

**He gave it to his friend, etc.**

**נתנה לחבירו כולי –**

### OVERVIEW

The גמרא cites a משנה which states; if someone took a stone of הקדש, he did not transgress the prohibition of מעילה; however if he gave this stone of הקדש (which he took) to his friend, the giver is מועל. Our תוספות will discuss why this difference whether he took it or he gave it.

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**בפרק קמא דחגיגה (דף יב, ב) פריך מכדי מגזל גזליה מה לי הוא מה לי חבירו –**

**The גמרא in the first פרק of מסכת חגיגה asks, since he took it (from הקדש), what difference is there whether he took it (where he is פטור), or whether his friend received it (where he is מועל). Seemingly the first person who took it should always be מועל, even if he did not give it to his friend.**

**ומשני באבני בנין המסורות לגזבר עסקינן<sup>1</sup> -**

**And the גמרא there answers; that we are discussing stones which belong to the גזבר, which were given over to the treasurer of הקדש.**

תוספות asks:

**ואם תאמר מכל מקום למעול דהוי מתכוין לקנות<sup>2</sup> -**

**And if you will say; but nevertheless the גזבר should be מועל even if he took them (and did not give them to someone else), for he had intent to acquire it for himself –**

תוספות anticipates a possible resolution:

**ואפילו למאן דאמר (בבא מציעא דף מא, א) שליחות יד צריכה חסרון<sup>3</sup> -**

**And even according to the one who maintains that שליחות יד requires that it be diminished –**

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<sup>1</sup> Therefore if the treasurer took the stones (which are under his jurisdiction) he is not מועל, because they are still in his רשות (where they are supposed to be). However, once the גזבר gave the stones to someone else, and they left the מועל is גזבר, the רשות הקדש.

<sup>2</sup> See 'Thinking it over' # 1.

<sup>3</sup> This is referring to the rule that a watchman is not permitted to use the item he is charged to guard. If he uses it, this is called שליחות יד (see (י) (שמות [משפטים] כב, ז) and the watchman is liable for any damage or loss to the object, even if it is an אונס. There is a dispute between רב and לוי whether שליחות יד צריכה חסרון meaning that his obligation to pay for אונס is only if through his שליחות יד the value of the item was diminished, or whether even if it was not diminished he is still considered a שליח for חסרון. In our case there was no חסרון, the גזבר merely took the stones; they still retain their initial value (so it cannot be considered שליחות יד [or מעילה] according to the מ"ד that שליחות יד צריכה חסרון). This would seemingly explain the ruling (why the גזבר is not מועל) according to the מ"ד that שליחות יד צריכה חסרון.

rejects this solution:

**הני מילי כשאין מתכוין לקנות הכל<sup>4</sup> -**

**When does this מ"ד maintain** חסרון יד שליחות **when he had no intention to acquire the entire** object (only [to use] a part of it); in that case it is not יד שליחות unless there was a חסרון. If however the שומר (or the גזבר) intended to take the entire object for himself (as in our case by the גזבר), all agree that חסרון יד אינה צריכה חסרון. The question remains that the גזבר should be מועל.

**ויש לומר דאין אדם מועל אלא במתכוין להוציאו מרשות מי שהוא והכא הוא סבור שלו הוא:**  
**And one can say that one is not מועל unless intends to remove it from someone else's רשות; however here the גזבר assumes that the stones are his,** so there was no intent to place them in a new רשות (and there was also no חסרון).

### SUMMARY

The גזבר is not מועל for taking it, since it is still in his רשות and he had no intent to remove it to a different רשות.

### THINKING IT OVER

1. מתכוין לקנות<sup>5</sup> מעל since he was גזבר should be מועל asks that the תוספות mean that he was מתכוין לקנות? We are discussing מעילה for which you are חייב (only) if it was בשוגג. Seemingly even in the question תוספות assumes that the גזבר thought it was his,<sup>6</sup> so how could he have לקנות. It is difficult to say that in the question תוספות maintains that the גזבר thought it belongs to someone else!<sup>7</sup> How can תוספות compare it to שליחות יד by a שומר where he knows it belongs to someone else?!

2. Why is there a difference (according to the חסרון יד שליחות צריכה חסרון<sup>8</sup>), whether he was מתכוין לקנות (where חסרון יד צריכה חסרון), or whether he was not מתכוין לקנות<sup>9</sup> (where חסרון יד צריכה חסרון)?

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<sup>4</sup> See 'Thinking it over' # 2.

<sup>5</sup> See footnote # 2.

<sup>6</sup> See חי' ר' נחום און קה and נחלת משה.

<sup>7</sup> משנה למלך הל' מעילה פ"ו ה"ד See! סבור שהוא שלו since מתכוין לקנות he is not should have answered that תוספות.

<sup>8</sup> See footnote # 4.

<sup>9</sup> See נח"מ (בד"ה בא"ד ה"מ).