נתנו לבכורות בנו או לבעל חובו -

He gave it for his firstborn son or to his creditor

Overview

רש"י offers[1] two interpretation as to the explanation of the סיפא of the משנה. The first is that the owner gave his cow to a כהן for פדיון הבן, or to his creditor, etc.[2] If the recipient made a proper קנין before the animal died, the owner discharged his obligation (for his creditor or פדה"ב), however if the animal died before a קנין was made, the owner still owes the money. The second interpretation is that the thief gave the animal to a כהן or to his creditor, etc. If the animal died after the כהן, etc. removed it from the רשות בעלים the thief is liable; otherwise, he is not liable. Both רש"י and תוספות prefer the second interpretation.

אותו לשון שפירש בקונטרס[3] דאבעלים קאי רחוק מאד -

That version, which רש"י explained that נתנו לבכורות בנו וכו' **refers to the owners, is very far-**fetched -

חדא שצריך לפרש לאותו לשון שמת בפשיעה[4] ולא כי אורחיה -

Firstly, according to that version it will be necessary to explain that the animal **died due to negligence but it did not** die **in an ordinary manner** –

Second difficulty:

ועוד דלשון חיוב ופטור לא שייך אבכורות בנו ובעל חובו[5] -

And additionally, the wording of 'liable and exempt' does not apply to the cases where the owner gave the animal, either for redeeming his **בכור son, or for his creditor –**

תוספות offers somewhat of a response:

וצריך לדחות דמשום אחרינא נקט חיוב ופטור -

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[1] בד"ה נתנו ובד"ה שלאח"ז.

[2] The משנה also mentions cases where it was given to one of the four custodians (ש"ח, ש"ש, שואל, ושוכר).

[3] See 'Overview'.

[4] This (first) difficulty is addressing the case where he gave it to one of the four custodians (see footnote # 2). There is no reason for the custodians (except for the שואל) to be liable for the animal's death, unless it died due to their negligence. There is no indication in the משנה that the animal's death was caused by negligence.

[5] The משנה states that if the animal died while still in the רשות of the owner; he is exempt. The creditor or the כהן is neither exempt or liable. We will need to say that if the animal died ברשות בעלים, the owner still owes money to the creditor, and if it died after it left his רשות, the owner has fulfilled his obligation, but it has nothing to do with the חיוב or פטור of כהן or the creditor. רש"י בד"ה פטור similarly asks these first two questions.

So, it may be necessary to 'push away' this (second) difficulty that the משנה **mentioned חיוב ופטור because of the other** cases regarding the (גנב in the רישא, or) שומרים –

Third difficulty:

ועוד דבתוספתא (פרק ז׳[6]) **קתני הגביהו או נתנו לבכורות בנו משמע דאגנב קאי -**

And furthermore, it states in the תוספתא, 'he lifted it up or he gave it לבכורות בנו'; indicating that we are referring to the thief -

דאי אבעלים מה צריך הגבהה והא דידיה הוא -

For if הגביהו was referring **to the owner, why is הגבהה necessary since it belongs to him –**

Fourth question:

ועוד דראיה דמייתי ממתניתין בגמרא אבעיא דתקנו משיכה בשומרים[7] -

And moreover, the proof which the גמרא brings from our משנה regarding the query whether **they instituted משיכה by custodians,** that proof -

אי אפשר ליישבה להאי לישנא לפי מה שמפרש[8] בגמרא -

It is impossible to explain it according to this (first) **version, the way (the גמרא) [I, תוספות] explains it -**

ולשון אחרינא שפירש בקונטרס נתנו הגנב לבכורות בנו הוא עיקר -

But the latter version in which רש"י explained that the thief gave it for בכורות בנו, that is the correct version -

דמתחייב הגנב במשיכת הני -

For the thief is liable with the משיכה of these people (the שומרים, כהן, בע"ח); when they took it out of the רשות בעלים, it is as if the גנב took it out and therefore he is liable -

תוספות asks:

ואם תאמר ואמאי מחייב במשיכה והא אין שליח לדבר עבירה -

And if you will say; but why is the thief **liable for** their **משיכה; for** is it not the rule **that there is no agency for a prohibited act –**

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[6] ה"ז. Our תוספתא reads as follows; נתן לפדיון בנו לבעל חובו ולאשה בכתובתה לא עשה כלום, הגביה ונתנו לפדיון בנו ולבעל חובו ולאשה בכתובתה מה שעשה עשוי. The רישא means he is not liable. In the סיפא, the words מה שעשה עשוי mean that he is liable. The only difference is that in the סיפא, he picked it up, but if it is referring to the owner, what difference is there if he picked it up or not. This proves that we are referring to the גנב, and when he picked it up, he was קונה it.

[7] אמימר queried (right after our משנה), whether the שומר needs to do an act of משיכה.

[8] See מהרש"א. Others amend this to read שאפרש, referring to the תוס' ד"ה תיקנו, where תוספות explains (not like רש"י בד"ה תיקנו, but rather) that the query is whether after the משיכה either party can retract from their agreement. However, if we assume that the owner gave the animal to the שומר and the proof is from the fact that the שומר is liable; however, that does not prove at all whether or not they can retract from their agreement. The שומר may be liable after he makes a משיכה, but that does not resolve the query regarding retracting from the agreement. See תוס' ד"ה תיקנו.

