rabi Elazar, who holds that land can be stolen. Rashi<sup>4</sup> explains that the cow becomes acquired by the thief through *kinyan agav* just as moveable articles are normally acquired together

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into a *reshus harabim*. Their dispute is only about whether a thief who does such a *meshichah* acquires the item that he stole in regard to becoming liable for *onsin*. Ravina holds that since the *kinyan gezeilah* is only for *onsin*, a *meshichah* can be done in a *reshus harabim*. This means that the Ri holds that Ravina holds that a *kinyan* for *kinyanei gezeilah* does not have all the details of *kinyanim* for purchases. However, the opinion of the Ritzba<sup>14</sup> is that there is no difference between the *kinyanim* of a thief and any other *kinyan*, and a thief becomes liable for *onsin* only with *kinyanim* that would work for a regular purchase. Clearly, Ravina, who says that a thief can do a *kinyan* even in a *reshus harabim*, holds that a regular *kinyan* can be done there as well.

[2] It is worth noting that there is an incredible *chiddush* in Rabi Akiva Eiger's words. According to him, it would be possible, in theory, for one to become liable to pay for an act that he did when he was a child. If one stole when he was a child, he would have acquired the item in regard to the liability for *onsin*. Although he would not have been obligated to pay for it had it become lost while he was still a child, because he is free from all obligations as long as he is a minor, nevertheless, the act of stealing that he did then will hold him liable when he is an adult. Even without any additional *kinyan*, he will be liable for *onsin* because of the act of stealing that he did when he was a child. This means that when he becomes an adult, he will be liable for the fact that a stolen item from others became acquired by him, although the act occurred when he was a minor.

with land. The Ketzos Hachoshen<sup>5</sup> extrapolates from this Gemora that a *kinyan agav* works even when there is no *daas makneh*, and that it is thus possible to acquire moveable articles from *hefker* together with land through *agav*. However, the Nesivos Hamishpat<sup>6</sup> disagrees with this and writes that a *kinyan* of moveable articles *agav* land is only possible when there is *daas makneh* allowing the *kinyan*. This means that *agav* can only be used when

purchasing the items or receiving them as a gift but not from *hefker*. He explains, therefore, that the reason that *agav* can be used for *gezeilah* is that it is considered as if there is *daas makneh* to obtain *kinyanei gezeilah* because the owner is happy that the thief should become liable for *onsin*. Therefore, *kinyan agav* works in this case and one cannot learn from this Gemora that *kinyan agav* works also on *hefker*, where there is no *daas makneh*.

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### The liability of the thief through the *meshichah* of a *shomer*

*Since the shomer does not know that this is a geneivah, there can be shelichus even for an aveirah / Whether hagbahah would acquire for one who sends a shaliach to lift up an item and the shaliach does not know that it is hefker / The difference between a shaliach to pick up an article that one has found and a shomer who does a meshichah from the domain of the owner*

תוספות, קצות החושן, נתיבות המשפט, דברי יחזקאל-

ב. The halachah is taught in the Mishnah that if one gives a stolen animal to a *kohen* as a *pidyon haben* or to a creditor to repay a debt or to a *shomer*, whether a *shomer chinam*, a *sho'el*, a *shomer sachar* or a *socher*, he is exempt if the animal dies in a case when any of those people did a *meshichah* in the domain of the owner but is liable if they did *hagbahah* or if they did *meshichah* and took the animal outside of the owner's domain. Rashi explains that this means that the thief gave it to any of these people in the domain of the owner, and, in this case, the thief will be exempt from *onsin* if the creditor or the *shomer* does *meshichah* in the domain of the owner. If they take it out of the domain of the owner, the thief will become liable for *onsin*.

Tosfos also writes that<sup>7</sup> the thief becomes liable for *onsin* through the *meshichah* of the creditor or the *shomer*, as long as they take the animal out of the domain of the owner. Tosfos explains that this does not fall under the category of *ein shalaich lidvar aveirah* because

the principle that *ein shaliach lidvar aveirah* is said only when the *shaliach* knows that an *aveirah* is happening. However, when a *shaliach* who is *shogeg* and does not know that there is an *aveirah* happening, there can be *shelichus*. [the reason for this is that in Babba Metziah daf 10b, Ravina says that if a *shaliach* is not one who can be liable, there is *shelichus* for *aveiros*, and when one is a *shogeg*, it is considered as if he cannot be liable. Similarly, according to Rav Sama,<sup>8</sup> who says that the principle that *ein shaliach lidvar aveirah* is said only when the *shaliach* is able to choose not to do the *shelichus*, but when the *shaliach* is *shogeg*, it is considered as if he had no choice in the matter since he did not know that it was an *aveirah*]. Therefore, the thief becomes liable through the *shelichus* of the *shomer* when the *shomer* does *meshichah* because this is not considered *shelichus lidvar aveirah*. Tosfos in Babba Metziah<sup>9</sup> also writes this. See the Notes and Addenda. [3]

