He agrees with the virtuous ones – הוא דאמר כצנועין

OVERVIEW

ר"ל maintains that the חיוב ד' וה' is only if the טביחה ומכירה took place before the owners were מייאש; however after the owners are מייאש, the גנב acquires the animal and it is שלו הוא טובח שלו הוא מוכר. It was necessary for ר"ל to establish the ברייתא, which states that if גנב והקדיש he does not pay ד' וה', in a case where the owner was מקדיש the animal while in possession of the גנב.[1] The גמרא explained the ר"ל agrees with the[2] צנועין who were מחלל the פירות,[3] which passersby took, even though it was already in the רשות of those passersby who are גזלנים, similarly by הקדש the בעלים can be מקדיש even though it is ברשות הגזלן. Our תוספות discusses the appropriateness of comparing the case of צנועין with our case of הקדש by the ד' וה'.

תוספות asks:

ואם תאמר והא צנועים מחללין אף אחר יאוש -

And if you will say; but the צנועים redeem the כרם רבעי **even after יאוש;** תוספות proves that this חילול took place after יאוש -

דהא סתם גניבה הוי יאוש בעלים כרבנן דרבי שמעון[4] -

For generally גניבה is considered יאוש בעלים as the רבנן, who argue **with ר"ש,** rule -

אם כן קסברי צנועין דיאוש לא קני[5] -

Therefore the צנועין must **maintains that יאוש** (alone) **is not קונה -**

וריש לקיש מודה דאין יכול להקדיש אחר היאוש דסבר יאוש קונה[6] -

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[1] The ברייתא is לפני יאוש and the only reason the גנב is פטור from ד' וה' is because the בעלים were מקדיש; otherwise the גנב would be חייב בד' וה' since it is לפני יאוש.

[2] The צנועין had vineyards that were כרם רבעי (the fourth year of growth) where it is not permitted to be eaten as is, but must be (redeemed and the money) taken to ירושלים and eaten there (like מעשר שני). However, passersby would pick the fruit (illegally) and eat it (transgressing both on איסור גניבה and רבעי). In order to prevent them from transgressing the איסור רבעי, the צנועין would place aside money and designate it as redemption for the fruits the passersby would take and eat.

[3] Otherwise how can the בעלים be מקדיש the animal (according to ר"ל) while it is not ברשותו (but rather ברשות הגזלן); this is contrary to the ruling of ר"י that גזל ולא נתייאשו הבעלים both of them cannot be מקדיש the stolen item.

[4] See the גמרא previously on א,סו, which cites a משנה that states a מחלוקת between the רבנן and ר"ש whether סתם גניבה is assumed to be יאוש בעלים (the view of the רבנן) or whether סתם גזילה יאוש בעלים (the view of ר"ש).

[5] If יאוש is קונה, then the passersby own the fruit (and not the צנועין), so how can the צנועין by מחלל the fruit when it is not theirs. [If we will assume that the צנועין maintain that one can be מחלל even if יאוש קני and it belongs to the passersby, then ר"ל can certainly not agree with the צנועין and derive his ruling from theirs because if the other person is קונה the item everyone agrees that no one else can be מקדיש it.]

[6] תוספות question is how can the גמרא answer that ר"ל agrees with the צנועין (that one can be מקדיש something which is שלא ברשותו), when obviously ר"ל (who maintains יאוש קני [and therefore there is no לאחר יאוש חיוב ד' וה', since שלו

However ר"ל admits that the owners **cannot be מקדיש after יאוש for** ר"ל **maintains that יאוש קונה!**

תוספות anticipates a possible answer:

וכי תימא דהוי יאוש שלא מדעת[7] שאינם יודעים אם לקטו אם לאו -

And if you will say, that in the case of the צנועין **it is considered יאוש שלא מדעת, since** the צנועין **are not aware if** passersby **gathered** the grapes **or not,** so therefore this יאוש is not קונה. Therefore ר"ל and the צנועין can agree that יאוש קונה -

תוספות rejects this answer that it is considered יאוש שלא מדעת:

הא גבי תמרי דזיקא אמרינן באלו מציאות (בבא מציעא דף כב,ב ושם) -

For we learnt in אלו מציאות פרק**, regarding the dates** that fall to the ground on account of **the wind -**

כיון דשכיחי דנתרי[8] חשיב יאוש מדעת -

That since it is common that they fall, it is considered יאוש מדעת.

