

## דוקא מכר דהוה ליה יאוש<sup>1</sup> ושינוי רשות<sup>2</sup> -

### Specifically by a sale where there is despair and change of possession

#### Overview

The **ברייתא** differentiates between **קרקע** and **מטלטלין** in a case where a stolen item was sold. If it was **קרקע** the **נגזל** (**שמעון**) can testify on behalf the buyer (**לוי**) against a potential claimant (**יהודה**), but not by **מטלטלין**. The **גמרא** asked (regarding the case of **קרקע**), why mention a sale; the same rule can apply with the **גזלן** (**ראובן**) against the outside claimant (**יהודה**). The **גמרא** answered that regarding **מטלטלין** however, we require that there is a sale, for then there is **יאוש ושינוי רשות**, so the buyer (**לוי**) acquires it,<sup>3</sup> however if there was no sale, the **נגזל** (**שמעון**) would not be able to testify on behalf of the **גזלן** (**ראובן**), for since the **נגזל** can take it from the **גזלן** (even if there was **יאוש**), he (**נגזל** the **שמעון**) is considered a **בעדות**.

פירש הקונטרס<sup>4</sup> וכגון שמכר ראובן ללוי שלא באחריות<sup>5</sup> -

**The ראובן explained** that were are discussing a case where, for instance, **ראובן** (**the גזלן**) **sold the פרה וטלית לוי without a guarantee** -

**ונראה דפירש כן משום דאי באחריות<sup>6</sup> הוא שמעון נוגע בעדות -**

**And it appears** to **תוספת** that the reason the **רשב"ם explained it so** (that it was sold without **אחריות**), is **because if** it was sold **with אחריות**, then **שמעון would be a נוגע** **בעדות**, and could not testify on behalf of **לוי** against **יהודה**. **תוספת** explains -

**דאף על גב דהוי יאוש ושינוי רשות מפיך לה שמעון מלוי -**

**That even though there was יאוש ושינוי רשות** (so seemingly **לוי** acquires this item and **שמעון** should not be able to take it away from him), nevertheless **שמעון can remove it from לוי** -

<sup>1</sup> **יאוש** means that we heard the owner say that he despairs of ever retrieving this lost or stolen item.

<sup>2</sup> **שינוי רשות** means that the item changed possession; in this case from the thief to the buyer. Everyone agrees that when there is **יאוש** and (then) **שינוי רשות**, that the current owner may keep the item even if we know who the original owner was. The owner has a claim against the thief, but not against the customer who bought it in good faith. Otherwise people would be reluctant to buy items, because (in case they were stolen) they may be taken away from them by the original owners. See (however) footnote # 7.

<sup>3</sup> **שמעון**, therefore, has no vested interest in testifying on behalf of **לוי** against **יהודה**, for even if **לוי** wins, **שמעון** has no claim against **לוי**, since **לוי** acquires this (stolen) item through **שינוי רשות**.

<sup>4</sup> See **רשב"ם ד"ה משום**.

<sup>5</sup> This means that it was agreed by the parties that even if this item is taken away from **לוי** (by the rightful owner, since **ראובן** stole it), **ראובן** is not obligated to compensate **לוי** for his loss.

<sup>6</sup> This means that **ראובן** guarantees the sale to **לוי** that he will be compensated for any loss incurred by purchasing this item, if it is taken away from him (by the **נגזל**).

כיון דאין שום הפסד ללוי שיחזור על ראובן<sup>7</sup> -

Since לוי suffers no loss, for he can return to ראובן and be compensated for his loss -

אבל בקרקע<sup>8</sup> דאינה יאוש ושינוי רשות הדרא ליה -

However regarding land (property) [even though there is] רשות ושינוי רשות, nevertheless it reverts back to the נגזל -

כדפירש הקונטרס<sup>9</sup> דאין מועיל יאוש<sup>10</sup> בקרקע<sup>11</sup> -

As the רשב"ם explained that [ושינוי רשות] יאוש is not effective by land -

פ"ה ה' תוספות disagrees and question the

וקשה לרבינו יצחק דבירושלמי (דכלאים פרק ז'<sup>12</sup>) אמר דיאוש מועיל בקרקע -

And the ר"י has a difficulty with the רשב"ם, for in תלמוד ירושלמי it states that יאוש is effective for קרקע -

דאף על פי שאינה נגזלת מכל מקום מהני בה יאוש<sup>13</sup> -

So even though קרקע cannot be stolen (and is considered always הנגזל), nevertheless יאוש is effective -

וגבי עבד משמע בהשולח (גיטין דף לט,ב) דמהני ביה יאוש<sup>14</sup> אף על גב דאיתקש לקרקע<sup>15</sup> -

And similarly regarding a slave (עבד כנעני), it seems in פרק השולח that יאוש is effective by an קרקע, even though he is compared to עבד כנעני -

ובשמעתין דסיקריקון<sup>16</sup> (שם דף נח,ב) אומר רבינו יצחק דמוכח נמי כן -

<sup>7</sup> When the consumer (לוי) will suffer a loss if the original owner (שמעון) will take it away from him, since there is no אחריות on this sale, we say that in order to protect the consumer, the נגזל cannot retrieve the stolen item (if there was יאוש ושינוי רשות). See footnote # 2. However when the buyer has recourse to recoup his loss from the גזול, the נגזל can take it back from the buyer. [See ש"ך הו"מ סי' לו ס"ק כט who argues with this and maintains that the נגזל cannot remove it from the buyer if there was יאוש ושינוי רשות, even if there is אחריות.]

