להתוודע ולהגלות מחמדי התורה בכל דף בש"ס
LEHISVADA
Daily shiurim revealing the sweetness of the Daf

Bava Kamma daf 65

A THIEF WHO CAUSES FURTHER DAMAGE

בבבא קמא דף ס"ה. גופא, אמר רב, קרן, כעין שגנב. תשלומי כפל ותשלומי ארבעה וחמשה, כשעת העמדה בדין. מאי טעמא דרב, אמר קרא גניבה וחיים, אמאי קאמר רחמנא חיים בגניבה, אחייה לקרן כעין שגנב וכו'

כי קאמר רב ביוקרא וזולא הוא דקאמר. היכי דמי, אילימא דמעיקרא שויא זוזא, ולבסוף שויא ד' זוזי, קרן כעין שגנב, לימא פליגא דרב אדרבה, דאמר רבה, האי מאן דגזל חביתא דחמרא מחבריה, מעיקרא שויא זוזא ולבסוף שויא ד' זוזי, תברה או שתייה משלם ד', איתבר ממילא משלם זוזא. אמרי, כי קאמר רב כגון דמעיקרא שויא ד', ולבסוף שויא זוזא, קרן כעין שגנב, תשלומי כפל ותשלומי ארבעה וחמשה כשעת העמדה בדין.

– א -

The obligation of a thief in further damage

A thief who causes further damage as compared to one who steals from thief / One who divides items with a thief / The damage is considered a secondary theft / The obligation to repay double

קצות החושן, נתיבות המשפט, אמרי משה

א. The gemoro tells us that if one steals a barrel of wine, or any other item, and at the time of theft it was worth one *zuz,* and at a later date the value increased, and it became worth four *zuz;* if at this time it broke, the thief is only obligated to pay one *zuz,* as was the value at the time of theft; if, however, he damaged it, or drank the wine, he is obligated to pay the value of the item at the time of damage. This is codified by the *Rambam*[1], *Tur,* and *Shulchan Aruch*[2].

There are numerous approaches as to how understand this ruling.

The *Ketzos Hachoshen*[3] asserts that the obligation to pay the higher price is not within the parameters of the obligation of theft; the theft is already complete as soon as the item has left the ownership of the original owner, and the action of theft has obligated him in the earlier price. Rather, he explains, that the obligation here is that of a *mazzik,* one who causes damage.

The *Ketzos Hachoshen* proves this, writing that were the obligation of *gezeilah* to obligate the thief even at a later stage, there would be no difference whether the thief himself damaged the stolen item, or it was damaged by itself. This is since he has undoubtedly performed a further *kinyan* on the item, either by physically raising it, or by it simply being within his premises, and as such the *kinyan* alone should be considered a further act of robbery, which would obligate him to reimburse the item at that value. Evidently, once the item has been taken away from the original owner the theft has been completed, and there is no further obligation of theft; rather the obligation under discussion in our *sugya* is that of *mazzik* – damages. [1]

With this reasoning the *Ketzos Hachoshen* explains the opinion of the *Rivosh*[4]. The *Rivosh* writes that one who divides the stolen item with the thief will not be classified as a thief, and as such will be valid to give testimony. The *Tumim*[5] questions this ruling, asking that surely one who receives stolen items from a thief is withholding items belonging to another, which is חמס - a form of thievery, and should therefore be invalid from giving testimony.

The *Ketzos Hachoshen* however insists that thievery is only when an item is taken directly from the owner. He explains that this is derived from the *pasuk* וגונב מבית האיש – it was stolen from the owner's home[6], from which we deduce that only a robbery from the owner obligates the thief to pay *kefel* – double reimbursement; while one who steals from a thief, i.e., steals a stolen item is not obligated. The *Ketzos* understands this that *geneiva* only takes place when an item leaves the rightful owner; withholding it at a later stage is not classified as robbery. As such, one who divided stolen items with a thief will not be invalidated from given testimony, as he has not partaken in robbery.

The *Nesivos Hamihspat*[7] however disagrees with this approach. He asserts that while simply doing a *kinyan* will not obligate the thief to pay the present price, this is because this *kinyan* was in no way an additional robbery, and did not take any further from the rightful owner. If, however, the thief damaged it, at that stage he is effectively adding to his original theft, and this action will obligate him to pay the present value. Similarly, if an additional person receives the item from the thief, and proceeds to change the item in some way, he too is adding to the theft, and will be responsible as a thief.