תוספות answers and distinguishes between the windblown dates and the grapes of the צנועין:

ויש לומר דהכא לא שכיח כולי האי שילקטו שיראים מן הבעלים -

And one can say; that here by the צנועין **it is not that common that** the passersby **will pick** the grapes, **for they fear the owners** will see them -

ולא דמי לתמרי דזיקא וחשיב יאוש שלא מדעת[9] –

And it is not like by the case of the **windblown dates, so** therefore by the grapes **it is considered יאוש שלא מדעת;** however by regular יאוש the צנועין agree with ר"ל that יאוש קני; we can now conclude the ר"ל agrees with the צנועין.

תוספות broadens the scope of his answer:

הוא טובח]) cannot agree with the צנועין (who maintain יאוש לא קני [see footnote # 5]). See 'Thinking it over'.

[7] יאוש שלא מדעת means if a person is unaware that he lost an item, however had he known that he lost it he certainly would have abandoned any hope of retrieving it (יאוש), this is called יאוש שלא מדעת since the reason he was not מתייאש is because he is unaware of his lost. According to אביי (and this is the הלכה) the rule is יאוש שלא מדעת is not considered יאוש. In our case the צנועין are unaware whether anyone picked their fruit (had they been aware they would be מייאש [since סתם גניבה is יאוש בעלים]). Therefore since יאוש שלא מדעת לא הוי יאוש, the צנועין are still the owners and can be מחלל (so they too agree with ר"ל that יאוש is קונה, however here there was no real יאוש only יאוש שלא מדעת).

[8] The passersby may take the fallen dates since the owner knows that it is common for dates to fall off the tree, it is considered that he was מייאש from these dates (since he realizes that the dates will be eaten by insects and vermin), and it is not considered יאוש שלא מדעת even though he does not know specifically that this date fell. Similarly here by the צנועין since the owners are aware that passersby will pick some grapes it is considered a proper יאוש and not יאוש שלא מדעת. The question remains it seems that the צנועין maintains that יאוש לא קני and ר"ל maintains יאוש קני.

[9] It is considered יאוש שלא מדעת since it is not common for passersby to take the fruit, however the צנועין were extra careful and they set aside money for חילול in the unlikely event that someone will take.

ואפילו למאן דאמר[10] יאוש שלא מדעת הוי יאוש -

And even according to the one who maintains[11] יאוש שלא מדעת הוי יאוש, nevertheless we can reconcile ר"ל with the צנועין, for -

איכא למימר דצנועין סברי כרבי שמעון[12] דאמר דסתם גניבה לא הוי יאוש בעלים[13] -

We can say that the צנועין agree with ר"ש who maintains that a גניבה generally is not considered יאוש בעלים.

In summation: both ר"ל and the צנועין maintain that יאוש קני. The reason the owners can be מחלל the כרם רבעי (according to the רבנן who maintain סתם גניבה יאוש בעלים) is because here it was a יאוש שלא מדעת (for the owner assumed no one would steal the grapes out of fear of being caught), and it is not considered a יאוש. Alternately even if we maintain יאוש שלא מדעת הוי יאוש they still can be מחלל the grapes because the צנועין agree with ר"ש that סתם גניבה לא הוי יאוש.

