

## מרובה קתני תנא ושייר –

**It merely stated, 'it is greater'; it teaches and leaves out**

### OVERVIEW

Our משנה mentions the difference between תשלומי ד' וה' and תשלומי כפל. The גמרא inferred from our משנה that it is supportive of a ruling by ר' חייא בר אבא that there is טוען טענת גנב by תשלומי כפל, just as there is טוען טענת גנב by תשלומי ד' וה'. Otherwise the משנה should have made this distinction as well (that there is no תשלומי ד' וה' by טוען טענת גנב). The first opinion in the גמרא accepted this proof. The second opinion (the איכא דאמרי) rejected this proof, saying, 'did the משנה state תשלומי ד' וה' אין בין תשלומי ד' וה' (there is no difference between payments and payments [except what is mentioned in the משנה]); in which case you can make the inference. However our משנה merely said that תשלומי כפל is מרובה (more applicable) that תנא ושייר, but it was not an exhaustive list, so we can say תנא ושייר. Our תוספות explains the first view and discusses the תנא ושייר.

לשון ראשון דמייתי סייעתא לא בעי למימר דשייר -

**The first view that brought proof from the משנה to the view of רחב"א, did not want to** refute the proof by saying תנא ושייר (as the איכא דאמרי maintains) -

דסבר ההוא לישנא דכיון דקתני מרובה אין לומר שייר כמו באין בין<sup>1</sup> -

**For that (first) view maintains that since the משנה writes 'מרובה', we cannot say** - אין בין תנא ושייר if the משנה would have stated תנא ושייר, just like

וכן משמע הלשון דקאמר ללישנא בתרא מי קתני אין בין מרובה קתני -

**And this is also indicated in the syntax of the גמרא where it explained according to the איכא דאמרי (that there is no proof, since); does it say 'אין בין'; it merely states 'מרובה' -**

משמע<sup>2</sup> שתחילה היה סבור דמרובה הוא כמו אין בין -

**Indicating that initially (according to the לשון ראשון) it was assumed that 'מרובה'**

<sup>1</sup> This לשון maintains that מרובה is the equivalent of אין בין and by both we cannot utilize the תנא ושייר. The reason presumably is if the משנה was תנא ושייר there is no need for the entire introduction of תשלומי ד' וה'. The משנה could have simply told us the rule that כפל is נוהג by everything and תשלומי ד' וה' is only by שור ושה. The introduction of תשלומי ד' וה' indicates that this is the only difference.

<sup>2</sup> According to the איכא דאמרי the גמרא initially (also) wanted to support רחב"א from the משנה (just like the לשון ראשון); however it ultimately rejected the proof by differentiating between מרובה and אין בין; indicating that (initially) everyone assumed (even the איכא דאמרי) that מרובה and אין בין are the same. If the גמרא (according to the ראשון, initially) assumed that the expression מרובה is not exhaustive it should have simply answered תנא ושייר (without stating מי קתני). (וכו').

is just like 'אין בין'; that the list is exhaustive.

asks on the refutation of תנא ושייר (according to the א"ד):

ואם תאמר ומאי שייר דהאי שייר<sup>3</sup> -

And if you will say; and what else did the משנה omit that it omitted this distinction between כפל and ד' וה' regarding a גנב?

answers:

ויש לומר דשייר טענת גנב באבידה<sup>4</sup> דדריש לקמן<sup>5</sup> רבי יוחנן דמשלם כפל -

And one can say that the משנה omitted the case where one claimed regarding an אבידה, which he found, that it was stolen, where ר"י later derives from a דרשה that he pays כפל (if he is the גנב) -

ואי טעין טענת גנב בפקדון לא משלם ארבעה וחמשה בטבח ומכר -

And if (we assume<sup>6</sup> that) if he claims a 'theft claim' by a deposit he does not pay ד' וה' if the custodian was טבח ומכר -

הכי נמי טוען טענת גנב באבידה<sup>7</sup> -

The same would also be by טוען טענת גנב באבידה. We therefore have two cases where there is כפל and not ד' וה', namely by טוען טענת גנב בפקדון (the case of רחב"א), and טוען טענת גנב באבידה (the case of ר"י).