The *Nesivos* quotes *Rashi* to prove his point, *Rashi*[8] writes וההיא שעתא דתברה ושתייה הוא דקא גזיל לה – and at that time, when he damages it or breaks it, he is stealing it. Evidently *Rashi* understood that the obligation is that of a *ganav,* although he took it earlier from the rightful owner; nonetheless, at the present moment he is distancing it further.

The *Nesivos* further proves this from a *Tosafos* in *Maseches Kesubos*[9] who rules that if one steals foodstuff from another, and feeds it willingly to a third party, the third party will be obligated to pay as soon as the item enters his mouth. Evidently, although the item has already been stolen from the rightful owner, nonetheless the third party is obligated as a *ganav.*

In conclusion, the *Ketzos* and *Nesivos* disagree as to whether one can be obligated as a thief when an item is already stolen; the *Ketzos* understands that one can only be obligated as a *mazzik,* while the *Nesivos* asserts that the obligation of a *ganav* can still apply. [2]

Notes

[1] The *Imrei Moshe*[19] raises the following question on the *Ketzos Hachoshen.* The *Ketzos Hachoshen* asserts that *geneiva* can only take place when the item is taken from the rightful owner, otherwise even were the price to increase and the item to become damaged by itself, the thief would have to pay the higher price, as simply being withheld from the rightful owner would serve as a form of robbery, since at any given time the item is within the *chatzer* of the *ganav.*

The *Imrei Moshe* points out that the *Ketzos* seems to contradict what he writes in a different place. The *Ketzos*[20] famously is *mechadesh* that a standard *kinyan chatzer* is not adequate to serve as a form of *geneiva* unless one does an additional action towards the acquisition. As such simply being within the property of the thief will not serve as robbery, and will not obligate him to pay the value at that point. [See further lehivada daf 64.]

R' Shlomo Zalman Auerbach[21] however suggests that although the *Ketzos* writes that a standard *kinyan chatzer* is not adequate to serve as a form of *geneiva,* this only applies when the item is being stolen and acquired from the owner; however, once the item is already stolen, and the thief has done a previous act of acquisition, a a standard *kinyan chatzer* will be adequate.

The role of the original act in obligating the thief at a later stage / A repetition of the theft

אבן האזל בשם הגרב"ד, חי' רבי נחום

[2] R' Isser Zalman Meltzer[22] quotes R' Boruch Ber as explaining that although the thief is responsible for the later damage he does as a form of a theft, as established by the *Nesivos,* this is not to be understood that a new action of theft

The *Imrei Moshe*[10] points out that there will be a practical difference between these two opinions. If the obligation is that of a *mazzik,* as the *Ketzos* understands, then the halachah of שמין למזיק – when an item is damaged, one estimates the worth of the remains, and only pays the difference between the original value and the value of the remains – will apply, and one will deduct the worth of the remains from the obligation. If, however, the obligation is that a *ganav* then the halachah of שמין will not apply, and he will be obligated to reimburse the full value of the item.

The *Imrei Moshe*[11] however questions the opinion of the *Ketzos,* pointing out that that the *Rambam* rules that if one steals an item and proceeds to break it one is obligated to pay *keffel* of the value at the time it was damaged. If there is an obligation to pay *keffel,* evidently the obligation is that of a *ganav* rather than a *mazzik,* as the obligation of *keffel* does not apply to a *mazzik.* [3]

– ב –

If the item was damaged due to negligence

The duty of a thief to guard the item / The different responsibilities to take care of items

סמ"ע, קצות החשן, שער משפט

ב. In our *sugya* Rabba rules that if the item increases in value, and one breaks it, he needs pay the increased value. This halachah is codified in *Shulchan Aruch*[12], wherein the *Mechaber* writes דאם שבר הכלי או אבדו' משלם כשעת העמדה בדין' – if he breaks the item or misplaces it, he pays the value at the later time. The *Sma*[13] explains that misplacing it means the item was misplaced due to negligence.

The *Ketzos Hachoshen*[14] however disagrees with this, and asserts that when the *Mechaber* writes ואבדו it means that that he destroyed the item. If, however, it was misplaced, even due to negligence, he is exempt from paying the higher value. He further

Notes

takes place at this stage, rather this act serves as a continuation of the original theft.

R' Nochum Partzowitz[23] further elaborates on this idea, explaining that the original thievery obligates the thief to return the item, when the thief damages it he is annulling the possibility of fulfilling the return; as such this act is within the parameters of the original obligation.