תוספות asks:

ואם תאמר והיכי מדמי הקדש לחילול שכמו שיכול לחלל מה שביד חבירו כן יכול להקדיש[14] -

And if you will say; but how can the גמרא **compare הקדש to חילול,** saying **that just as one can be מחלל that which is in the possession of his friend** (the case of the צנועין) **so too one can be מקדיש** what is in the possession of his friend (the case of the ברייתא of ד' וה'). תוספות develops his question:

והלא אף על פי שאין יכול להקדיש פירות של חבירו יכול לחלל הקדש של חבירו[15] -

For is it not so that even though one cannot be מקדיש his friend's פירות, nevertheless **he could redeem his friends הקדש;** תוספות proves this -

כדמשמע בריש האשה רבה (יבמות דף פח,א) דקאמר[16] אי קדושת דמים[17] משום דבידו לפדותו -

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[10] This is רבא who argues with אביי (see footnote # 7) and maintains יאוש שלא מדעת הוי יאוש.

[11] According to this opinion even if we maintain that by the צנועין it was a יאוש שלא מדעת, nevertheless it would seem that the צנועין maintain יאוש לא קני (disagreeing with ר"ל), for since it was a יאוש שלא מדעת it is a proper יאוש and nevertheless the צנועין maintain that the בעלים (who were [שלא מדעת] מייאש) can still be מחלל the פירות; proving that יאוש לא קני.

[12] See footnote # 4.

[13] The צנועין can be מחלל the grapes since there was no יאוש at all for (according to ר"ש [and the צנועין]) we maintain סתם גניבה לא הוי יאוש בעלים, and this (by the צנועין) is a case of גניבה (not גזילה).

[14] The גמרא explained that according to ר"ל the בעלים of the animal can be מקדיש the animal (לפני יאוש) which is in the possession of the גנב, since we find by the צנועין that they could be מחלל the grapes which are in the possession of the passersby. תוספות argues that we cannot compare הקדש to חילול!

[15] Therefore we can also distinguish between חילול of something which is אינו ברשותו (the case of צנועין) which is valid and the case of מקדיש something which is אינו ברשותו (the case of ר"ל) where it is not valid.

[16] The גמרא there is discussing the believability of an ע"א. The גמרא says that one person is believed to say that הקדש was redeemed, so we can derive from there that an ע"א is נאמן. The גמרא challenges this assumption, and says if it is קדושת דמים then he is believed because it is בידו to redeem it (but we cannot derive that an ע"א is believed even if it is not בידו) and if it is קדושת הגוף (where the owner claims he retracted the הקדש), then let us see; if he made the קדושת הגוף, etc. (it is בידו to retract it, and if someone else make the קדושת הגוף perhaps he is indeed not נאמן).

As it seems in the beginning of פרק **האשה רבה where** the גמרא **states if it is קדושת דמים, it is because he is capable of redeeming it -**

ואי קדושת הגוף[18] אי דידיה כולי משמע דבקדושת דמים אין חילוק בין דידיה לחבריה[19] -

And if it is קדושת דמים it depends **if it his, etc. It appears that by קדושת דמים there is no difference whether it is his or his friends,** that in all cases he may redeem it. It is evident that redeeming is more leniently applicable than הקדש, for one can be מקדיש only his own, while one can redeem even his friend's. The question is how can ר"ל claim that just as the צנועין can redeem something which is not in their possession, similarly one can be מקדיש something which is not in his possession; we cannot compare the two, since חילול is less restrictive than הקדש.

תוספות answers, distinguishing between חילול of הקדש and חילול of כרם רבעי:

ויש לומר דלא דמי -

And one can say; that חילול כרם רבעי **is not similar** to חילול הקדש,

דהקדש מאחר שהוקדש יצא מרשות בעלים וכמו שהבעלים יכולין לפדותו כמו כן אחר -

For regarding הקדש once it became הקדש it leaves the domain of the owners (and it now belongs to הקדש), **and just as the owners can redeem** this הקדש, **similarly others can also** redeem the הקדש. The status of the original owner and a stranger are the same with regards to this הקדש, which belongs to neither of them.