offers additional cases where there is כפל but not ד' וה':

ועוד שמשיר שותף שגנב מחבירו ושותפין שגנבו לא משלם ארבעה וחמשה -

And additionally the משנה omitted the cases of a partner who stole from his partner, and partners who stole from an outsider; in both these cases there is no payment of ד' וה' -

כדאמר לקמן בפירקין (דף עח,ב) -

<sup>3</sup> There is an accepted understanding in the גמרא that we do not omit only one item (and mention everything else); there has to be at least two items omitted in order to state תנא ושייר. According to the א"ד there needs to be an additional omission in the משנה besides not mentioning the difference between כפל and ד' וה' by טוען טענת גנב.

<sup>4</sup> We know that an individual found a lost object which he was obligated to return; however the finder maintains that it was stolen from him. It turns out that he had the object all the time. He is liable to pay כפל.

<sup>5</sup> See the very bottom of סג,א. However, ר"י does not rule explicitly whether he is חייב for ד' וה'.

<sup>6</sup> According to the א"ד we are assuming that the משנה disagrees with רחב"א and maintains that there is no ד' וה' תשלומי ד' וה'.

<sup>7</sup> See נח"מ that the reason טוען טענת גנב בפקדון would be פטור from דו"ה is because initially it came to his possession in a permissible manner (he was entrusted with it), we therefore cannot derive it from a regular גנב where it came into his possession illegally. The same logic should also apply by טוען טענת גנב באבידה where it also come into his possession legally (he found it). [However טוען טענת גנב בפקדון pays כפל for that is written in the תורה (see שמות [משפטים] כב,ח), and the same applies to a טוען טענת גנב באבידה (see סג,א) which is derived from the same פסוק as פקדון (which is another reason why their rules are the same by דו"ה).]

As the ברייתא states later in our פרק.<sup>8</sup>

מה שייר דהאי שייר offers an alternate solution to the initial question of תוספות:

ועוד יש מפרשים דאין לחוש הכא אם אינו משייר כי אם דבר אחד כיון דלא נחת למנינא<sup>9</sup> -

And furthermore there are those who explain that we need not be concerned if the משנה omits only one case (the ruling of רחב"א), since the משנה did not involve itself in counting the differences between כפל and ד' והו' -

אלא דגלי לן שיש ריבוי בכפל מארבעה וחמשה:

But rather it revealed to us that there are more cases of כפל, than there are cases of ד' והו'.

### SUMMARY

The difference between the two לשונות is whether מרובה is equivalent to אין בין (the לשון ראשון) or whether it is not the same (א"ד). We can say that there are additional omissions besides the one mentioned here, or we can say that since the משנה did not place a number on the differences the issue of מאי שייר דהאי שייר does not apply.

### THINKING IT OVER

1. שותפין by דו"ה that there is no ברייתא cites the תוספות.<sup>10</sup> Seemingly this presents a difficulty for the לשון ראשון who maintains that מרובה is the equivalent of אין בין, where we do not say ותנא ושייר, so how come the תנא omitted שותפין?!<sup>11</sup>

2. Is there any continuation between the beginning of תוספות and the question which follows, מה שייר דהאי שייר?<sup>12</sup>

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<sup>8</sup> The ברייתא derives it from the word וטבח, which means he must slaughter the entire animal; this cannot apply to שותפין (for it is only partially his). See 'Thinking it over' # 1.

<sup>9</sup> See פנ"י who explains that if the משנה would make many differences between כפל and דו"ה then we can ask מה שייר even if he did not mention the number of differences (see previously יא, where the גמרא asks מה שייר even though there is no number), because since he mentioned many differences, why would he not mention one more; however here where the משנה mentions just one difference between כפל and דו"ה, we can say that the משנה is merely teaching us that there can be כפל without דו"ה and he gives one example; we can understand that he need not give us all the examples. See נחלת משה.

<sup>10</sup> See footnote # 8.

<sup>11</sup> See מהרש"א (הארוך) and מהר"ם.

<sup>12</sup> See # 38 אוצר מפרשי התלמוד.