

Here too, since he despairs, etc.

הכא נמי כיון דמייאש כולי –

OVERVIEW

The גמרא compares יאוש of גזילה to יאוש of אבידה. Just as יאוש is קונה by אבידה,¹ it should also be קונה by גזילה (according to one side of the query).² תוספות will explain how this comparison is valid regardless of the difference(s) between the יאוש of אבידה and the יאוש of גזילה.

anticipates a difficulty: תוספות

אף על פי שאין יאוש מועיל באבידה בתר דאתי לידיה -

Even though יאוש is not effective by אבידה if the יאוש took place only after it came into the possession of the finder -

כדקאמר לאו כיון דמייאש מרה מינה מקמי דאתי לידיה קני ליה -

As the גמרא states here concerning יאוש דאבידה; 'is it not so that since the owner was מייאש from it before it came into the hands of the finder, the finder acquires it -

וכדאמר באלו מציאות (ב"מ דף כא, ב) בהדיא³ -

And as the גמרא states explicitly in אלו מציאות פרק that יאוש is קונה only if the יאוש takes place before it was found. How can the גמרא derive from יאוש באבידה that יאוש בגזילה when יאוש takes place after the item is in the possession of the גזול, and by אבידה the יאוש must take place before it came into the finder's possession.

responds: תוספות

מכל מקום בעי למילף שפיר דיאוש קני בגזל בתר דאתי לידיה -

Nevertheless the גמרא correctly attempts to derive from יאוש באבידה that יאוש is קונה by גזל after it comes into the possession of the גזול -

דבמציאה נמי נהי שלא היה קונה לענין זה שלא יצטרך להשיב ולהפטר לגמרי -

For by מציאה (there is also a concept of יאוש after it was in his possession,⁴ for), granted that by מציאה he would not acquire the item in the sense that he is not required to return the item and he is completely exempt from any monetary obligation to the owner; this is obviously not true -

¹ The (general) concept that יאוש באבידה is קונה is that the finder may keep the item and is not responsible to the owner at all.

² The concept of יאוש בגזילה is that the גזול need not return the item he stole to the owner, but rather he can pay the owner the value of the item he stole while retaining the item for himself.

³ The גמרא there states that יאוש is not קונה by סימן even if we heard the owner later being מייאש since באיסורא הוא דאתא לידיה.

⁴ See 'Thinking it over' # 1.

הואיל וכבר נתחייב בהשבה –

Since the finder was already obligated to return the item which he found before יאוש, that obligation continues (in a general sense) -

מכל מקום היה קונה לענין זה שלא יתחייב לשלם כי אם דמים כמו לגבי גזל⁵:

However the finder would be קונה the אבידה in the sense that he is not responsible (to return the item itself [since the owner was מייאש] but rather he is) only responsible for the monetary value of the item, just as we want to derive by גזל.⁶

SUMMARY

By אבידה, if the owner was מייאש after the item was found, the finder may keep the item provided he pays the owner for it.

THINKING IT OVER

1. According to תוספות that we are deriving יאוש בגזילה from a case of באבידה that took place after he found it,⁷ then why does the גמרא say (on the other side of the query) that we cannot derive גזילה from אבידה, for by אבידה it is אתי לידיה, בהיתירא, when תוספות explained that the comparison is from a case of אבידה where it was יאוש (before יאוש)?!⁸

[In addition why did the גמרא state that יאוש is קונה באבידה when the owner was מייאש, when according to תוספות the comparison is to a יאוש where he was מייאש after he found it?⁹]

2. תוספות maintains that if the יאוש took place after the אבידה was found, the finder may keep the אבידה, however he must pay the owner for it.¹⁰ If the finder is קונה the אבידה, then why is he required to pay for it. A גזלן is required to pay because he stole it, and at that moment he became obligated to pay; however a finder never had an obligation to pay, and once he is קונה ביאוש, there should be no obligation to pay!¹¹

⁵ תוספות maintains that the גמרא attempts to derive יאוש קונה בגזילה meaning that the גזלן should be able to keep the stolen item, and (only) pay the owner for it; (we should derive this) from the rule of יאוש by אבידה, if the owner was מייאש after the item was found, where the finder may keep the item if he pays its value to the owner.

⁶ See 'Thinking it over # 2.

⁷ See footnote # 4.

⁸ נח"מ.

⁹ See חי' ר"נ אות עה.

¹⁰ See footnote # 6.

¹¹ See חי' ר"נ אות עט-פ.