אבל כרם רבעי הבעלים זכאים לאוכלה בירושלים[20] –

However regarding כרם רבעי the owners have the right to eat it in ירושלים; he has rights in the כרם רבעי (others may not take it without the owner's permission).

In summation: regarding הקדש there is a leniency in חילול הקדש in comparison to being מקדיש; one can be מקדיש only if it is his, but one can be פודה another's הקדש (because once it is הקדש it belongs to neither of them so they both can be פודה equally); however regarding the חילול of כרם רבעי it is stricter than פדיית הקדש and only the owner can be מחלל כרם רבעי, since it always belongs

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[17] קדושת דמים – a holiness of money – refers to items a person is מקדיש which cannot be brought on the מזבח. Its קדושה is limited to its value. הקדש will sell this item and use the money for whatever purposes it needs.

[18] קדושת הגוף – a holiness of the body – refers to items which can be brought on the מזבח; an animal for a קרבן or wheat for מנחות, etc.

[19] The גמרא made a distinction between his הקדש and his friend's הקדש only in regards to קדושת הגוף, however it made no distinction regarding his ability to redeem, between his הקדש and his friend's הקדש; indicating that one may redeem his friend's הקדש.

[20] תוספות rejects his previous assumption that by כרם רבעי anyone can redeem it, rather now תוספות maintains that by כרם רבעי it cannot be redeemed only by the initial owner (not like פדיון הקדש [but like being מקדיש, where only the owner can be מקדיש something]). Therefore if the צנועין would maintain that one cannot be מקדיש something which he owns, but is in the possession of a stranger, the צנועין would also agree that the owners cannot redeem כרם רבעי either, if it is not in the possession of the owners (for redeeming כרם רבעי is just like being מקדיש הקדש); since however the צנועין maintain that the כרם רבעי may be redeemed by the owners even if the fruit is not in their possession, we can also apply it to הקדש that the בעלים can be מקדיש it even if it is not in their possession.

to the בעלים, therefore the rules of הקדש and of חילול כרם רבעי can be derived from each other.[21]

תוספות asks:[22]

ואם תאמר אכתי הרי יכול לחלל מעשר שני של חבירו -

And if you will say; nevertheless we find **that one can redeem his friend's מע"ש -**

דאמרינן בפרק האיש מקדש (קדושין דף נה,ב[23] ושם) **-**

For there is a משנה **cited in פרק האיש מקדש** regarding מעות מעשר שני;[24]

אין לוקחין בהמה טמאה עבדים וקרקעות ממעות מעשר שני -

One may not buy an unclean animal, slaves and land[25] from the money of מע"ש -

ואם לקח יאכל כנגדן בירושלים[26] -

And if he bought it, **he** (the buyer of the בהמה טמאה, etc.) **should eat their equivalent in ירושלים -**

ופריך אמאי יחזרו דמים למקומן[27] ומשני כשברח אלמא מחללין מעות שביד המוכר[28] -

And the גמרא **asks; why** do we require this process, let **the money return to its source? And** the גמרא **answered, that** the seller **ran away.[29] It is evident that we can redeem the money which is in the seller's possession!**

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[21] One cannot be מקדיש anything which belongs to someone else and one cannot be מחלל the כרם רבעי of someone else. This assumption is critical in order to derive הקדש from חילול כרם רבעי.

[22] תוספות ruled regarding an item which requires redemption, if this item belongs to the owner (like כרם רבעי), only the owner can redeem it. This assumption is necessary to explain how we can compare הקדש to פדיון (that in both these cases only the owner can act). תוספות now will ask a series of questions which challenges this assumption.

[23] תוספות is seemingly referring to the משנה cited on א,נו.

[24] On the first, second, fourth and fifth year of שמיטה, after one removed the תרומה (for the כהן) and מעשר ראשון (for the לוי), one must take a tenth from the remaining produce and designate it as מע"ש, and it needs to be eaten in ירושלים. If it is too difficult to bring the produce to ירושלים, one can redeem the produce with money and bring the money to ירושלים. In ירושלים he is to purchase food with this מעות מע"ש to be eaten in ירושלים.

