

או שהוציאו מרשות בעלים כולי –

Or he took it out from the owner's domain, etc.

Overview

Our משנה states; היה מושכו ויוצא ומת ברשות הבעלים פטור הגביהו או הוציאו מרשות בעלים. ומת חייב. Our תוספות discusses what is meant by הוציאו מרשות בעלים.

בריש אלו נערות (כתובות דף לא,ב ושם) פליגי רב אחא ורבינא -

In the beginning of נערות and ר"א, there is a dispute between ר"א and רבינא regarding the rule of הוציאו מרשות בעלים ומת חייב -

חד אמר שהוציאו לסמטא¹ אבל לרשות הרבים לא קני -

One said; he is liable only if he took it out to a סמטא, however if he took it out to a רה"ר, he is not קונה the גניבה and therefore not liable at all; the death is considered an אונס -

ודייק מסיפא הוציאו דומיא דהגביהו² דאתי לרשותיה -

And he infers his ruling from the סיפא (which states חייב וכו' הוציאו וכו'), that the הוציאו (dragging it out) must be similar to picking it up, just like by הגביהו, he is קונה the item, for it came into his possession, similarly he is חייב by הוציאו, only if he is קונה it, by taking it into his possession in a סימטא -

ואידך³ אמר אפילו הוציאו לרשות הרבים קנה -

And the other one said; even if he dragged it out to a רה"ר, the thief acquires it, and is חייב -

ודייק מרישא דמת ברשות בעלים פטור הא חוץ לרשות חייב אפילו הוציאוהו לרשות הרבים -

And he infers it from the רישא, which states that if while he was dragging it, the animal died ברשות בעלים, פטור; we can infer from this, however if it died anywhere else outside the רשות of the owner, he is חייב, even if he dragged it out to a רה"ר, he is still חייב.

In summation; there is a dispute (between ר"א ורבינא)⁴ whether a thief (or anyone) is קונה (or חייב) if he dragged the (stolen) item into the רה"ר.

¹ A סמטא is like a (narrow) alleyway. According to this מ"ד (which is ר"א), making a משיכה in (or into) a סימטא is a valid קנין. However, making a משיכה in (or into) a רה"ר is not a valid משיכה and one is not קונה.

² When הגביהו is done it is considered as if the מגביה took it into his רשות, therefore by משיכה as well he must take it into his רשות. Bringing it into a (private) סימטא is considered bringing it into the רשות of the קונה; however, bringing it into the רה"ר (an open public place) is not considered as if it came into the רשות of the קונה.

³ This is רבינא, who maintains that משיכה is קונה ברה"ר (just like הגביהו) in all cases, including קנין and גניבה.

⁴ The גמרא states that (generally) in these unspecified disputes between ר"א ורבינא, it is ר"א who is strict and רבינא who is lenient, and the הלכה is like רבינא. In our case it is רבינא who is lenient, for he maintains that משיכה is קונה ברה"ר.

ונראה דההוא⁵ פליג אאביי ורבא דאמרי בהמוכר את הספינה (בבא בתרא דף פד, ב) -

And it appears to Tosfos that the גמרא there (in נערות) argues on אביי who stated in הספינה את המוכר את -

משיכה קונה בסמטא אבל לא ברשות הרבים⁶ -

That משיכה is an effective קנין in a סמטא, but not in a ר"ר -

rejects an anticipated opposing view:⁷

ואין נראה לחלק כלל בין קניית גנב שאין אלא להתחייב באונסין⁸ ולשאר קניות -

And it does not appear to be correct to differentiate between the acquisition of a thief, which is only to hold him liable for אונסין, and other קנינים, which are to actually acquire the object. Tosfos explains why this distinction is incorrect -

מדדרשין לעיל (דף סה, א) גבי גנב אין לי אלא ידו וגו חצירו וקרפיפו מנין -

אם המצא תמצא בידו הגניבה¹⁰ of the verse¹⁰ regarding a thief; 'I would only know that the thief is liable (to pay) (כפל) if the גניבה was found in his hand; how do we know that he is liable even if it is found on his roof, or in his courtyard, or his קרפף; therefore, the תורה writes תמצא תמצא that he is liable in any event -

משמע דלא מחייב אלא במקום שראוי לקנות -

This דרשה indicates that the thief is not liable to pay, only in a place which is fitting to be קונה (but not through משיכה in a ר"ר) -

כי היכי¹¹ דדרשין גיטין (דף עז, א) ונתן¹² בידה -

— גגה וחצרה וקרפיפה the verse of ונתן בידה to include מסכת גיטין [in] Just as we expound

⁵ This is referring to רבינא (see footnote # 3 & 4).

