

The Penitents' Enactment: Justice and Rehabilitation in Rabbinic Civil Law

Part I

1. תלמוד בבלי מסכת גיטין דף נה ע"א

משנה: העיד רבי יוחנן בן גידגדה על החרשת שהשיאה אביה, שהיא יוצאה בגט. ועל קטנה בת ישראל שנשאת לכהן, שאוכלת בתרומה, ואם מתה, בעלה יורשה. ועל המריש הגזול שבנאו בבירה, שיטל את דמיו, מפני תקנת השבים. ועל חטאת הגזולה שלא נודעה לרבים, שהיא מכפרת, מפני תקון המזבח.

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"ועל המריש הגזול שבנאו" — תנו רבנן: גזל מריש ובנאו בבירה בית שמאי אומרים מקעקע כל הבירה כולה ומחזיר מריש לבגלו ובית הלל אומרים אין לו אלא דמי מריש בלבד משום תקנת השבין.

MISHNA:¹ Rabbi Yohanan ben Gudgeda testified before the Sages **about:** the case of a **deaf-mute woman who was married off by her father, that she can be released** from her marriage **through a bill of divorce**. And similarly, he testified **about** the case of the **minor daughter of a non-priest who was orphaned and then married off to a priest, that nevertheless she may partake of teruma, and furthermore if this girl dies, then her husband inherits her estate**. And he further testified **about a stolen beam that was already built into a large building [bira], that the victim of the robbery receives only the value of the beam but not the beam itself, due to an ordinance instituted for the penitent**. And lastly, he testified **about a sin-offering that was obtained through robbery but that was not publicly known to have been obtained in that manner that it effects atonement for the robber who sacrifices it, for the benefit of the altar**.

...

§ "About a stolen beam that was built..." — The Sages taught in a *baraita* (*Tosefta, Bava Kamma* 10:5): If **one robbed another of a beam and built it into a building, Beit Shammai say: He must destroy the entire building and return the beam to its owners. And Beit Hillel say: The injured party receives only the value of the beam, due to "the ordinance of the penitents."**

a. רש"י גיטין נה ע"א

מפני תקנת השבים — שאם אתה מצריכו לקעקע בירתו ולהחזיר מריש עצמו ימנע מלעשות תשובה.

Due to "the ordinance of the penitents" — for if you were to force him to destroy the building and return the beam, he would be prevented from *teshuvah*.

2. משנה בבא קמא ט:א

הגזול עצים, ועשאן כלים, צמר, ועשאן בגדים — משלם כשעת הגזלה.

MISHNA: In the case of **one who robs another of wood and fashions it into vessels**, or one who robs another of **wool and fashions it into garments**, he **pays** the robbery victim **according to** the value of the goods at the **time of the robbery**, but he need not return the vessels or garments.

3. בבא קמא טו.

אמר רבה: שינוי קונה פתיבא ותנינא. פתיבא — {ויקרא ה':כ"ג} "והשיב את הגזלה אשר גזל" מה תלמוד לומר אשר גזל? אם כעין שגזל יחזיר, ואם לאו דמים בעלמא בעי שלומי. תנינא — הגזול עצים ועשאן כלים צמר ועשאן בגדים משלם כשעת הגזילה... אלמא שינוי קונה.

§ **Rabba said:** The principle that **a change** in a stolen item causes the thief to **acquire** it **is written** in the Torah, **and we learned** it in a mishna as well. **It is written: "He shall restore the item that he robbed"** (Leviticus 5:23). **What** is the meaning when **the verse states** the seemingly superfluous phrase **"that he robbed"**? That **if** the item is the same **as** it was **when he stole** it, **he must return** the stolen item itself. **But if** it is **not**, **he is required** to **pay only money**.

¹ Translations modified from Sefaria or my own.

We learned this *halakha* in a mishna as well: In the case of **one who robs** another of **wood and fashions it into vessels**, or one who robs another of **wool and fashions it into garments**, **he pays according to** the value of the goods at the **time of the robbery**, and keeps the altered materials for himself. **Apparently**, a physical **change** in a stolen item causes the thief to **acquire** it.