[25] These are not edible items.

[26] Let us assume that ראובן bought from שמעון a בהמה טמאה with the מעות מע"ש worth one hundred זוז. The hundred זוז that שמעון (the seller) has in his possession is still מעות מע"ש since there was no valid redemption (the מעות מע"ש was not used to buy edible items). The rule is that ראובן (the buyer) must lay out an additional hundred זוז, proclaim that with this money he is redeeming the מעות מע"ש that שמעון has, so now the קדושת מעות מע"ש is transferred back to the money held by ראובן, and ראובן is required to buy one hundred זוז of edible items to be eaten in ירושלים.

[27] Let שמעון (the seller) return the money to ראובן (and ראובן will return his purchase).

[28] תוספות previously asserted that by חילול כרם רבעי, only the owner can redeem it; however here by מע"ש, which has the same rule as כרם רבעי (the owner exclusively has the right to eat it in ירושלים), and nevertheless ראובן (who is not the owner of the מעות מע"ש anymore [for he purchased the בהמה טמאה with it]), can be פודה the מעות מע"ש which belongs to שמעון, just as one can be פודה another's הקדש. This seemingly disproves תוספות assertion that חילול כרם רבעי (or מע"ש) is different from חילול הקדש.

[29] It was necessary to mention this detail (כשברח), for otherwise we may have assumed that the buyer redeems it with the consent of seller (which would prove nothing), however now that we establish the case כשברח, the seller is not here, so he redeems it without the consent of the seller (owner).

תוספות answers:

ויש לומר דהתם הוי כמו גזלן דאי לא ברח הוי המקח חוזר בו[30] -

And one can say; that there by חילול מע"ש, the seller is (not like an owner, but rather) **like a robber, for if** the seller **did not run away, the sale would be reversed,** so this is not a case where one is פודה another's מע"ש, but rather -

והוי כמו גזל ולא נתייאשו הבעלים[31] וכצנועין דהכא -

It is like the case where **one robbed and the owners were not מייאש, and like the צנועין** case cited **here.**

תוספות offers an alternate explanation:

אי נמי[32] התם קנסא בעלמא[33] וכן משמע התם מתוך הסוגיא -

Or you may **also** say; **there** by מע"ש **it is merely a fine** that he is required 'to eat the equivalent in ירושלים', **and it is so indicated from the סוגיא there.**

In summation: regarding one who sold inedible items for מעות מע"ש, we can either assume that he is not considered the owner of this money ([but rather like a גזלן] since he is required to return it and invalidate the sale), and therefore the original owner of the מעות מע"ש can redeem the מעות מע"ש that is in the possession of the seller, or we may consider him the owner and indeed the buyer cannot actually redeem the מעות מע"ש, however the חכמים, as a fine, required him to 'go through the motion' and eat the value of the מע"ש in ירושלים.

תוספות explores further this issue of redeeming items which belong to other people:

ומיהו בפרק לולב הגזול (סוכה דף לט,א ושם) משמע -

However from the גמרא **in פרק לולב הגזול it seems -**

שיכול אדם לחלל [דמי] פירות שביעית[34] של חבירו שלא מדעתו -

That one can redeem the money of his friend's פירות שביעית without his friend's **knowledge -**

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[30] If שמעון were present, he would be required to nullify this illegal sale and return the מעות מע"ש to ראובן. See footnote # 26 & 27.

[31] ר"ל and the צנועין are both discussing a case where there is a legal owner; however the item is in the possession of an illegal owner. They both maintain that the הקדש and חילול (respectively) are valid. The same case is by מע"ש. The original and current legal owner (ראובן) is being פודה his מע"ש which is illegally in the possession of שמעון (the seller).

[32] תוספות may be dissatisfied with the previous answer that it is not the seller's money, since in fact as long as the sale was not invalidated, the money belongs to the seller.

