כל שלקטו עניים היום יהא הפקר –

Everything which the poor gathered today should be *Hefker*

Overview

The גמרא cites a ברייתא in which ר' יהודה and ר' דוסא have a dispute how the owners can prevent the poor people (who occasionally glean more than their allotment) from eating produce which was not tithed. They both agree that the owners render the produce gathered by the עניים to be הפקר and הפקר is exempted from מעשר. Their dispute is whether it is made הפקר (in the morning) before the עניים gather it, or (at night) after the עניים gathered it.[1] תוספות discusses the need and the efficacy of this הפקר.

תקנה עושה לעניים לפוטרם מן המעשר כשמלקטין יותר מדינם כגון ג' שבולים[2] -

ר' דוסא (and ר' יהודה) is providing **a remedy for the poor to exempt them from tithing when they gather more than their allotment, for instance when** they gathered **three stalks** or more -

ואוכלין בלא מעשר[3] לפי שלקט שכחה ופאה פטורים מן המעשר -

And they eat them without tithing, since לקט שכחה ופאה are exempt from tithing, and these עניים mistakenly assume that they are eating לקט, when in fact it is חייב במעשר since it is not לקט -

לכך אומר בעל הבית כל שלקטו יהיה הפקר כדי שיפטור הכל ממעשר דהפקר פטור ממעשר -

Therefore the owner states, 'whatever they have gathered should be הפקר', in order that everything which they gathered (even three or more stalks) **should be exempt from מעשר, since הפקר is exempt from מעשר.**

תוספות comments:

וצריך לומר דבעל הבית אין מתייאש[4] -

And it is necessary to assume that the owner does not abandon these fallen stalks which are not legally לקט -

דאם היה מתייאש וחשיב יאוש מדעת כמו תמרי דזיקא -

For if we assume that the owner **was מתייאש and** furthermore we will assume **that**

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[1] The גמרא (in different versions) attributes each view to both disputants.

[2] The rule regarding לקט is that the עניים may gather if only one or two stalks of grain fell from the sickle, but not if three or more fell, for then all the three (or more) belong to the owner.

[3] See 'Thinking it over' # 1.

[4] Even though he is aware of the possibility that the עניים will gather three or more stalks (and סתם גניבה יאוש בעלים), nevertheless the owner is not מתייאש.

it is considered יאוש מדעת like the windblown dates[5] -

ואם כן למאן דאמר יאוש כדי קני[6] תקשה ליה מה מועיל הפקר לפוטרו מן המעשר -

So if we make this assumption, **then according to the one who maintains that יאוש alone acquires, there is the difficulty, what will the הפקר accomplish to exempt it from מעשר -**

והלא כבר זכו בהן עניים בתורת גזל על ידי יאוש[7] -

For did not the עניים already acquire this 'לקט', **through stealing it, since there was יאוש.** Therefore we must assume that the owner was not מייאש and the עניים did not acquire it, therefore it still belongs to the owner and he can be מפקיר it.[8]

תוספות anticipates a difficulty in the reverse:[9]

ומיהו זה אין להקשות אם בעל הבית מתייאש למה צריך להפקיר כדי לפוטרו מן המעשר -

However we cannot ask as follows; if the owner was מייאש, why is it necessary for the owners **to be מפקיר in order to exempt** the produce **from tithing -**

והלא יאוש חשוב הוא כהפקר לפוטרו מן המעשר[10] כדמוכח באלו מציאות[11] (בבא מציעא ד' כא,ב) -

For is not יאוש considered as הפקר that יאוש can also **exempt from מעשר as is evident in אלו מציאות?!** פרק This seemingly proves that the owners were not מייאש.[12]

תוספות asks an additional question:

ועוד דלמה לא יועיל כל שלקטו לכולי עלמא[13] דאטו מי גרע מיאוש -

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[5] See סח,ב תוד"ה הוא TIE footnote # 8. We will need to distinguish between the פירות of כרם רבעי which תוספות there states (see TIE there footnote # 9) are not considered יאוש מדעת (since no one has the right to pick those פירות, the owner is not מייאש), and the case here by לקט, which is considered יאוש מדעת (since the עניים have the right to gather two שבלים, the owner realizes that it is highly probable that they will gather more).

[6] See סו,א where רבה rules יאוש קני.