תוספות answers:

ויש לומר דהנהו לא ידעי דאתי לידיה באיסורא אלא סבורין שהיה שלו -

And one can say that these people **did not know that it came** into the thief's **hand illegally, rather they assumed** that the animal **was his,** and therefore the rule of אשלד"ע does not apply, as תוס' continues to explain -

ובין ללישנא דמפרש בפרק קמא דבבא מציעא[9] (דף י,ב ושם) טעמא דאין שליח לדבר עבירה -

So, whether according to the version that explains the reason for אשלד"ע in the first פרק of ב"מ מסכת -

משום דשליח בר חיובא הוא ודברי הרב ודברי התלמיד דברי מי שומעין[10] -

Is because since the שליח **has liability** for doing this act, so we challenge the שליח saying, '**whose voice do we listen to; the master's voice or the student's voice**' -

ובין ללישנא דאי בעי עביד אי בעי לא עביד אין שייך לכאן -

Or whether according to the other **version there** that the rule of אשלד"ע applies to cases where the שליח had the option **that if he wanted, he can do it, and if he wants, he cannot do it,** whichever of these two versions we accept, **it has no bearing to** the situation **here -**

דהתם אין יודע שהשליח יעבור[11] אבל כאן יודע הוא שיקח מאחר שהוא סבור שהוא שלו -

Because there the principal (משלח) **is not sure whether the agent will transgress, however here the** thief **knows that** the recipient **will take it, since** the recipient **assumes that it belongs to the** thief, in which case there is no rule of אשלד"ע –

תוספות comments:

ולעיל (עא,א) גבי גנב וטבח בשבת דמוקי לה בטובח על ידי אחר -

And previously regarding the case where **he stole and slaughtered on שבת, where we established** this case **that another** person **slaughtered it** (not the thief) -

ופריך וכי היכן מצינו שזה חוטא וזה מתחייב הוי מצי למימר דסבור שהוא שלו[12] -

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[9] There is a view there (in ב"מ) that one's חצר can acquire object for the owner, since his חצר is considered his שליח. The גמרא asked there that we know that a גנב is liable for a גניבה that was found in his חצר, but how can he be liable since אשלד"ע. The גמרא there offered two distinctions between a חצר and a 'regular' שליח, so therefore the rule of אשלד"ע does not apply to a חצר. One distinction is that a שליח himself is liable (for [let us say] stealing), however a חצר is not liable for stealing. Secondly a שליח has the option of doing the שליחות or not, while a חצר has no option. Therefore because of these two distinctions the rule of אשלד"ע does not apply to a חצר. Our תוספות explains that similarly it will not apply to a שליח who is not aware that a transgression is taking place.

[10] We say that the שליח is liable because he should not have listened to the משלח, but rather to ה'; however, in our case where they had no idea that it was stolen, there is no reason why he should not have done it.

[11] The שליח has the option whether to do the שליחות or not (since it is a דבר עבירה); however here there is no reason why the שליח should not do it.

[12] According to what תוספות just said that when the שליח is not aware that there is a דבר עבירה, we say ישלד"ע. See 'Thinking it over' # 1.

And the גמרא **asked; 'where do we find that this one** (the שוחט) **sins, and the other** (the thief) **is liable'** (namely it is אשלד"ע); the גמרא **could have answered that the** שוחט **assumed that it belonged to the** thief -

אבל משני שפיר והאמת –

Nevertheless, the גמרא **offered the correct and truthful answer** that by ד' וה' the rule is that ישלד"ע –

תוספות asks:

אבל קצת קשה היכי יליף מה מכירה על ידי יאחר אף טביחה כולי -

However, there is a slight difficulty; how did the גמרא **derive** the rule of ישלד"ע by ד' וה' by saying **just as selling is through another party, similarly the טביחה is also through another** party -

דלמא דוקא כשסבור שהוא שלו כיון דליכא יתור[13]: [ועיין תוספות קדושין מב,ב דיבור המתחיל אמאי]:

Perhaps there is a חיוב for טביחה when it is done through another party, **only when** the other party **assumes that it's the** thief's (but not when he knows that it is stolen, since אשלד"ע)**, since there is no superfluous** פסוק**.**

Summary

The rule of אשלד"ע is only if the שליח is aware that there is a דבר עבירה; however, if he thinks there is no דבר עבירה we say ישלד"ע.

Thinking it over

1. תוספות asks that when the גמרא asked (regarding שבת בשוחט ע"י אחר טובח) 'where do we find שזה חוטא וזה מתחייב'; the גמרא could have answered that the טובח assumed that it belonged to the גנב.[14] Seemingly תוספות question is not understood; granted that the שליח thought that it belongs to the גנב, but how was he on שבת?!

2. תוספות asks that maybe the דרשה of מה מכירה ע"י אחר אף טביחה ע"י אחר, is only when the טובח thinks that it belongs to the גנב.[15] However, by מכירה he is חייב in all cases whether he thought it belongs to the גנב or not; why should טביחה be different?![16]

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[13] If there would have been an extra פסוק to teach us that by ד' וה' there is שלד"ע, there would be no question, since we know on our own that where the שליח does not know that there is a דבר עבירה, there is a שלד"ע, so we understand that extra פסוק by ד' וה' teaches us that by ד' וה' there is a שלד"ע even if he knows that it is a דבר עבירה. However now that there is no extra פסוק, perhaps the rule of ישלד"ע by ד' וה' is only when the טובח did not now that it was stolen. See 'Thinking it over' # 2

[14] See footnote # 12.

[15] See Footnote # 13.

[16] See נחלת משה.