[33] According to this answer the original owner (ראובן) cannot redeem the מעות מע"ש which is in the possession of שמעון (the seller), since שמעון is the owner and one cannot redeem the מע"ש (or כרם רבעי) of another. However the חכמים fined ראובן (the buyer) for buying inedible items with his מעות מע"ש, and required of him to go through the process and buy edible items in ירושלים, even though in truth no actual redemption takes place.

[34] The rule regarding פירות שביעית is that it is תופס את דמיו. Meaning that if one sold פירות שביעית, the money the seller receives retains the קדושת שביעית and the פירות שביעית which were sold remain with the קדושת שביעית. See סוכה מ,ב.

דתניא אין מוסרין דמי פירות שביעית[35] לעם הארץ[36] יותר ממזון שלש סעודות[37] -

For we learnt in a ברייתא that one may not deliver to an עם הארץ money, which has the קדושה of **פירות שביעית, more than** the worth of **three meals -**

ואם מסר אומר הרי מעות הללו מחוללין על פירות שיש לי בתוך ביתי[38] -

But if he gave the ע"ה more than מזון ג' סעודות, the giver **should say, 'these monies** of שביעית**,** which I gave to the ע"ה **should be redeemed on the produce which I have in my house'**

ובא ואוכלן בתורת שביעית –

And the owner of these פירות **comes and eats them in accordance with the laws of שביעית.** This contradicts תוספות assumption that only the owner can redeem.

תוספות answers:

ויש לומר דאפקינהו רבנן מרשות עם הארץ[39] כדי שלא יהא נכשל[40] -

And one can say; that the רבנן removed the מעות שביעית **from the possession of the ע"ה in order that the** ע"ה **should not be ensnared** in the איסור שביעית of לאכלה ולא לסחורה -

ואוקמינהו ברשות זה שיכול לחלל דהפקר בית דין הפקר[41] -

And the רבנן **placed** this מעות שביעית (which is physically in the possession of the ע"ה) **into this** one's (the person who erroneously gave it to the ע"ה) **domain to enable him to redeem** the מעות שביעית which is ברשות ע"ה), the רבנן were able to effect this transfer **since הפקר בי"ד הפקר.**

In summation: This rule of not being able to be מחלל another's property applies to שביעית as well,

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[35] פירות שביעית, fruit that grew on שביעית, may be eaten but are not to be used for commerce. One may redeem פירות שביעית for money and the קדושת שביעית is transferred to the money; the money then can be used only to purchase food to eat, but not for commerce, this is referred to as לאכלה ולא לסחורה. See ויקרא (בהר) כה,ו.

[36] The חכמים were concerned that the ע"ה will use this money for commerce.

[37] If it is only enough to purchase three meals (at most) we allow it to be given to an ע"ה, for we assume he will buy with this money the three סעודות for שבת.

[38] The קדושה of שביעית, which is on the money that is in the possession (and ownership) of the ע"ה is transferred to the פירות of the giver, so the money becomes חולין and the פירות take on קדושת שביעית. It may be assumed that the מעות שביעית which is in the possession of the ע"ה belongs to him and nevertheless another may redeem it. This contradicts תוספות assumption that (except for הקדש) one cannot redeem anything which is owned by another (like שכיעית and מע"ש, כרם רבעי).

[39] תוספות answer is that indeed one cannot be מחלל שביעית (or כרם רבעי ומע"ש) which belongs to someone else. However here the חכמים made an exception (through הפקר בי"ד הפקר) to allow the מעות שביעית which is ברשות ע"ה to be redeemed by another, in order to protect the ע"ה so he will not transgress the prohibition of לאכלה ולא לסחורה.

[40] We are concerned that the ע"ה will use this money לסחורה which is prohibited.

[41] בי"ד has the power to appropriate property which belongs to one person and assign it to another. Here too בי"ד removes the ownership of these מעות שביעית from the ע"ה and grants the מחלל the ownership. He is therefore being מחלל his own מעות שביעית, not those of the ע"ה.

with the proviso that if someone gives an ע"ה מעות שביעית, the giver can be מחלל, for the חכמים, through הפקר בי"ד, will transfer the ownership to the מחלל in order to prevent the ע"ה from transgressing איסור שביעית.

