

Notes are excluded

יצאו שטרות –

OVERVIEW

The ברייתא derives (through a כלל ופרט וכלל) that if notes were deposited for safekeeping and the custodian swore they were stolen, and it turned out that the custodian stole them he is exempt from paying כפל. Our תוספות explains the need to derive this from a פסוק.

asks: תוספות

ואם תאמר למה לי קרא למעט מכפל -

- כפל שטרות from paying a פסוק necessary to exclude שטרות
- והא מפילו אבדו בידים לא משלם קרן¹ למאן דלא דאין דינא דגרמי² -

For even if one destroyed שטרות with his hands (he burnt them) he does not pay even the principal, according to the one who does not enact the rule of גרמי -

ואפילו מאן דדאין לא הו אלא מדרבנן³ כדפרישית בסוף [הפרה] (דף נד,א דיבור המתחיל חמור) -

And even the one who enacts the rule of גרמי; it is only מדרבנן, as I explained in the end of הפרה - פרק הפרה

answers: תוספות

ויש לומר כיון דאי איתיה לשטר בעין חייב להחזיר⁴ (משלם⁵) -

And one can say; since if the שטר exists he is obligated to return it -

סלקא דעתך דכשמחזיר [משלם] (מחזיר) הכפל עמו:

It may have entered our mind that when he returns the קרן, he should pay the קרן together with the כפל.

SUMMARY

¹ question is if someone who destroys a שטר is exempt from paying the קרן (even though he caused a loss to the owner) so certainly if a שומר merely claimed גנב and is returning the שטר (causing no loss to the owner), so certainly he should be exempt from paying כפל. See 'Thinking it over' # 1.

² גרמא and גרמי are two terms used to indicate an indirect damage; in which גרמי is a more direct damage than גרמא. Everyone agrees that גרמא בנזקין is פטור; there is a dispute whether גרמי is חייב (the view of ר"מ) or פטור (the view of the רבנן). Destroying someone's notes is considered גרמי since (on one hand) the damage is only to paper, but (on the other hand) it causes (indirectly) the owner to lose the monetary rights conferred to him by the notes.

³ This means that מדאורייתא there is no payment for גרמי, there would therefore (seemingly) be no need for a פסוק to teach us that he is exempt from paying כפל (see footnote # 1). See 'Thinking it over' # 4.

⁴ This is in contrast to destroying the שטר where he is exempt from paying the קרן.

⁵ The words in the parenthesis (here and in the next line) are deleted by the מהר"ם.

There is more plausibility (regarding גרמי) that once one is already obligated to return that he also pay כפל, than being obligated to pay initially.

THINKING IT OVER

1. פטור asks; if one is פטור if he destroys the שטר; he should certainly be פטור from כפל.⁶ Seemingly we can differentiate between the two; one who destroys a שטר is פטור since it is only גרמי; however here the שומר accepted upon himself to watch the שטר and return it, therefore the rules of שמירה apply to him (for he accepted it voluntarily), therefore if he is טוען טענת גנב for this שטר, the rule of כפל applies to him that he must pay!⁷

2. How can we understand the difference between תוספות assumption in the question and his conclusion in the תירוץ?⁸

3. The obligation to pay כפל by טוען טענת גנב is only if the שומר swore (that he was not פושע, etc.) Here by שטרות there is no חיוב שבועה (just as there is no חיוב שבועה by קרקע), and seemingly here he cannot swear even through a גלגול שבועה (as we explained by קרקע [see previous קרקעות תוס' ד"ה יצאו קרקעות]), because even if he was פושע or שולח בו יד (the type of שבועות a שומר needs to swear), he is also פטור, since he is merely a גרמי, so why do we need a פסוק to exclude שטרות from כפל?⁹

4. It appears from תוספות that if גרמי would be liable מדאורייתא, there would be no question.¹⁰ However even if גרמי is חייב מדאורייתא that would explain why he is חייב if he destroyed the שטר, since he caused the owner a loss of money; however the חיוב כפל is because the גנב took something away from the owner; here the שומר did not take away the loan (he does not have any right to collect the loan); why should he pay כפל?¹¹

⁶ See footnote # 1.

⁷ See אהרן.

⁸ See חידושי רבי נחום און ט # 80 and אוצר מפרשי התלמוד.

⁹ See תוספות ד"ה יצאו קרקעות פני יהושע.

¹⁰ See footnote # 3.

¹¹ See חידושי רבי נחום און י.