And the witnesses testify that he ate it – והעדים מעידים אותו שאכלו

Overview

The משנה (cited in our גמרא) teaches that if the owner said to the custodian, 'Where is my deposit', and the custodian replied, 'it was lost', and there are witnesses that the custodian ate it, the custodian is liable for the principal, but not for כפל. However if the custodian replied that it was stolen and witnesses testify that he stole it, he is liable for כפל. Our תוספות explains why in one case the משנה writes אכלו, and in the other גנבו.

אכלו נקט לרבותא אף על פי שאבדו מן העולם[1] פטור מן הכפל בטענת אבד -

The משנה **mentioned אכלו,** in the first case **to** teach us a novelty; **even though the custodian destroyed it completely,** nevertheless **he is exempt from** paying כפל, **if his claim is** that it was **lost -**

וסיפא נקט שנגנבו לרבותא דאף על פי שהוא בעין חייב כפל כיון שטוען טענת גנב:

And in the **סיפא** the משנה **mentions שנגנבו to** teach us another **novelty that even though the deposit is before us** (and can be returned to the owner without him suffering any loss); nevertheless**,** the שומר **is obligated** to pay **כפל since he asserts the claim** that it was **stolen**

Summary

There is no כפל by the claim of אבד even if it is destroyed; there is כפל by טוען טענת גנב even if the item is בעין.

Thinking it over

See תוספות שבועות דף מט,א ד"ה והעדים, where תוספות is גורס in the סיפא that מעידים אותו שאכלו (and not שגנבו). How can we reconcile these two תוספות?[2]

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[1] He (may have) caused the owner irreparable damage, for he cannot reacquire this object, nevertheless the rule of כפל by a שומר is only if he claims a טענת גנב, but not טענת אבידה.

[2] See אמתחת בנימין לר' בנימין חשין.