תוספות asks:

ומיהו קשה דבפרק קמא דבכורות (דף יא,א ושם דיבוד המתחיל הפודה) **משמע -**

However there is a difficulty; for it is seems from the גמרא **in the first פרק of** מסכת **בכורות -**

דהפודה פטר חמור[42] של חבירו פדיונו פדוי ואפילו שלא מדעתו[43] -

That one who redeems his friend's פטר חמור, the redemption is valid, even without the knowledge of the owner; we know that he can be פודה even שלא מדעתו -

מדבעי ליה פדיונו פדוי לפודה או דלמא פדיונו פדוי לבעלים -

Since the גמרא there **queried;** this **redeemed** חמור is it **redeemed for the redeemer,** (does the פודה acquire ownership of this חמור), **or perhaps this redemption is redeemed for the owner** (the owner receives the חמור). This concludes the גמרא. תוספות continues with his proof -

ואי מדעת בעלים דומה היה דפדיונו פדוי לבעלים -

And if the redemption can only be done **מדעת בעלים, it would seemingly** be obvious **that the redemption is for the owner.** This proves that one can be פודה even שלא מדעת בעלים. The question is how can one be פודה something which belongs to another!

תוספות answers:

ויש לומר דפטר חמור לא דמי לכרם רבעי דכיון דאסור בהנאה[44] -

And one can say; that פטר חמור is not similar to כרם רבעי (or מע"ש ושביעית), **for since** a פטר חמור **is אסור בהנאה** before פדיון -

הוי כמו הקדש[45] לענין זה שיכול כל אדם לפדותו -

It is like הקדש regarding this ruling **that anyone can be פודה** it -

ולא ממש הוי כהקדש דבהקדש פשיטא לן דפדיונו פדוי לפודה -

However it is not completely like הקדש, for by הקדש it is obvious to us that it

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[42] A פטר חמור is the first born donkey. One needs to either redeem it with a sheep (to be given to a כהן), or is required to chop off its neck (see שמות [בא] יג,יג).

[43] If he can only be פודה מדעת בעלים, there would be no question, for then the פודה is a שליח of the בעלים and it is understood that he can be פודה for the owner. תוספות (for his question) will prove that he can be פודה even שלא מדעת בעלים, so therefore תוספות has a valid question.

[44] See the גמרא there that the רבנן (who argue with ר"ש) maintain that a פטר חמור is אסור בהנאה.

[45] תוספות previously explained that by הקדש anyone can redeem it, because once it is הקדש it does not belong to the מקדיש, therefore all are equal regarding its redemption. פטר חמור is (somewhat) similar to הקדש. There is an איסור הנאה on this חמור, therefore it cannot practically be considered as belonging to its owner (since he is forbidden to derive any benefit from it).

belongs to whoever redeems the הקדש -

ובפטר חמור מסקינן דפדוי לבעלים[46] -

But by פטר חמור the גמרא **concludes that the redeemed** חמור **belongs to the בעלים.**

In summation; a פטר חמור may be redeemed by others (even שלא מדעת בעלים), for since it is אסור בהנאה it is somewhat similar to הקדש (meaning it does not (entirely) belong to the original owner).