Based on this reasoning he differentiates between our *sugya* and that of גונב מן הגנב – one who steals from a thief. One who steals from a thief is indeed exempt from paying *keffel* as the entiretheft does not relate to the original owner. In our *sugya* however, the act of damaging is a continuation of the original act of theft, which was from the original owner; as such the later actions too obligate the thief in *keffel.*

He further suggests a second approach[24]. Were he not to have stolen the item, but rather he would have damaged it or drunk from it at this stage, this action would obligate him to reimburse the original owner in the increased value. As such, these actions are considered as if he repeated the original theft, and further obligate him.

The obligation of keffel

רמב"ם, אמרי משה

[3] The *Imrei Moshe* however debates the *Rambam* at length. He points out that even if damaging the item serves as a further form of theft, it still should be unable to obligate the thief to pay *keffel,* as it is no different than a גונב מן הגנב who is exempt from *keffel.*

He explains that as far as concerns the basic value, even one who steals from an intermediary is obligated; as such the thief himself can be obligated too by a further act of robbery. However, the obligation of *keffel* does not apply from an intermediary, why then should it apply to a later act of theft.

However, he explains[25] that according to the *Nesivos* that these acts are considered an extension of the original theft. It being that the original theft took place from the owner, and these acts are an extension thereof, they too will obligate the thief is *keffel.*

elaborates, writing that the obligation to pay for loss due to negligence only applies to the various guardians, however, a thief is not obligated.

The *Ketzos* bases this on a *Tosafos*[15] who write that there are various obligations that apply to guardians but not to thieves; for instance if one steals fruit and they begin to rot; a guardian is responsible to care for them, and is obligated to pay for nay damage; while a thief need only return the original item. Evidently, a thief has no responsibility to safeguard the item, and as such the halachah of our *sugya* will only apply to a thief who damages or destroys an item.

He further quotes the *Rosh*[16] who writes clearly that if the item is misplaced, even due to negligence, the thief is not obligated in the later price.

Based on this he asserts that the *Mechaber* is only referring to a circumstance in which the thief destroyed the item.

The *Shaar Hamishpat*[17] however disagrees with the *Ketzos Hachoshen* and is *meyashev* the opinion of the *Sma.* He first raises a question on the above-mentioned *Tosafos,* which exempts a thief from obligations due to negligence, questioning why he should bear less obligation that one who finds a lost item. One who finds a lost item - a שומר אבידה – is classified as a guardian, and as such bears the responsibility for negligence. Similarly, the *Mechaber* rules[18] that one who receives a stolen item has equal responsibility to a שומר אבידה; why then should the thief himself be different.

He concludes that although the thief will not be classified as a *shomer sachar,* - one who is receiving renumeration for his services – as he is not included in the various exemptions that apply to one who is involved in a mitzvah; nonetheless, a thief is classified as a *shomer chinam,* - one who is not receiving renumeration.

Based on this reasoning, he explains the *Rishonim* to be exempting a thief only from those obligations which apply to a *shomer sachar;* however, a thief is included in the obligations which apply to a *shomer chinam.*

As such, if the item is misplaced due to negligence; in which case a *shomer chinam* too is obligated, a thief too will be obligated, and will need to pay according to the value at the time.

מראי מקומות

1. בפרק א' מהלכות גניבה הלכה י"ד 2. חו"מ סי' שנ"ד סעיף ג'. 3. סי' ל"ד סק"ג 4. ריב"ש בסי' רס"ו מובא ברמ"א שם סעיף ז'. 5. שם סק"ה 6. שמות כ"ב 7. שם סק"ט 8. בד"ה תברה 9. דף ל': (ד"ה ואי) 10. סי' ל"ב (אות כ"ט) 11. אות א' 12. סי' שנ"ג סעיף ג' 13. שם סק"ז 14. שם סק"ב 15. לעיל דף נ"ו: (ד"ה פשיטא) 16. סי' ב' 17. שם סק"א 18. סי' שמ"ח סעיף ז' 19. סי' ל"ב (אות א') 20. בסי' שמ"ח סק"ב 21. במנחת שלמה (שיעורים סי' ל"ב אות א' ד"ה ויש) 22. באבן האזל בהשמטה סוף הלכות גניבה 23. חי' רבי נחום (אות ל"ג ד"ה ובאחרונים) 24. שם ד"ה וע"כ 25. אות ה'