⁶ This is (seemingly) in complete disagreement with רבינא who maintains משיכה is קונה ברה"ר.

⁷ The dispute between ר"א ורבינא is in the case of a thief; meaning at which point do we consider that the thief 'owns' the item he stole. This is relevant in a case where while he was stealing it, an unforeseeable accident happened and the item was destroyed. If the thief already acquired 'ownership', he is liable; otherwise he is not liable for this אונס. The ruling of אביי ורבא, however is regarding a 'regular' קנין (when buying something), but not by a thief, so it is possible that the ruling of אביי ורבא does not apply to a thief (and a thief could be קונה through משיכה even in a ר"ר). Tosfos rejects this reasoning.

⁸ Perhaps since the acquisition of a thief is not a real acquisition (it does not belong to him, and he is required to return the stolen item [if it is intact]), therefore even a lesser קנין (like משיכה ברה"ר) is also effective to hold him liable for אונס; as opposed to a real קנין, when buying or receiving a gift, where משיכה ברה"ר is not effective. Tosfos does not agree to this distinction.

⁹ A קרפף is a fenced off area used for storage or other needs.

¹⁰ שמות (משפטים) כב, ג.

¹¹ Tosfos may be saying that we have two דרשות; one by a גנב, and the other by a גט, so just as by a גט it requires a complete קנין (that the גט belong to her; not just להתחייב באונסין) the same applies to the גנב that in order to be liable it needs to be a complete קנין (even if it is just להתחייב באונסין). See # 73. אוצר מפרשי התלמוד.

¹² דברים (תצא) כד, א. The word ונתן teaches that he can place the גט anywhere which is her רשות.

concludes: תוספות

ונראה דהלכה כאב"י ורבא מדמייתי מילתייהו בהמוכר [את] הספינה¹³ (שם) משמע שהם עיקר -
And it appears that the הלכה is like אב"י ורבא (that משיכה ברה"ר is not קונה), **since**
the גמרא cites their ruling in הספינה את המוכר פרק, this indicates that their view is
the correct one -

ולא שייך כאן¹⁴ כל היכא דפליגי רב אחא ורבינא הלכה כרבינא¹⁵ לקולא:
So, it is not applicable here the ruling that wherever ר"א ורבינא argue the rule is
to be lenient like רבינא (meaning that משיכה is קונה), but rather the הלכה is like אב"י ורבא that
משיכה is not קונה ברה"ר (even by a thief).

Summary

Both by קנין משיכה in a רה"ר and by other קנינים, there is no קניני גניבה.

Thinking it over

רבינא לקולא¹⁶ However, it seems that רבינא writes that here we do not follow
has the stricter view, for according to ר"א if there was a משיכה into the רה"ר, the גנב
will be חייב; however according to רבינא, the גנב will be פטור; how is this רבינא
?!¹⁷ לקולא

¹³ The גמרא there initially attempted to interpret the משנה there, in a manner which would imply that משיכה is קונה ברה"ר. The גמרא asked how can you say that since אב"י ורבא both maintain that משיכה is not קונה ברה"ר. This indicates that the גמרא accepts the ruling of אב"י ורבא. [Additionally that is the פרק which discusses קנינים.]

¹⁴ That ruling (that we follow לקולא רבינא) is only when he is arguing with ר"א (only); however here he is also arguing with אב"י ורבא, so the rule does not apply.

¹⁵ See 'Thinking it over'.

¹⁶ See footnote # 15.

¹⁷ See נחלת משה.