באומר לו עקוץ תאינה מתאינתי כולי –

Where he said to him, 'take off a fig from my fig tree'

Overview

The גמרא initially wanted to explain the ברייתא, which states that גנב ומכר בשבת פטור, is in a case where the buyer (of the stolen animal) said to thief, 'chop off a fig from my tree as payment for the animal'. Therefore since the thief is מחוייב מיתה for חילול שבת, he is exempt from paying ד' וה'. The גמרא does not accept this explanation, for if the buyer would demand that the thief either deliver the cow to him (since he acquired it with the fig), or return the figs to him, the בי"ד would not require the thief to do so, since the thief is liable for the death penalty (it is קם ליה בדרבה מיניה), so it turns out that there is no sale, however the ברייתא maintains that he is פטור in a case of גנב ומכר. However according to this explanation there is no מכירה. Our תוספות clarifies the s'גמרא question.

תוספות asks:

ואם תאמר והיכי דמי אי דקיימא גניבה בחצירו של לוקח בשעת עקיצה -

And if you will say; but how is this case; if the stolen animal **is standing in the courtyard (domain) of the buyer at the time** of the fig **plucking -**

מאי פריך עלה וכיון דאי קתבע ליה כולי מכירה נמי לא הוי מכירה -

Why does the גמרא **challenge this** answer, saying **that since if the** buyer **would demand,** the animal (בי"ד would not force the thief to deliver it), **etc.** so therefore **the sale is not** an effective **sale,** but why not -

נהי דמחייב בנפשו[1] מכל מקום קנייה ליה חצירו ללוקח -

Granted that the thief **is liable with his life, nevertheless the חצר of the לוקח acquired** the animal -

ואלא דליתא בחצירו של לוקח דל חיוב שבת מהכא לאו מכירה היא[2] -

And if you would **rather** say **that** the animal **was not in the domain of the buyer** (and therefore there is no sale) that is also not acceptable, for **remove from here the** death **liability** for desecrating the **שבת**, it **would** still **not be a** valid **sale,**

דהא קיימא לן כרב נחמן דאמר פירות לא עבדי חליפין-

---

[1] We cannot obligate one who is מחוייב מיתה to make any payment that he owes someone, so if the animal was ברשות הגנב, we cannot obligate him to deliver it to the לוקח, since קלב"מ (and the same with returning the figs). However in this case the animal is already in the possession of the buyer, and he rightfully owns it, for there was payment and a proper קנין to which the thief agreed to; we are not demanding anything from the thief. The sale is and remains valid!

[2] The thief would be פטור even if it was not on שבת; since there was no קנין, the sale is not valid and there can be no תשלומי ד' וה'.

For we have established the ruling **according to ר''נ who maintains that fruit (food) cannot be** an effective way for[3] **חליפין** קנין **–**

תוספות offers a possible resolution to his question:

ומיהו לפירוש רבינו תם ניחא דמפרש[4] דהא דפירי לא עבדי חליפין היינו בתורת קנין סודר[5] -

However according the ר''ת's explanation it is understood, for the ר"ת **explains that this** rule of **פירי לא עבדי חליפין is only if the** פירות are used **in the manner of a קנין סודר -**

שמחזיר לו הסודר ולא יהיב לו אלא לקנין בעלמא -

Where he returns the סודר to the owner, **and the** קונה **only gives the** מקנה a **סודר for the sake of a קנין,** but not as payment -

אבל במכוין להקנות זה תחת זה שוה בשוה[6] בתורת דמים קני[7] -

However when the מקנה **intends to transfer** ownership; **this** item **for this item** (a form of barter) each **of equal value, as a monetary** payment then פירי **are effective –**

תוספות answers (the original question):

ואומר רבינו יצחק דהכא לא דייק אלא אלשון מכר[8] -

And the ר''י says that here he is only asking the question based on the **inference from the expression, 'sold' -**

דאפילו קאי בחצר הלוקח כיון דלא אמר זיל שלים אין זו מכירה אלא מתנה -

For even if the animal **is standing in the domain of the buyer** (so it belongs to

---

[3] See קדושין ח,א כח,ב. Generally מטלטלין (including animals) cannot be acquired by paying for it with money; they can be acquired through (משיכה, הגבהה and) חליפין. Presumably the קנין to acquire the animal with the figs was a קנין חליפין, however we rule that פירות are not valid for קנין חליפין. So even without the issue of חלול שבת there is no valid מכירה and therefore no תשלומי ד' וה'.