תוספות asks (a final question):

ומיהו דבר תימה דהיכי מדמי הקדש כלל לחילול -

However it is something astonishing; for how can we at all compare הקדש to חילול -

דלמה לא יוכל לחלל נטע רבעי ומעשר שני של חבירו שלא מדעתו -

For why should not one be able to be redeem his friend's נטע רבעי or מעשר שני without his knowledge -

כיון דזכות הוא לו דזכין לאדם שלא בפניו[47] -

Since it is advantageous for the owner (of the כרם רבעי and מע"ש to have them redeemed), **so** the rule is **that זכין לאדם שלא בפניו –**

תוספות anticipates a difficulty:

דהא דמבעי לן באין בין המודר (נדרים דף לו,ב) התורם משלו על של חבירו -

For this which we queried in אין בין המודר פרק**, one who separates תרומה from his own** produce **for his friend's** produce -

צריך דעת בעלים או לאו -

Does it require the knowledge of the owner or not; seemingly indicating that even though it is a זכות for him to have תרומה separated for him at no cost, nevertheless there is a query if this is permitted, so perhaps this same query applies her to כרם רבעי –

תוספות responds:

היינו טעמא כדקאמר התם דדלמא ניחא ליה למעבד מצוה בממוניה -

The reason why there is a query in the case of תרומה is **as** the גמרא **states there, for perhaps** the owner **would rather perform the מצוה** of separating תרומה **with**

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[46] Technically, the פטר חמור belongs to the owner, however since it is אסור בהנאה this ownership has no practical application therefore anyone can redeem it (like הקדש). However once it is redeemed and has value it belongs to the owner (not like הקדש which [once it becomes הקדש] leaves the owner's domain entirely)

[47] One may act on behalf of another (regarding acquisitions and other matters) if it is beneficial for the recipient. Here too it is beneficial for the owner of רבעי and מע"ש to have them redeemed, which will allow him to eat the produce outside ירושלים (and the redeemer will have to bring the money [used for the redemption] to [be spent in] ירושלים).

his money (not with someone else's money; therefore it may not be a זכות) -

אבל הכא וכי אין טוב להם למלקטים שיחללו אותם הבעלים ממה שיאכלו בלא חילול -

However here (by the צנועין) **is it not preferable for the gatherers that the owners should redeem** the כרם רבעי, **rather than they should eat** the כרם רבעי **without חילול?!** Here it is obviously only a זכות for them (for they have no intention of being מחלל the כרם רבעי), so therefore one can certainly redeem it since זכין לאדם; how can ר"ל derive from here that one may be מקדיש something which is not ברשותו (which is no זכות at all to the one who is in possession of this item)?! תוספות does not answer this question.[48]

In summation: תוספות final question is that even though one may be מחלל the כרם רבעי of the מקלטים since it is a זכות for them, we cannot derive from here that one can be מקדיש something which is שלא ברשותו (since it is not a זכות for them).

[ועיין תוספות קדושין נו,א דיבור המתחיל מתקיף]:

Summary

The צנועין and ר"ל maintain יאוש קני. The case of צנועין is a יאוש שלא מדעת situation. Only הקדש can be redeemed by anyone; other items requiring redemption (such as כרם רבעי, מע"ש, שביעית) need to be redeemed by the original owner (except under certain circumstances). It is not clear why another cannot redeem these items on account of זכין לאדם שלא בפניו.

Thinking it over

תוספות asks how can the גמרא answer that ר"ל agrees with the צנועין, since ר"ל maintains יאוש קנה and the צנועין must maintain יאוש לא קנה.[49] Seemingly we can answer this by saying that even though ר"ל and the צנועין disagree whether יאוש קני or not, nevertheless ר"ל maintains that just like the צנועין maintain that they can be מחלל the כרם רבעי (even after יאוש) even though it is not in his possession (since יאוש לא קני), similarly according to ר"ל the owner can be מקדיש the animal (before יאוש) even though it is not in his possession (since there was no יאוש)![50]

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[48] See תוספות קדושין נו,א ד"ה מתקיף that the צנועין cannot be זוכה for the מלקטים since the מלקטים are robbers, which invalidates them from redeeming the כרם רבעי, so they cannot make a שליח to redeem it for them, therefore the צנועין cannot either redeem it for them מטעם זכיה (if we assume that זכיה is מטעם שליחות). See מהרש"א and אוצר מפרשי התלמוד #121-126..

[49] See footnote # 6.

[50] See אוצר מפרשי התלמוד # 71.