[7] Once the עניים acquired it (בתורת גזל), it is theirs to the extent that the owner cannot be מפקיר it any more. They will therefore be eating it באיסור without tithing. See 'Thinking it over' # 2.

[8] This issue is relevant only if the owner states כל שלקטו (since he is מפקיר it after it came into the possession of the עניים). However if the owners say כל שילקטו, it is irrelevant whether the owner is מייאש or not, since the owner is מפקיר it while it is still in his possession.

[9] תוספות just said that we cannot say the בעלים were מייאש for then the owners cannot be מפקיר it since the עניים already required it. Now תוספות will negate another possible explanation why we cannot say that the בעלים were מייאש.

[10] This seemingly proves that the owners were not מייאש and therefore they need to be מפקיר it (in order לפוטרו מן המעשר); however if they were מייאש there is seemingly no need to be מפקיר לפוטרו מן המעשר.

[11] The ברייתא there states that if one finds figs on the side of the road (under a fig tree whose branches extended over the road), he may eat them and they are פטור from מעשר, since the owners are certainly מייאש. This proves that יאוש exempts from מעשר (like הפקר).

[12] This 'proof' (that the owners were not מייאש) would (seemingly) be valid according to both opinions. See footnote # 8. This may be why תוספות discusses this additional 'proof'.

[13] The ברייתא cites a מחלוקת whether the owner says כל שלקטו (in the past) or כל שילקטו (in the future). Seemingly the reason of the one who requires כל שילקטו is that once it was gathered it is no more in the רשות of the owner and he

And additionally, why should the statement of **'כל שלקטו' (whatever was gathered), not be effective according to everyone, is then** הפקר **inferior to** יאוש**?!**

תוספות answers and distinguishes between the יאוש in ב"מ and the יאוש here:[14]

דהא לא דמי יאוש דהכא דגבי גזלן[15] ליאוש דמציאה -

For the יאוש here regarding robbers is not comparable to the יאוש by a מציאה -

דאי יאוש קני בכל ענין אפילו אם אין הגזילה ברשות הגזלן בשעת יאוש[16] -

For if we assume that יאוש קני by a גזלן **in any event, even if the stolen item is not in the possession of the גזלן at the time of יאוש;** if we assume this –

אם כן יאוש דהכא לא הוי אלא כלפי דידיה[17] והוי כמתנה בעלמא ואין לו לפטור מן המעשר -

It follows that the יאוש here (by the עניים, which is גזל) **is directed only to the** עני (who is stealing the לקט), **so it is like** the owner is **just** granting the עני **a present, and therefore he cannot be exempt from מעשר.** This explains the difference between the two types of יאוש if we assume that יאוש קני בכל ענין**.**

תוספות continues:

ואפילו אם תמצא לומר דלא קני אלא אם כן הגזילה ברשות הגזלן -

And even if you will assume that the גזלן **does not acquire** it with יאוש, **unless the גזילה is ברשות הגזלן -**

אבל אם היא ברשות הרבים בשעת יאוש כל המחזיק בה זכה בה[18] -

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cannot be מפקיר it (see however תוספות ע,א ד"ה כסתם). However by יאוש we find that it is effective even though it is not in the רשות of the owner; תוספות question is, if יאוש is effective even though it is שלא ברשותו then הפקר (which is stronger than יאוש) should certainly be effective even though it is not ברשותו. See 'Thinking it over' # 3.

[14] תוספות will answer the first question that we cannot prove that the owners were not מייאש since we require a הפקר and the second question why is not הפקר effective since יאוש is effective, by distinguishing between the יאוש here (which is not effective) and the יאוש by מציאה (which is effective).

[15] Here, the עניים if they take more than their allotment they are גזלנים; he is מייאש because he assumes they will steal it. There in ב"מ he found something (a fig) which the owner was מייאש from since he realizes that when the תאנה falls it will splatter and be unfit to eat, therefore the one who finds it may eat it לכתחלה because the owner was מייאש.

[16] This means that if when the owner was מייאש it was not ברשות הגזלן nevertheless the גזלן acquires it. This also means that no one else can acquire it then, for if anyone can acquire it why does the גזלן acquire it, it belongs to whoever takes it. The only way to explain why the גזלן acquires it and no one else, is because, as תוספות continues to say that it is considered as if the owner is granting it to the גזלן with this יאוש. See following footnote # 17.