[4] See גאולה תוד"ה א,מז ב"מ.

[5] קנין סודר (acquisition through a shawl) is the standard mode of acquisition which is referred to in the גמרא as a קנין (like for instance when we say וקנו מידו). In this type of a קנין the one who is acquiring (the קונה) hands the מקנה any type of כלי and the מקנה takes it. This validates the transfer of ownership from the מקנה to the קונה. The מקנה returns the סודר to the קונה. There is no exchange of value for the goods received (at this point); it is merely a symbolic transfer of the סודר that makes the transaction effective. If it is a sale, the קונה is obligated to pay the agreed upon price, and the מקנה must deliver the goods.. It is only in this type of קנין חליפין that ר"נ rules פירי לא עבדי חליפין (according to the ר"ת).

[6] We may need to say that when he said עקוץ תאינה מתאינתי, he did not mean one fig, but rather as many figs as the animal is worth.

[7] In our case there was a barter, the animal for its value in figs, in this case, ר"נ agrees (according to the ר"ת) that the קנין is valid. Even though we mentioned that one cannot acquire מטלטלין with money, that is a rabbinic enactment that applies only to money (which is the more common way of buying), however buying through barter is uncommon and therefore the חכמים did not disallow this type of קנין. According to the ר"ת we can say that the animal was not ברשות הלוקח and normally he would be קונה the animal with חליפין שוה בשוה, however since it was שבת we cannot coerce the thief to deliver the animal (or the figs) on account of קלב"מ.

[8] The ברייתא states פטור **ומכר** גנב.

him), but **since** the בי"ד **cannot say** to the thief, **go and make up** to the buyer, what he paid you for (for it is a case of קלב"מ), therefore **this is not considered a sale, but rather a gift**[9] (so why does the ברייתא state <u>ומכר</u> גנב, when it is not a sale) –

תוספות anticipates a difficulty:

ואף על גב דבתשלומי ארבעה וחמשה מתחייב על המתנה כמו על המכר כדאמרינן לקמן[10] -

And even tough regarding the payment of ד' וה', one is liable for a gift, just as for a sale, as the גמרא **states later,** so what difference does it make whether it is a sale or a gift –

תוספות responds:

מכל מקום גנב ומכר בשבת קתני ואין זו מכירה[11] -

Nevertheless the ברייתא stated גנב <u>ומכר</u> בשבת, and this is not a מכירה -

וכך לן עקוץ תאינה מתאינתי כמו[12] עקוץ תאינה מתאינתיך:

And it is the same to us, whether he said **cut off a fig from my fig tree, just as** if would have said **cut off a fig from your fig tree.**

Summary

A transfer is considered a sale, only if both parties are obligated to fulfill their respective commitments.

Thinking it over

רב פפא answered that the buyer said, 'throw the stolen animal into my domain and my domain will acquire it for me'. Obviously he means to say that 'I will pay you afterwards'. Why cannot we say the same thing by עקוץ תאינה מתאינתיך, that this was merely a condition as to when the sale will take place, but the buyer will obviously have to pay him later, so why could we not establish the ברייתא in this type of a case?![13] Why is it any different from זרוק גניבותיך לחצרי?!

---

[9] See footnote # 12.

[10] עט,א.

[11] This is what תוספות meant previously that the גמרא is מדייק (bothered) by the wording of מכר.

[12] If the buyer would say that the transfer of the animal will take place when you cut off a fig from your fig tree, even though he cut off the fig, it is not considered a sale, since the 'buyer' did not give the thief anything of value in return. Similarly even if he said עקוץ תאינה מתאינתי, it is also no sale, since we cannot force the seller to deliver the goods in exchange for the figs that he received (on account of קלב"מ). When a seller cannot be coerced to deliver the merchandise, even though the buyer acquires the merchandise, it is not considered a 'sale' (but rather a gift). A sale is when both parties, after they made a קנין are obligated to both pay and deliver the merchandise to one another, respectively. See 'Thinking it over'.

[13] See מהרש"א וכו'.