

Land is excluded, etc.

יצאו קרקעות כולי –

OVERVIEW

The גמרא cites a ברייתא which derives from a פסוק¹ that the payment of כפל (by a טוען טענת גנב בפקדון) does not apply to land (and עבדים ושטרות והקדש)². There is another similar type of exclusion elsewhere from a different פסוק that one does not swear regarding וכו' קרקעות עבדים ושטרות וכו'. Our תוספות discusses the need for the exclusion here.³

תוספות asks:

ואם תאמר כיון דאמעיתי⁴ משבועה כדאמרינן בפרק הזהב⁵ (בבא מציעא דף נז, ב) -

And if you will say; since by a dispute concerning קרקע one is exempt from taking an oath -

תיפוק ליה דאין בהם כפל בטוען טענת גנב -

- טוען טענת גנב by קרקע there is no כפל payment by -
דלא משלם אלא בשבועה כדאמרינן לקמן⁶ בשמעתין⁷ -

Since the טוען טענת גנב does not pay כפל, unless he first swore that it was stolen, as the גמרא states later in our סוגיא.

תוספות negates a possible solution:

וליכא למימר דאצטריך לקופץ ונשבע⁸ -

¹ שומר חנם by a טוען טענת גנב, שמות (משפטים) כב, ח.

² See at end of this תוספות that there can be a case of טוען טענת גנב by קרקע.

³ For a clarification we cite the פרשה of a שומר חנם in כב, ח-ו, שמות (משפטים), which states as follows: וְכִי יִתֵּן אִישׁ אֶל רֵעֵהוּ כֶסֶף אוֹ כְּלִים לְשֹׁמֵר וְגָנַב מִבֵּית הָאִישׁ אִם יִמָּצֵא הַגָּנֵב יִשְׁלַם שְׁנָיִם. ז אִם לֹא יִמָּצֵא הַגָּנֵב וְנִקְרַב בְּעַל הַבַּיִת אֶל הָאֱלֹהִים אִם לֹא שִׁלַּח יָדוֹ בְּמִלְאֲכַת רֵעֵהוּ. ח עַל כָּל דִּבְרֵי פֶשַׁע עַל שׂוֹר עַל חֲמוֹר עַל שָׂה עַל שִׁלְמָה עַל כָּל אֲבֵדָה אֲשֶׁר יֹאמַר כִּי הוּא זֶה עַד הָאֱלֹהִים יָבֹא דְבַר שְׁנֵיהֶם אֲשֶׁר יִרְשִׁיעַן. אֱלֹהִים יִשְׁלַם שְׁנָיִם לְרֵעֵהוּ. The first two פסוקים are discussing cases where the שומר did not steal the object (but rather claims it was stolen); if the גנב is found, the גנב pays כפל (פסוק ו). Otherwise the שומר swears that he was not negligent and is exempt from paying (פסוק ז). The last (ח) פסוק is discussing where the שומר claims it was stolen, but it turns out that the שומר stole it (טוען טענת גנב), and he has to pay כפל. Our גמרא here derives from פסוק ח' (through a כלל ופרט וכלל) that there is no כפל by חיוב כפל. קרקעות וכו' by חיוב כפל. The גמרא in (נז, ב) derives from the first two (ו'ז') פסוקים (through a כופו"כ) that the ש"ח is exempt even from a חיוב שבועה by חיוב כפל if he claims it was stolen (and no גנב was found).

⁴ This applies to עבדים ושטרות והקדש as well, since they are all excluded from a שבועה with the same כופו"כ.

⁵ The ברייתא there derives it from a כלל ופרט וכלל (similar to the one mentioned here) from the פסוק in שמות (משפטים) # 3. See footnote # 3. (שבוועה) שומר חנם (and his subsequent שבוועה). כב, ו, שמות (משפטים).

⁶ סג, ב. The שומר must first swear that it was stolen, and then if it was found that he stole it he pays כפל. If however he never swore that it was stolen, and it was found that the שומר stole it, he does not pay כפל.

⁷ The question is why was it necessary for the תורה to write the כופו"כ (in פסוק ח') to exclude קרקעות from כפל since they are already excluded from כפל because of the כופו"כ of פסוק ו' which excluded them from שבועה.

⁸ The one who claimed the קרקע גנב שבועה swore that it was stolen; seemingly he would be מחויב in כפל if not for the exclusion mentioned here.