4. **בבא קמא צד:**

אמר רבי חייה בר אבא אמר רבי יוחנן: דבר תורה גזילה הנשתנית חוזרת בעיניה שנאמר { **ויקרא ה' כ"ג** } "והשיב את הגזילה אשר גזל" — מכל מקום. ואם תאמר: משנתנו! משום תקנת השבים.

Rabbi Ḥiyya bar Abba says that Rabbi Yoḥanan says: By Torah law, a stolen item that has changed is returned as is, as it is stated: "And he shall restore that which he took by robbery" (Leviticus 5:23). This indicates that he shall return it **in any case**, even if it has been changed. **And if you object from our mishna — that policy was instituted by the Sages due to the ordinance instituted for the penitent.**

5. **בבא קמא צג: - צד.**

אמר אבוי: רבי שמעון בן יהודה, ובית שמאי, ורבי אליעזר בן יעקב, ורבי שמעון בן אלעזר, ורבי ישמעאל — כולו סבירא להו שינוי במקומו עומד... בית שמאי מאי? היא דתניא: נתן לה חטין באתונה ועשאן סולת, זיתים ועשאן שמן, ענבים ועשאן יין — תני חדא אסור, ותניא אידך מותר. ואמר רב יוסף תני גוריון דמאספורק בית שמאי אוסרין ובית הלל מתירין. מאי טעמיה דבית שמאי? אמר קרא { **דברים כ"ג: ט** } "גם שניהם" — לרבות שינוייהם. ובית הלל אמר קרא "הם" — ולא שינוייהם.

§ Abaye said: Rabbi Shimon ben Yehuda, and Beit Shammai, and Rabbi Eliezer ben Ya'akov, and Rabbi Shimon ben Elazar, and Rabbi Yishmael all hold that despite a change, the changed item remains in its place, i.e., the changed item is still considered to have the status it had before the change... **What is the source that indicates that Beit Shammai maintain this position? As it is taught** in a *baraita*: If one gave a prostitute wheat as her payment, and she ground it and converted it into flour; or if he gave her olives, and she squeezed them and converted them into oil; or if he gave her grapes, and she squeezed them and converted them into wine; and if, in any of these cases, she subsequently consecrated the final product, **it is taught in one baraita that it is prohibited** to sacrifice them, **and it is taught in another baraita that it is permitted.** **And Rav Yosef says:** It was taught by Guryon of Asporak: Beit Shammai prohibit sacrificing these items and Beit Hillel permit doing so. **What is the reason of Beit Shammai? The verse states: "even both of these** are an abomination unto the Lord your God" (Deuteronomy 23:19). The word "even" is an amplification, which serves to include these items in their changed form. **And what is the reason of Beit Hillel? The verse states "these"** to emphasize that the prohibition applies only to these items in their initial form, **but not in their changed form.**

a. **דברים כג: ט**

לא תביא אתנן זונה ומתיר ללב בית ה' אלקיך לכל־גֹדֶר כִּי תועֲבֹת ה' אֱלֹקֶיךָ גַּם־שְׁנֵיהֶם:

You shall not bring the hire of a harlot or the price of a dog into the House of the Lord your God for any vow; for **even both of these** are an abomination unto the Lord your God.

6. **תענית טז.**

"וישב איש מדרכו הרעה ומן החמס אשר בכפיהם", מאי "ומן החמס אשר בכפיהם"? אמר שמואל: אפילו גזל מריש ובגאווה בבירה — מקעקע כל הבירה כולה ומחזיר מריש לבעליו.

The verse states: **"And let them turn, every one from his evil way, and from the violence that is in their hands" (Jonah 3:8).** **What is the meaning of the phrase "and from the violence that is in their hands"?** Shmuel said that the king of Nineveh proclaimed: **Even if one stole a beam and built it into his building, he must tear down the entire building and return the beam to its owner.**