

That it was in his house at that time - ההיא שעתא דאיתיה בביתה

OVERVIEW

The גמרא explained that the rule of הכופר בפקדון is פסול לעדות when testifies that the פקדון was in the house of the שומר at the time that he denied having it. גירסא and interpretation תוספות rejects a different.

לא גרסינן דאשתבע¹ –

The text does not read דאשתבע (when he swore) -

דאי איכא סהדי דנשבע לשקר במלוה נמי פסול² –

For if there are witnesses that he swore falsely, he is פסול לעדות by a מלוה as well, not only by a פקדון -

וכן משמע בהגוזל קמא (בבא קמא דף קז,ב) דמיירי בלא שבועה⁴:

And it also seems so in פרק הגוזל קמא that we are discussing a case without a שבועה.

SUMMARY

If testifies that one swears falsely (even) concerning a loan, he too is פסול לעדות.

THINKING IT OVER

It would seem that those who are גורס the word דאשתבע, maintain that הכופר אישתמוטי alone is not פסול לעדות because of אישתמוטי. How can there be אישתמוטי by a פקדון?

¹ A if testifies that it was in his possession at the same time when he denies having it. However (to make him פסול לעדות) it is not necessary that the testifies that it was in his possession when swore that he does not have it.

² If the שומר swears that he did not borrow from the מלוה and testifies that he did borrow he is also פסול לעדות. The idea of אישתמוטי is relevant only to the עבירה of stealing; however concerning a שבועה there is no 'excuse'; if one swears falsely he is פסול לעדות.

³ This should be amended to קה,ב (See תוה"ר ר"פ and תוה"ר קה,ב) of מימרא who cite the תוספות ר"פ and תוה"ר קה,ב. (קה,ב) which is on נעשה עליו גזלן.

⁴ rules that the כופר בפקדון נעשה עליו גזלן וחייב באונסין רב ששת (for the proof that the גמרא attempts to bring) it is apparent that we are discussing a כופר בפקדון without a שבועה. The reason he is liable is as רב ששת states, because he is a גזלן. This proves that he becomes a גזלן even without swearing falsely and thus פסול לעדות.