

אלמא קרן כעין שגנב – It is evident that he pays for the principal as it was worth when it was stolen

OVERVIEW

ברייתא stated that the payment of the חומש can be substituted by a payment of the כפל (if both payments are equal). The only way both payments can be equal (according to ר"ה) is if כפל and קרן כעין שגנב, that רב, מעיקרא שויה ד' ולבסוף זוזא and we follow the ruling of רב, כשעת העמדה בדין. Our תוספות challenges this proof and maintains that the ברייתא can be explained differently.

asks: תוספות

תימה אמאי לא דחי כגון דמעיקרא שויה זוזא ולבסוף שויה ד' -

It is astounding! Why did not the ברייתא reject this proof by saying that the גמרא is discussing a case where for instance initially it was worth a זוז and subsequently (בשעת העמדה בדין) it was worth four זוזים -

וכפילא זוזא כעין שגנב דלא כרב -

And therefore the כפל is a זוז as it was worth when it was stolen; not as רב rules that כפל is כשעת העמדה בדין (and it should be four) -

וחומשא זוזא כשעת העמדה בדין¹ כדאמר דתברה או שתייה משלם ד'² -

And the 'fifth' is also a זוז as it was worth בדין בשעת העמדה, as רבה ruled that if the thief broke the barrel of wine or drank the wine he pays four זוזים; the amount it was worth when it was destroyed.

answers: תוספות

ויש לומר דליכא למימר הכי כלל -

And one can answer; that you cannot maintain this at all -

דמהיכא תיתי דקרן יהא כשעת העמדה בדין וכפל ד' וה' יהי' כעין שגנב -

For from where do you derive that קרן pays בדין כשעת העמדה and ד' וה' כפל ד' וה' כשעת העמדה בדין; there is no basis for this distinction -

¹ Since זוז is worth four זוזים בשעת העמדה בדין, the חומש is a זוז.

² The commentaries discuss how our case is compared to תברה או שתייה, since (seemingly) in our case there is no תברה או שתייה. One possible explanation may be that when he swore that he does not have the item, it was worth ד'. The שבועה (denying possession) is compared to תברה או שתייה; just as by תברה או שתייה he pays for the value at that time, similarly by חומש he pays for the value that it was at the time of the שבועה. [We would also have to assume that he pays ד' for the קרן as well; otherwise תוספות (first) answer will not be understood.] See אמ"ה. See 'Thinking it over'.

דאין לחלק בין כפל ד' וה' לקרן³ אם לא מכח הפסוק ובזה אין לנו שום פסוק –

For we cannot differentiate between 'כפל ד' וה' and קרן unless there is a פסוק to that effect; and in this distinction that תוספות is suggesting we have no such פסוק -

ורב נמי דמחלק היינו משום דקרא קדריש –

And רב, as well, who differentiates between כפל ד' וה' and קרן that is only because he interprets a פסוק in this manner. Otherwise we cannot distinguish between כפל וכו' and קרן.

תוספות offers an additional answer:

ועוד דבלאו הכי דחי שפיר –

And furthermore since **without** this answer **he nevertheless properly rejects** the proof for \aleph_1 -

ונוח לו כפי האמת⁴ ובאותו ענין שהיה המסייע אומר שאין להעמידה⁵:

So it is preferable for רבא to establish the ברייתא as it is truthfully and in the same manner that the assister (רבי חנינא) claimed it cannot be established.

SUMMARY

We cannot differentiate between קרן and כפל ד' וה' (concerning כשעת or כעין שגנב) unless there is a פסוק that indicates so (as רב taught). Even when a proof is refuted, the אוקימתא should not be שלא כהלכתא if at all possible. The refutation is more complete if the new אוקימתא is precisely the one that was initially rejected in order to make the proof.

THINKING IT OVER

תוספות asks that perhaps the ברייתא disagrees with רב and we are discussing a case where initially it was worth a זוז and בשעת העמדה בדין it was worth four. The כפל he pays כעין שגנב and the חומש is כשעת העמדה בדין for it is like שתיהן.⁶ תוספות answers that we cannot differentiate between כפל (that it is כעין שגנב) and קרן (that it

³ See [הארוך] מהרש"א that this is only according to the ר"י but not like the ר"ת in טלמים ד"ה תוס' on א, טו.

⁴ If רב would have established the ברייתא as תוספות suggested in the question, it would go against the ruling of רב. The הלכה is like רב. Therefore רבא merely rejected the proof that the ברייתא must follow the view of רב, however the ruling of the ברייתא the way רבא established it (while it does not prove the ruling of רב, it) does not contradict the view of רב.

⁵ רב חנינא who attempted to prove רב correct from this ברייתא claimed that the ברייתא cannot be discussing a case where מעיקרא שויה ד ולבסוף שויה זוזא (rather it must be discussing a case where מעיקרא שויה ד' ולבסוף שויה ד' correct), therefore רבא prefers to say that the ברייתא can indeed be discussing a case where מעיקרא שויה ד' ולבסוף שויה ד': not a חנינא ר' claimed.

⁶ See footnote # 2.

is (כשעת העמדה בדין). Seemingly however we are not differentiating between the two; he pays the כפל כעין שגגב for the חיוב כפל is for גניבה; however he pays ד' for the קרן, since תוספות considers our case like או שתייה where he pays (כעין שגגב) for the current גזילה (or current היזק)⁷ when it was worth ד'.⁸

⁷ There is no חיוב of (ד' וה') כפל by גזילה (or מזיק)

⁸ See חידושי ר"נ אות מו-מז and נח"מ