

The Significance of Ye'ush in Theft משמעות יאוש בגזילה בava kamma 111b

Ownership is both physical and mental/emotional according to halakhah. This can be seen through examples in which an owner's mental relationship to an object has changed. In this shiur, we will examine the case of יאוש as just such an example. The despair (יאוש) experienced by those who have had something stolen from them impacts the halakhic status of that item. In this shiur, we examine why this is the case and what that impact is.

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1. בבא קמא סו.

יאוש – אָמַר רַבֵּן דִּנְקִי, מִיְהוּ לֹא יֵדְעִין אִי דְאֹרְיִיתָא אִי דִרְבָּנָן. אִי דְאֹרְיִיתָא – מִיְדֵי דְהוּא אֲמוּצָא אֲבִידָה; מוּצָא אֲבִידָה לֹא כִיּוֹן דְמִיֵּאֵשׁ מְרָה מִינָהּ מְקַמֵּי דְתִיתִי לִידֵיהּ, קִנִּי לִיהּ? הֲאִי נָמִי, כִּיּוֹן דְמִיֵּאֵשׁ מְרָה, קִנִּי לִיהּ. אֲלֵמָא קִנִּי. אוּ דְלֵמָא לֹא דְמִיֵּאֵשׁ לְאֲבִידָה, אֲבִידָה הוּא דְכִי אֲתָאִי לִידֵיהּ – בְּהִתִּירָא אֲתָאִי לִידֵיהּ; אֲבָל הֲאִי, כִּיּוֹן דְבְּאִסּוּרָא אֲתָאִי לִידֵיהּ – מִדְרָבָנָן הוּא; דְאָמֹר רַבֵּן נִיקְנִי, מִפְּנֵי תַקְנֵת הַשְּׁבִיִּים. וְרַב יוֹסֵף אָמַר: יֹאשׁ אִינוּ קוֹנֶה, וְאִפְּלֹי מִדְרָבָנָן.

With regard to the owner's despair over ever recovering the stolen item, the Sages say that this too causes the thief to acquire the stolen item. However, we do not know if this *halakha* applies by Torah law or by rabbinic law. If it applies by Torah law, this is just as it is with regard to one who finds a lost item. Is it not the case with regard to one who finds a lost item that once the owner of the item despairs of recovering it, before the item came into the finder's possession, the finder acquires it and may keep it for himself? The same principle applies to this thief as well: Once the owner of the item despairs of recovering it, the thief acquires it for himself and need no longer return it. Apparently, then, the despair of the owner causes the thief to acquire the stolen item.

Or perhaps the case of a stolen item is not comparable to the case of a lost item, as it is only with regard to a lost item that the owner's despair enables the finder to acquire the item, because the item came into his possession in a permitted manner. But in this case of the thief, since the item came into his possession in a prohibited manner, this case cannot be derived from the *halakha* of a lost item. If so, the ruling that despair effects acquisition in a case of theft applies not by Torah law but by rabbinic law.

Why would this *halakha* have been instituted by rabbinic law? As, the Sages said that a thief should acquire the stolen item in this manner, due to an ordinance instituted for the penitent. To encourage thieves to repent and repay their victims, the Sages instituted that they need not return the stolen item after the owner despairs of recovering it. Rather, they can reimburse the owner for the monetary value of the item.

And Rav Yosef says: Despair on the part of the owner over the possibility of recovering his item does not cause the thief to acquire that item at all, and this is the *halakha* even by rabbinic law.

2. בבא קמא קיא:

מִתְנִי' הַגּוֹזֵל וּמֵאֵכִיל אֶת בְּנָיו, וְהַנִּיחַ לְפָנֵיהֶם – פְּטוּרִין מִלְשָׁלָם. וְאִם הָיָה דֹבֵר שְׂיֵשׁ בּוֹ אַחֲרֵיכֵן – חַיִּיבִין לְשָׁלָם.
MISHNA: One who robs another of food and feeds it to their children, or who left a stolen item to them and then died, the children are exempt from paying the victim of the robbery after their

father's death. But if the stolen item was something that serves as a legal guarantee of a loan, the heirs are obligated to pay.

גמ' אמר רב חסדא: גזל ולא נתייאשו הבעלים, ובא אחר ואכלו ממנו – רצה מזה גובה, רצה מזה גובה. מאי טעמא? כל כמה דלא נתייאשו הבעלים – ברשותיה דמריה קאי. תנן: הגזל ומאכיל את בנו, והניח לפנייהם – פטורין מלשלם. תיובתא דרב חסדא! אמר לך רב חסדא: כי תניא ההיא – לאחר יאוש.

GEMARA: Rav Hisda said: If one robbed another, and the owners of the stolen item have not yet despaired of retrieving it, and another person came, took it from the robber and ate it, the owner may collect from either the first robber or the second robber. Why? As long as the owners did not despair of retrieving it, it remains the possession of its owner.

We learn in the mishna: One who robs another of food and feeds it to their children, or one who left a stolen item to them as an inheritance, the children are exempt from paying the victim of the robbery after their father's death. This appears to be a conclusive refutation of the opinion of Rav Hisda, who holds that one who steals from a thief is obligated to pay the owner.

Rav Hisda could have said to you: When that mishna is taught, it addresses a case where the owners had already despaired of retrieving the item, whereas Rav Hisda was referring to a case where the owners had not yet despaired.

3. אור שמח הלכות גזילה ואבידה ה:ד

(R. Meir Simcha HaKohen of Dvinsk 1843-1926, Commentary to Mishneh Torah)

ואולי טעמא דלאחר יאוש אם אכלו דהוי כממון שאין לו תובעין דהמזיק פטור וכמו שאמרו גבי מתנות כהונה, כן הכא לבתר יאוש דהבעלים כבר נתייאש ונפיק מרשות מריה והוי כאין לו תובעין

And maybe the reason is that after despair, if someone eats the stolen item, it is like money/possessions that have no claimants, in which case one who does damage is exempt from payment. And it is like what they said regarding priestly gifts. Likewise, here, after the despair of the owners, the item has left its owners possession and it is like something that has no claimants. (See Chullin 130b)

4. תוספות שם ד"ה גזל

...ומסברא מחלק רב חסדא בין לפני יאוש בין לאחר יאוש דלא הוי כל כך ברשות מריה אחר יאוש כמו לפני יאוש שנקל לצאת מרשות בעלים בשינוי רשות או בשינוי השם...

And based on logic Rav Hisda distinguishes between prior to despair and after despair - the item is not as much in its owners' possession following despair as it is prior to despair, as it can more easily be removed from its owners' possession through a change in possession (to a third party) or with a change of nomenclature.

5. רמב"ם משנה תורה הל' גזילה ואבידה ב:ב

...נתייאשו הבעלים ממנה ולא נשתנית קנה הגזלן כל השבח שהשביחה אחר יאוש ואינו משלם אלא כשעת הגזלה. ודבר זה מדבריהם מפני תקנת השבים. וכשמחזיר לו הגזלה שמין לו השבח ונוטל מן הנגזל:

If the owner despaired of its return, but it did not undergo a change, the robber acquires the right to its increase in value from the time the owner despaired. He is required to pay only the value of the article at the time of the robbery. This is also a Rabbinic ordinance to encourage repentance.

In such an instance, when he returns the object he obtained by robbery, the increase in value is evaluated, and the robber is paid for it by the person they robbed.