<sup>8</sup> The הגהות הב"ה amends this to read בקרקע אף על גב דאיכא יאוש (instead of דאינה יאוש).

<sup>9</sup> See footnote # 4

<sup>10</sup> The הגהות הב"ה amends this to read יאוש ושינוי רשות בקרקע (instead of יאוש בקרקע).

<sup>11</sup> There is a rule that קרקע אינה נגזלת, it is always considered that it is in the רשות of the rightful owner (not of the גזול) and (according to the רשב"ם) not even ברשות לוקח (even after יאוש). Therefore by קרקע since שמעון the נגזל can dislodge לוי (the buyer) from the field, so שמעון cannot testify on behalf of לוי, for he is a בעדות, since as soon as the field is established by לוי, the נגזל can take possession of the field away from לוי.

<sup>12</sup> ירושלמי לד,ב. In our סוף ה"ד.

<sup>13</sup> Granted that קרקע אינה נגזלת, however that is only without יאוש, however when there is יאוש ושינוי רשות it is effective and the original owner is no longer considered a מוהזק.

<sup>14</sup> Possibly תוספות is referencing the case there where the master said עבדי מפלוני עבדי (נתייאשתי מפלוני עבדי); the rule is that the slave is free (from working, but still requires a גט שחרור [to marry a ישראל]). It is evident that יאוש is effective by ע"כ.

<sup>15</sup> It stands to reason that if יאוש is effective by ע"כ (who is compared to קרקע regarding many laws [including the laws of קנינים (acquisition)]), so יאוש should also be effective by קרקע.

<sup>16</sup> סיקריקון is an extortionist who kills people if they do not give him their property. One of the laws regarding סיקריקון is that if the סיקריקון was on the property for twelve months (after taking it by force from the ישראל), anyone can buy it from the סיקריקון since the owner was מייאש (except that he must give the owner a fourth of the property, עיי"ש). It is evident that the יאוש is effective since anyone can buy it from the סיקריקון.

**And, says the ר"י that in the discussion regarding סיקריקון it is also evident that** **קרקע** <sup>17</sup> is effective (even) by **יאוש**.

תוספות explains:

**ונראה דמיירי שלא נתייאש -**

**And it seems that the case of קרקע is where the נגזל was not מייאש –**

תוספות responds to the obvious question:<sup>18</sup>

**והוה מצי לפלוגי נמי בפרה וטלית<sup>19</sup> בין לפני יאוש בין לאחר יאוש -**

**And the גמרא could have also differentiated by פרה וטלית itself whether it was** **לא לפני יאוש** (where he cannot testify), or **whether it was after יאוש** (where he can testify) -

**אלא מילתא דשכיחא נקט דבקרקע אין רגילין להתייאש כשישראל גזלה -**

**Rather** the reason he chose to differentiate between קרקע and מטלטלין is because the תנא **mentions something which is common, since regarding קרקע it is not common to be מייאש, when a ישראל stole it;** the reason he is not מייאש -

**שאם לא יוכל להוציאה מידו משום דלא ציית דינא יוציאנה מיד<sup>20</sup> בנו:**

**For the נגזל assumes that if he cannot take it away from the גזלן, for he does not obey the דין בית דין, I will take it away eventually from his son.**

### **Summary**

There is a dispute between רשב"ם and תוספות whether יאוש is קונה by קרקע, or not.

### **Thinking it over**

תוספות writes that the גמרא could have differentiated by פרה וטלית whether it was **לא לפני יאוש** or **לאחר יאוש**.<sup>21</sup> Why did not תוספות (also) say that we could have differentiated by קרקע whether it was **לא לפני יאוש** or **לאחר יאוש**!?!

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<sup>17</sup> In any event since we see that יאוש is קונה by קרקע, why is there a difference between פרה וטלית (where we say he can testify since יאוש is קונה, and ושינוי רשות) and קרקע (where we say that he cannot testify since he can remove the buyer), but since יאוש is קונה by קרקע, there is no difference between the two. If he was מייאש he should always be able to testify, and if he was not מייאש, he should never be able to testify.

<sup>18</sup> Why are we differentiating between קרקע and מטלטלין, we should distinguish between יאוש (where he can testify) and no יאוש (where he cannot testify).

<sup>19</sup> See 'Thinking it over'.

<sup>20</sup> However by מטלטלין he is מייאש since he is not sure where the item will be, that he should be able to retrieve it.

<sup>21</sup> See footnote # 19.