The Ketzos Hachoshen<sup>10</sup> writes that if one sends a *shaliach* to pick up a certain item from *hefker* but does not tell the *shaliach* that it is *hefker*, and the *shaliach* thinks that the item belongs to the *meshaleach*, the *meshaleach* will acquire that item. Although the *shaliach* did not intend to make a *kinyan* for him with this *hagbahah*, the intention of the *meshaleach* to acquire it is

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[3] However, the Nemukei Yosef<sup>5</sup> disagrees with Tosfos. He brings many proofs that there is no *shelichus* for *aveiros* when the *shaliach* is *shogeg*. Therefore, He explains the Mishnah that teaches that there will be liability if the animal is brought out to the *reshus harabim* as referring to the *shomer* who is doing the

*meshichah*. The *shomer* will be liable for *onsin* if he does a *meshichah* on the animal. This is unlike Rashi and Tosfos. According to this, the Mishnah is talking about a case where the *shomer* knows that they are taking an item that belongs to the owner.

sufficient, following the principle that *shaliach shel adam kemoso*.

He proves this from the words of Tosfos in the current *sugya*. Tosfos writes that a thief becomes liable for *onsin* through the *meshichah* of a *shomer* and this is not subject to the principle that *ein shaliach lidvar aveirah* because the *shomer* does not know that the item belongs to someone else. One can ask that in order for the thief to become liable for *onsin*, there must be some kind of *kinyan*, just as a purchase or the receipt of a gift. Every *kinyan* requires the *koneh* to have intention to make it, and if the *shomer* did not have intention to acquire the *gezeilah*, being that he did not know that it was stolen, how can the thief become liable? It is clear from here that the act of a *kinyan* from the *shaliach* is effective if the *meshaleach* has intention to acquire, following the principle of *shaliach shel adam kemoso*.

However, the Nesivos Hamishpat<sup>11</sup> disagrees with this. He writes that if the *koneh* does not intend to acquire the item, the intent of the *meshaleach* will be of no avail.

The Divrei Yechezkel<sup>12</sup> also concludes that when a *shaliach* is sent to pick up an item, if the *shaliach* thinks that the item belongs to the *meshaleach* and picks it up merely to give it to him, the *meshaleach* does not acquire it and the intent of the *meshaleach* does not help. This is because the intent that is required for a *kinyan* is that an act without intention to do a *kinyan* is not considered an

act of *kinyan* at all. If so, when a *shaliach* does an act without particular intent, since it is not considered an act of *kinyan*, it will not help that the *meshaleach* has intention to acquire. The act of the *shaliach*, which was devoid of intent, is like the act of a monkey, and the intent of the *meshaleach* will not help to make it considered as if the *shaliach* made a *kinyan*.

He comments on the halachah that is taught in the current *sugya* that a thief who tells a *shomer* to take something outside for him becomes liable for *onsin* based on the halachah of *shelichus* even if the *shomer* was unaware that the item was being stolen. According to the above, this should not be considered an act of *meshichah*. However, the reason that the thief indeed does become liable is that since the *shomer* did the *meshichah* in order to bring upon himself the liabilities of a *shomer*, the thief becomes liable with this *meshichah*. The fact that it is called a *meshichah* regarding the *shomer's* liabilities makes it considered a *meshichah* also regarding the *kinyanei gezeilah* of the thief. Since it is a *meshichah* for one respect, it is also a *meshichah* for other matters. However, if one would ask someone to pick something up for him, and that person thinks that the item belongs to the one who asked him and does not know at all that it is *hefker*, the intent of a *shaliach* will not help. Since the *shaliach* did not intend to make an acquisition through the *meshichah*, it is not considered a *meshichah* at all. [See a similar discussion in the Notes and Addenda].

#### מראי מקומות

1. שו"ת סי' א' 2. שם 3. סי' ר"ב סק"ב 4. ד"ה פרה 5. סי' ער"ה סק"א 6. שם 7. ד"ה נתנו 8. שם 9. דף י': ד"ה אי 10. סי' ער"ה סק"ג 11. שם סק"א 12. סי' נ"ג (אות ג') 13. שם (ד"ה וברשות) 14. שם 15. דף כ"ט. מדפי הר"ף