

## A gratuitous guardian

## שומר חנם –

### OVERVIEW

The גמרא challenges the view of the מ"ד that the הילך is from פטור משבועת מוב"מ, רמי בר חמא of ברייתא, which states that by שומרים there is a requirement of במקצת. There is a שומרים even though (seemingly) it is a case of הילך. The four שומרים are enumerated in this ברייתא. First תוספות explains the order in which the שומרים are mentioned. Then תוספות explains why the גמרא chose to challenge the מ"ד that the הילך is from a ברייתא concerning שומרים, when he could have asked from משניות which discuss הילך by שומרים.

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 תוספות explains the order of the ברייתא; beginning with a שומר חנם, who is -

**פטור מכל חוץ מפשיעה ושואל חייב בכל חוץ ממתה מחמת מלאכה –**

**Exempt from payment in all cases except for negligence, followed by the borrower who is liable in all cases except where it died because of the work for which it was borrowed; these two are followed by –**

**ונושא שכר והשוכר<sup>1</sup> במקצת חייב ובמקצת פטור –**

**The paid watchman and the renter who are partially liable (by גניבה - (אונס) and partially exempt (by ואבידה) –**

**ולכך תנא להו כסדר זה<sup>2</sup> ולא שנאם כסדר כתיבתם<sup>3</sup> –**

**And therefore the תנא of the ברייתא mentioned the שומרים in this order and did not mention them in the order in which they are written in the תורה.**

תוספות asks:

**ואם תאמר ואמאי לא מקשה מכמה משניות דזה אומר עד הזיו וזה אומר עד החלון<sup>4</sup> –**

**And if you will say; and why did not the גמרא challenge the view that the הילך is from the various משניות including the case where one claimed I deposited wheat in your house and it reached up to the bracket, and the other says it reached only up to the window -**

**ועשרה גפנים דשבועות (דף מב,ב) –**

<sup>1</sup> There is a מחלוקת whether a שוכר is like a ש"ח or a ש"ש. Here תוספות assumes that he is like a ש"ש.

<sup>2</sup> There is logic in this sequence; he first mentions the absolutes (where they are either always exempt [ש"ח] (which is first in the פסוק) or always liable [שואל]) followed by the intermediate cases (sometimes exempt and other times liable) the ש"ש and שוכר.

<sup>3</sup> In the תורה they are written in the following order; first the ש"ח (in כב,ו-ח), followed by the ש"ש (in פסוק יג), the שואל (in פסוקים ט-יב), and the שוכר is last in פסוק יד.

<sup>4</sup> This is a case of הילך because the watchman is returning everything up to the window.

And the case of **the ten vines**;<sup>5</sup> these two cases are mentioned in a משנה in מסכת שבועות -

ומתניתין דהשואל (לקמן דף צז,ב: ושם) דזה אומר שאולה וזה אומר שכורה<sup>6</sup> -

And also the משנה of פרק השואל where the owner **claims** it was the **borrowed** cow that died באונס (for which the שומר is חייב) and the שומר **claims** it was the **rented** cow that died באונס (for which the שומר is פטור) -

דמיירי בפקדון הא הילך הוא -

Where all these cases are discussing a deposit where the admission is a case of הילך and nevertheless in all these cases there is a חייב שבועת מוב"מ; why did not the גמרא ask from these משניות, and asked instead from a ברייתא?!

answers: תוספות

ויש לומר דניחא ליה לאקשוויי מכל ד' שומרינ:<sup>7</sup>

And one can say; that the גמרא would rather challenge the פטור מ"ד הילך פטור from all four שומרים<sup>8</sup>, therefore he asks from this ברייתא which mentions all four שומרים; however the משניות above do not discuss all the שומרים (only one or two).

## SUMMARY

The order of the שומרים ד' (in the ברייתא of רב"ה) is according to their liability. The גמרא prefers to ask from all four שומרים (even though it is a ברייתא); rather than ask from some of the שומרים (even though it is a משנה).

## THINKING IT OVER

There is seemingly an advantage in asking from רב"ה than from the משניות. We can establish the משניות (which are individual cases) in a situation where there is no הילך; however רב"ה is discussing a universal law of שומרים; it is unreasonable to limit this law to a case where it is not הילך.<sup>9</sup>

<sup>5</sup> The depositor claimed I gave you ten laden vines to guard, while the watchman argues that he was given only five laden vines; this too is a case of הילך, for the grapes of five vines are available.

<sup>6</sup> The depositor gave the watchman two cows, one as a loan (שואל), and the other was a rental (שכורה). One of the cows died (through an אונס, for which a שואל is חייב and a שוכר is פטור) and it is not known whether it was the שואל (and the watchman is חייב) or whether it was the שכורה (and he is פטור). In any event the שומר is a מוב"מ in a הילך situation because he is returning the other (live) cow. The שומר swears that מתה שכורה.

<sup>7</sup> The same answer that the גמרא gives concerning the שומרינ ד' will also apply to the משניות; in all the cases, that which the שומר admits to was lost or stolen (בפשיעה), so it is not הילך.

<sup>8</sup> [According to רב"ה] there can be no שבועה by שומרים if הילך is פטור; however from the משניות there is a difficulty for the מ"ד הילך is פטור, only in specific instances. See 'Thinking it over'.

<sup>9</sup> See # 77. אמ"ה