[17] The rule of יאוש regarding a גזלן is that the גזלן need not return the item he stole (but nevertheless he needs to pay for the item). We are now assuming that this יאוש is directed towards the גזלן exclusively and no one else has a right to this object (see previous footnote # 16). Therefore it is not like הפקר which is accessible to everyone. This type of יאוש does not exempt from מעשר. However by מציאה the owner is מייאש in a manner that it is available to all (see footnote # 15), anyone may keep the fig; which is similar to הפקר and therefore by יאוש דמציאה it is פטור ממעשר.

[18] The יאוש is for all, so if it is ברה"ר whoever acquires it then keeps it, if at the point of יאוש it is ברשות הגזלן the גזלן acquires it (he may keep the item but still needs to pay for it), but he has no inherent advantage over anyone else.

But if it is ברה"ר at the time of יאוש the rule is, **whoever possesses it acquires it**; which makes it similar to הפקר (for it belongs to all) -

אי נמי למאן דאמר יאוש כדי לא קני כלל וכל המחזיק בה[19] זכה בה[20] -

Or even if we will assume **as the one who maintains יאוש alone is not קונה at all** for the גנב, in which case the rule will be, **that whoever possesses it acquires it,** just like הפקר, so one may assume this the type of יאוש is פוטר מן המעשר –

However תוספות negates this:

מכל מקום אין זה יאוש פוטר מן המעשר -

Nevertheless this is not the יאוש which exempts from מעשר.

תוספות explains:

דנהי דנגזל אין יכול לתבוע מן המחזיק בה אחר יאוש כדאמרינן בהגוזל בתרא (לקמן ד' קיא,ב) -

For granted that the נגזל (the owner from whom it was stolen) **cannot claim** this stolen item **from the person** (not the גזלן) **who possessed it after יאוש, as** רב חסדא **stated in** פרק **הגוזל בתרא -**

דדוקא גזל ולא נתייאשו הבעלים ובא אחר ואכלו רצה מזה גובה רצה מזה גובה -

For it is specifically in a case where an item **was stolen and the owners were not מייאש, and another** person **came and destroyed this** item, it is then רב חסדא ruled that the owner **can collect from this** (first) **one if he wants** to, and if **he wants he can collect from this** (second) **one;** this is only if it was destroyed before יאוש -

אבל אחר יאוש אין יכול לגבות כלום מן השני[21] -

However if it was destroyed **after יאוש,** the owner **cannot collect anything from the second** person who destroyed the item. Therefore in these cases where anyone can acquire this item after יאוש, one may think that such a יאוש exempts from מעשר –

תוספות rejects this:

מכל מקום כיון שכל אדם אסור להחזיק בה מפני שהיא צריכה לגזלן ליפטר מן הנגזל[22] -

Nevertheless since everyone is prohibited from possessing this stolen item, **since the robber needs it to absolve** himself **from** repaying **the נגזל -**

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[19] This means that if a third party took possession of the גזילה from the גזלן, after the גזלן stole it (and there was יאוש בעלים), he gets to keep it. In this case the מחזיק is (somewhat) similar to one who found an אבידה after יאוש.

[20] One may then (mistakenly) argue that according to these views, יאוש is like הפקר and פטור ממעשר.

[21] It is therefore seemingly apparent that this יאוש is like הפקר, since anyone can take it and not be obligated to return it to the original owner. One would then perhaps assume that this type of יאוש by גזילה is sufficient to exempt from מעשר. However, תוספות negates this.

[22] If the stolen item is by the גזלן, he can use it to pay back the owner, however if someone takes it away, it causes a loss to the גזלן, that now he must pay from his own pocket. Therefore it is forbidden to take it from the גזלן.

