**והוא לא אמר והא אמר רבי יוחנן גזל כולי –**

**And he did not say** it; **but *Rabi Yochonon* said,** if **he stole, etc.**

## Overview

ר' זירא repeated the ruling of רב (that if someone was מקדש a woman with an object which he stole from her, she is not מקודשת) before ר' יוחנן. And ר"י said, 'did רב indeed say this'. Initially we assumed that ר"י maintained that רב was incorrect, so the גמרא asked, 'and did not ר"י give the same ruling', namely if one stole and the owners were not מייאש neither can be מקדיש this money, which seemingly corresponds to the ruling of רב.[1] Our תוספות has a difficulty with the גמרא's question, and discusses the חידוש in the rulings of both ר' יוחנן and רב.

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תוספות asks:

**תימה מאי מתמה גמרא דלמא לא אמר רבי יוחנן מילתיה אלא בגזל דאחרים[2] -**

**It is astounding! What is the גמרא surprised about; perhaps ר' יוחנן only said his rule when it is stolen from others -**

**אבל בגזל דידה פליג עליה דרב דאמר דאינה מקודשת -**

**However with** an object which was **stolen from her,** perhaps ר"י **argues with רב, who maintains that she is not מקודשת,** however ר"י may maintain that she is מקודשת -

**דהא שמעינן בסמוך דבגזל דידה מקודשת טפי מבגזל דעלמא[3] -**

**For it appears from** the גמרא **shortly that by גזל דידה** there is **more** reason for her to be **מקודשת than by גזל דעלמא,** so what is the גמרא's question, 'והוא לא אמר וכו'?

תוספות answers:

**ויש לומר דהא דמהני גזל דידה טפי מגזל דעלמא הני מילי בדשדיך -**

**And one can say that this** which we say **that** by **גזל דידה** there is **more** reason for the קידושין to be **effective than by גזל דעלמא that is only if there was** a prior **engagement -**

**אבל בדלא שדיך אדרבה גרע גזל דידה מגזל דעלמא דמצי אמרה אין שקלי ודידי שקלי -**

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[1] Just as thief cannot be מקדיש this money, because it is not his, he also cannot be מקדש a woman with this money, because it is not his.

[2] ר' יוחנן is discussing whether the גזלן can be מקדיש the item; it is always a case of גזל דאחרים (he did not steal from הקדש, but from someone else).

[3] When one steals something from a stranger and gives it to the woman for קידושין it is understood that she is not מקודשת, for since the stolen item is not his (for the owner was not מייאש), he did not give her anything (it needs to be returned to the owner). However when he stole something from the woman and gives it to her as קידושין and she accepts it (knowing that this item was stolen from her), this indicates that she forgives him for the stealing and it is as if she is granting him the object so that he can be מקדש her with it.

**However when there was no** prior **engagement,** then **on the contrary, גזל דידה is worse** (less chance of being מקודשת) **than גזל דעלמא, for she can say, 'indeed I took** the item **but I took what was mine;**[4] I did not take it as קידושין -

**ורב הוה מיירי בדלא שדיך**[5] **-**

**And רב is discussing** a case of **לא שדיך,** so there ר"י agrees with רב that אינה מקודשת (even) by גזל דידה, for by לא שדיך we say that גזל דידה is less leaning to be מקודשת than גזל דעלמא, therefore the גמרא correctly asks 'והוא לא אמר וכו'.

תוספות asks (a general question):

**ואם תאמר מאי אתא רבי יוחנן לאשמועינן בהא דאמרינן דאינו יכול להקדיש פשיטא -**

**And if you will say; what is ר"י coming to teach us with this** rule **where he states that** the thief **cannot be מקדיש** the stolen item; **it is obvious!**

**דהא אמרינן בכמה משניות**[6] **ובריתות דגזל אינו נקנה אלא בייאוש -**

**For we have learnt in many משניות and ברייתות that גזל cannot be acquired unless there is ייאוש** בעלים **-**

**כגון ההיא דאילו מציאות** (בבא מציעא דף כב,א) **שטף נהר קוריו עציו ואבניו -**

**For instance that** ברייתא **in אלו מציאות** פרק which states; '**the river swept away his beams; his wood and his stones,** the rule is -

**אם נתייאשו הבעלים הרי אלו שלו משמע הא לא נתייאשו לא**[7] **-**

**If the owners were מתייאש the** finder **may keep them';** indicating that **if there was no ייאוש** בעלים he **cannot** keep them. We see that יאוש is required!

תוספות answers:

**ויש לומר דמילתיה דרבי יוחנן קא משמע לן דאין הנגזל יכול להקדישן לפי שאינן ברשותו -**

**And one can say that the ruling of ר"י teaches us that the נגזל (the one who was robbed) cannot be מקדיש the item because it is not in his possession -**

**אבל בגזלן ליכא שום חידוש כדפרישית**[8] **-**

**However regarding the גזלן there is** indeed **no חידוש** that he cannot be מקדיש it, **as I explained** that we already know it from other sources.

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[4] If it was שדיך (they already agreed to be married) we can assume that if she accepted גזל דידה, it is because she wants the קידושין to be effective. However if it was לא שדיך she may have no interest at all in marrying this stranger, she only accepted the גזילה in order that she should have it, for if she would refuse it, he will readily go away and she will never be able to retrieve her גזילה. [However by גזל דאחרים if she did not want the קידושין why did she accept it?] See 'Thinking it over' # 1.

[5] See the גמרא on the top of נב,ב.

[6] See 'Thinking it over' # 2,

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

[8] See footnote # 11.