And we cannot answer that this exclusion here from כפל is necessary in a case where he 'jumped up' and swore –

negates this answer:

דבהגזול קמא (לקמן דף קו,א) מוכח דלא משלם אלא אם כן בית דין משביעין אותו -
For in טענת גנב כפל it is evident that one does not pay פרק הגזול קמא unless בי"ד makes him take the oath, but not if קפץ ונשבע. The question remains why we need this exclusion for כפל if we already know that there is no חיוב שבועה.

answers:

ויש לומר דאצטריך להיכא דנשבע על ידי גלגול -
And one can say; that this exclusion from כפל for קרקע is necessary in a case where he swore on account of גלגול –

(שבועה which is generally exempt from a קרקע) applies even to גלגול שבועה תוספות

כדתנן (קדושין דף כו,א) זוקקין הנכסים שיש להם אחריות עם הנכסים כולי לישבע עליהן¹⁰ -
As we learnt in a משנה; the assets which are guaranteed (i.e. real estate) are bundled with the assets, etc. (which are not guaranteed) i.e. movables, to be required to swear for them.

offers an alternate solution to the initial question:

ומיהו לפי מאי דמסקינן לקמן¹¹ האי כל ריבוי הוא מדלא כתיב הני פרטי גבי כסף וכלים¹² -
However according to the conclusion of the גמרא later that this word כל (from the phrase (על כל דבר פשע) is inclusive (and it should not be understood as merely a כלל), since these details (שור, חמור, שה, שלמה) were not written by כסף וכלים -
וסבירא להו דכפל ושבועה הכל אחד ניחא דליכא אלא חד קרא לתרוייהו¹³ -
And the גמרא assumes that the laws regarding כפל and שבועה are the same;

⁹ גלגול or 'rollover', refers to the rule that if one is already obligated to swear, his litigant may make him swear regarding other claims he has against him, even though those claims on their own would not obligate him to swear.

¹⁰ If one was required to swear for מטלטלין (he was a מודה במקצת for instance) he is also obligated to swear for any claim his litigant has against him regarding קרקע.

¹¹ See 'Thinking it over' (ד"ה אלא and ד"ה למה תוספות סג,א).

¹² See footnote 3. The גמרא concludes that פסוק ח' which states על כל דבר פשע וגו' is not to be understood as a כופו"כ, but rather the word כל is a ריבוי (not merely a כלל) to include everything. For if the intention was that it be interpreted as a כופו"כ, all the details of פסוק ח' could have been stated in פסוק ו' (where it says או כסף או כלים). This indicates that the כופו"כ of פסוק ו' (in פסוק ח') is valid both for שבועה and כפל (and indeed פסוק ו' mentions כפל) that they do not apply to קרקע וכו', for otherwise if the פסוק of פסוק ח' refers only to שבועה (but not to כפל), how can the גמרא suggest that all the פרטים should say by יתן וכו', for then how would we exclude קרקע וכו' from כפל.

¹³ See footnote # 7. The question was why do we need an extra כופו"כ (in פסוק ח') for כפל; the answer is that indeed there is no additional כופו"כ.

according to this conclusion, all is **understood for** indeed **there is only one פסוק for both** כפל and שבועה that they do not apply by קרקעות עבדים ושטרות.

תוספות asks:

ואם תאמר וגניבה בקרקע היכי שייכא¹⁴ -

And if you will say; but how is it possible to steal land?!

תוספות answers:

ויש לומר במשיג גבול¹⁵ -

And one can say; it is possible to steal land by moving the boundary.

תוספות offers an alternate solution:

אי נמי במחובר לקרקע –

Or you may also say; if it was attached to the ground -

כי ההיא די' גפנים טעונות וטוען שנגנבו לו ה' ונמצא שהוא גנבם¹⁶ (שבועות דף מב,ב) :

Like that story where one claimed I gave you **ten laden vines** to watch, and the שומר **claims that** the grapes on **five were stolen and it turned out that** the שומר **stole them;** in which case he is exempt from כפל for these five vines.

SUMMARY

We may require two פסוקים to exempt קרקע וכו' from שבועה and כפל in a case of a גלגול שבועה. The conclusion is that there is only one פסוק required to exempt from both. קרקע can be stolen, by השגת גבול or fruits which are מחובר לקרקע.

THINKING IT OVER

תוספות offers two answers on his initial question. What are the relative merits of each answer?¹⁷

¹⁴ This question may be regarding the חיוב כפל both by a גנב and a טוען טענת גנב. Stealing indicates it was done in a surreptitious manner; how is that possible by land. In addition there is a rule that קרקע אינה נגזלת.

¹⁵ This can be by a גנב where a neighbor moved the property line, when he is found out he need not pay כפל. It can also be discussing a case where one neighbor was charged with watching an acre of land and the owner measured it later to be less than an acre. The שומר claims that the other neighbor moved the boundary, when in fact the שומר moved the boundary; he also does not pay כפל.

¹⁶ This would seem to be only by a טוען טענת גנב (for a גנב would pay כפל is this situation). See נחלת משה.

¹⁷ See הישועות כוס.