ואם כבר זכה בה אחר לכל הפחות חייב לשלם דמים לגזלן -

And furthermore even **if someone acquired** this stolen item (and he destroyed it) **he is obligated to pay money to the גזלן -**

כדאמר לעיל[23] דאפילו למאן דאמר יאוש לא קני חייב גנב שני לשלם קרן לגנב ראשון -

As the ברייתא **stated previously, that even according to the one who maintains יאוש לא קני,** nevertheless **the second גנב is obligated to pay the principal to the first גנב,** therefore, on account of this (that one is not permitted from possessing this item, and one is obligated to pay the גזלן, therefore) this type of יאוש -

לא חשיב כהפקר לפטור מן המעשר -

is not considered הפקר in order to exempt him from מעשר, as תוספות explains shortly**.**

תוספות explains why this factual difference is relevant regarding the פטור ממעשר:

דטעמא דהפקר פטור מן המעשר משום דכתיב[24] ובא הלוי כי אין לו חלק ונחלה עמך[25] -

For the reason הפקר is פטור מן המעשר is because it is written, 'and the לוי shall come since he has no share or inheritance with you' and he shall eat the מעשר -

יצא לקט ושכחה ופאה שיש לו חלק ונחלה עמך[26] והיינו טעמא דהפקר -

This excludes לקט שכחה and פאה, which the לוי also **has a share** in it **with you, and the same reasoning applies to הפקר,** since the לוי has a share in the הפקר, there is no חיוב to tithe the הפקר -

והכא אין לו חלק בה שאסור לזכות בה ואם זכה חייב לשלם לכל הפחות דמים -

And here (by the יאוש of גזילה) the לוי **has not share in this** item, **for it is forbidden to acquire it and if he acquired it, he has to at least pay its value.**

תוספות offers an (entirely) different answer:

ועוד דבסתמא אין מתייאש אלא לגבי עניים -

And furthermore, presumably the owner **is מייאש** from this לקט **only regarding the עניים** (who he assumes will gather it regardless); however he is not מייאש from the עשירים; he does not assume they will take it -

ואין מועיל לפטור מן המעשר עד שיהיה הפקר לעניים ולעשירים כשמיטה:

Therefore this limited type of יאוש **is not effective לפטור מן המעשר, unless it is a הפקר for** both **עניים and עשירים like שמיטה** which is הפקר for all.

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[23] א,סח. If it we assume that יאוש קני then the גנב שני is required to pay כפל to the גנב ראשון (and certainly the קרן); however even if we maintain יאוש לא קני, nevertheless the גנב שני must pay (only) the קרן to the גנב ראשון.

[24] דברים (ראה) כד,כט.

[25] We derive from this that one gives מעשר to the לוי from produce which the לוי has no share in it; that which belongs to the owner.

[26] The לוי is permitted to gather לקט שכחה ופאה.

Summary

The owners are מפקיר the (additional) לקט in order to prevent the עניים from transgressing the איסור of בלתי מעושר. This is effective (according to the מ"ד יאוש קונה), only if the owners were not מייאש. The יאוש which is a result of אבידה exempts it from מעשר, but not the יאוש מחמת גזילה.

Thinking it over

1. תוספות writes that the reason the owners are מפקיר the לקט is in order they should not eat בלא מעשר.[27] Why did not תוספות say that they were מפקיר it in order the עניים should not be עובר on איסור גזילה?![28]

2. תוספות claims that we need to assume that the owners were not מייאש, for if they were מייאש, how could the make it (לאחר שלקטו) הפקר.[29] Previously תוספות stated[30] regarding פירות שביעית, that the seller can redeem them for the חכמים removed them from the רשות of the buyer, so that he should not transgress איסור שביעית. Why do we not say the same thing regarding מעשרות that the חכמים removed them from the gatherers so that the owner can be מפקיר them and thus prevent the gatherers from the איסור of אינו מעושר.[31]

3. תוספות asks why does not everyone agree to כל שלקטו (even though it is then שלא ברשותו), for since יאוש is effective even when it is שלו ברשותו, so הפקר which is more powerful that יאוש should certainly be effective by שלא ברשותו.[32] Seemingly יאוש is effective שלא ברשותו (by an אבידה) only before it came into the רשות of an individual (it was in a רה"ר); however once it came into someone's רשות before יאוש, the יאוש is not effective and he is responsible to return it to the owner. In our case if he says כל שלקטו, the grain is already in the רשות of the עניים so יאוש and הפקר cannot be effective. What is תוספות question?!

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[27] See footnote # 3.
[28] See חידושי ר' נחום אות קנב.
[29] See footnote # 7.
[30] סח,ב תוס' ד"ה הוא TIE footnote # 39 .
[31] See רש"ש.
[32] See footnote # 13.