תוספות asks (a similar question on רב):

**ואם תאמר לרב נמי דקאמר לעיל דקידשה בגזל אינה מקודשת מאי אתא לאשמועינן -**

**And if you will say, according to רב also, who ruled previously that if he was מקדש her with גזל, she is not מקודשת, what is he coming to teach us -**

**הא מכח משנה שלימה[9] היא דהיכא דלא נתייאשו הבעלים אינו שלו -**

**For we know it** directly **from an explicit משנה that wherever the owners were not מתייאש, it is not his** (the thief's), so what is רב teaching us?!

תוספות answers:

**ויש לומר מכל מקום אצטריך מילתיה דרב דאי מכח המשנה -**

**And one can say; notwithstanding** the משנה, **the ruling of רב is necessary, for if** we relied **on the ruling of the משנה -**

**הוה אמינא דוקא בממונא הוא דלא קנה אלא ביאוש ליחייבוהו בית דין לשלם -**

**I may have thought that it is only regarding monetary issues that** the thief **does not acquire** the stolen object **unless there was יאוש,** for the purpose that **בי"ד should obligate him to pay** (we are strict with the thief) -

**אבל לחומרא אף על גב דלא נתייאשו אמרינן שאם קידש אשה מקודשת להצריכה גט -**

**However we will say – to be strict – that even if לא נתייאשו** הבעלים he is קונה regarding **if he was מקדש a woman** with this גזילה that she is **מקודשת and requires a גט** (in such a case where we are strict with the thief that perhaps he is קונה) -

**לכך אצטריך מילתיה דרב[10] לומר דאינה מקודשת -**

**Therefore the ruling of רב is necessary to teach us that she is not מקודשת** (and we rule that he is not קונה even לחומרא) –

תוספות resolves an anticipated difficulty:[11]

**והשתא ניחא שפיר דמתמה גמרא ממילתא דרבי יוחנן והוא לא אמר כלומר -**

**And now it is well understood what the גמרא is astounded by the statement of**

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[9] רב derives his ruling from an inference of our משנה (since the משנה states that the fruit belonged to them, indicating that if it did not belong to them [it was גזל] they are not מקודשת), however why rely on an inference we there are other sources which state this explicitly?!

[10] This (perhaps) can also be the answer on the (same) question on ר"י, that the גזלן cannot be מקדיש the גזילה even לחומרא, while from the other sources we only apply it only for דיני ממונות (to be strict on the גזלן).

[11] תוספות previously stated (see [text by] footnote # 8) that the חידוש of ר"י was regarding the בעלים, that (even) they cannot be מקדיש the stolen item; however there is no חידוש that the גזלן cannot be מקדיש (without יאוש); we know that from other sources. If that indeed is the חידוש of ר"י, why then does the גמרא ask, 'and did ר"י not say' the same rule of רב, but this is not a question, for ר"י was merely discussing the בעלים, not the גזלן, he mentions the גזלן only דרך אגב. Additionally the גמרא should have asked, what was ר"י wondering how רב could have ruled that the גזלן is not קונה (without יאוש), when there any many sources that state that same ruling. [However now that we explained that רב (and ר"י) were teaching a חידוש that even לחומרא they are not קונה, we understand the s'גמרא question on ר"י.]

ר"י (that he questioned s'רב ruling) and said, '**and did he (ר"י) not say**' the same thing as רב, **meaning -**

**וכי רבי יוחנן לא אמר כך והא איהו דאמר אינו יכול להקדיש לפי שאינו שלו -**

**And did not ר"י rule similarly** (that even לחומרא there is no קנין without יאוש), **but** ר"י **ruled** that the גזלן **cannot be מקדיש** the גזילה **since it is not his -**

**ואפילו איסורא דרבנן לית בה[12] וכמו כן בקידושין נמי לא נחמיר להצריכה גט -**

**And there is not even an איסור דרבנן** if someone uses **this** הקדש, **so similarly by קידושין, we should also not be strict to require her** to receive **a גט -**

**והשתא מייתי שפיר גמרא מרבי יוחנן:**

**And now the גמרא properly cites ר"י** as the source that even לחומרא there is no קנין by גזילה, if there is no יאוש.

## Summary

The חידוש in the rulings of רב and ר"י is that a גזלן is not קונה without ייאוש בעלים, even לחומרא.

## Thinking it over

1. תוספות writes that by לא שדיך there is less reason to assume that by גזל דידה she is מקודשת, than by גזל דאחרים.[13] Why is it then that רב (who is discussing לא שדיך),[14] states 'אפילו בגזל דידה', when there is less חידוש by גזל דידה?[15]

2. תוספות writes that there are many משניות (and ברייתות) that teach us that גזילה without יאוש is not קונה.[16] However, תוספות (merely) cites a ברייתא (of שטף נהר וכו'), but no משנה. What does תוספות mean that there are many משניות?![17]

3. תוספות proves (from the ברייתא of שטף נהר וכו') that there is no קנין without יאוש by אבידה,[18] perhaps by גזילה (where there is also שינוי רשות) there is קנין even without יאוש?![19]

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[12] One would think that we should be מחמיר and make an איסור (דרבנן) on someone using the הקדש which the גזלן was מקדיש. The fact that it is not הקדש at all (even לחומרא) teaches us than under all circumstances one is not קונה a גזילה without ייאוש בעלים.

[13] See footnote # 4.

[14] See footnote # 5.

[15] See מהרש"א.

[16] See footnote # 6.

[17] See נחלת משה.

[18] See footnote # 7.

[19] See אוצר מפרשי התלמוד # 113.