

21.3.8

40b → 41b (משנה ט') (אף כאן לשבועה)

1. אם לא ימצא הגנב ונקרב בעל הבית אל האלהים אם לא שלח ידו במקלאת רעהו: שמות פרק כב פסוק ז (שומר חנם)
 2. שבצת ה' תהיה בין שניהם אם לא שלח ידו במקלאת רעהו ולקח בעליו ולא ישלם: שמות פרק כב פסוק י (שומר שכר)

- I 'משנה ט': liability of שומר for losses incurred while – or as a result of – moving the barrel of wine
- a If: the owner didn't designate a specific place and it broke while moving –
 - i If: he was moving it for his own purposes – liable
 - ii If: he was moving it for the sake of the פקדון – exempt
 - iii If, however: it broke after he had moved it – in either case, he is exempt
 - b If: the owner did designate a specific place and it broke, whether while moving or afterwards
 - i If: he was moving it for his own purposes – liable
 - ii If: he was moving it for the sake of the פקדון – exempt
- II Analysis of authorship
- a Background: ר' ישמעאל and ר"ע disagreed if there is a requirement of דעת בעלים when returning a גולה (ר"י – no need)
 - b Analysis #1 – ר' יוחנן – (who maintains that הניחה always implies that it was returned to its proper place)
 - i רישא follows ר"י, as the minute he returns the barrel to its place, it's considered "returned" and he is פטור
 - 1 Challenge: if it follows ר"י, he should be exempt even if the owner had designated a spot
 - 2 Answer: indeed, and we have an example of "לא זו אף זו" here
 - ii סיפא follows ר"ע, as he remains liable even after returning it to the place
 - 1 Challenge: if it follows ר"ע, he should be liable even if the owner hadn't designated a spot
 - 2 Answer: indeed, and we have another example of "לא זו אף זו"
 - iii Resolution: "split" משנה (ר' יוחנן), משנה according to 1 authority)
 - c Analysis #2 – ר' ישמעאל – רב ור' ששת – all follows ר' ישמעאל
 - i רישא – he returned it to the proper place; סיפא – he returned it to an improper place
 - 1 רב (presented by ר' יעקב בר אבא): he picked it up in order to steal it
 - 2 רב (presented by ר' נתן בר אבא): he picked it up in order to use it
 - (a) Explanation of disagreement: whether שליחות יד, which would place the item under watch of שומר for full liability even in case of אונסין, can only be applied if there is a real deficiency to the פקדון
 - (i) ר' יעקב בר אבא demands a חסרון → the only liability w/o חסרון is גולה
 - (ii) ר' נתן בר אבא demands no חסרון → liability is possible for שליחות יד w/o חסרון
 - ii Challenge (ר' ששת): משנה doesn't refer to him "taking" it, rather "moving" it
 - 1 Rather (ר' ששת): he moved the barrel in order to have birds sit atop it
 - (a) And: שואל שלא מדעת (which he is, as he "borrowed" it without owner's permission) is a גזלן

III Full exposition of שליחות יד and the demand of חסרון to qualify as שליחות יד to generate liability for all אונסין

 - a רב/לוי disagree about it
 - i Inference: רב maintains there must be חסרון (from his read of liability of shepherd for sheep taken by wolves etc.)
 - ii Implication: לוי maintains that there is no need for חסרון
 - 1 Reason (ר' יוסי בן נהוראי): ש"ש שליחות יד is unnecessary (inferred from ש"ח via ק"ו) → even w/o חסרון
 - 2 Dissent (ר' יוחנן): ש"ש שליחות יד is similar to that of ש"ח;
 - (a) Meaning (as per ר"א): defeat ק"ו – ש"ח is more severe – he'll pay 'וה' כפל' ד' if he claims גנבה (and is lying)
 - (b) Counter: ר' יוסי בן נהוראי: ש"ח is still less severe; ק"ו is a more significant liability than שבועה
 - iii neither ש"ח (v. 1) nor ש"ש (v. 2) are necessary – both can be inferred from שואל via ק"ו
 - 1 Rather: they are both written to expand scope of שליחות יד
 - (a) as per לוי above
 - (b) Negation of דיו liability even if the owner is with the שומר (unlike שואל)
 - 2 דב: both are necessary
 - (a) to negate דיו (as per [b] above)
 - (b) to parallel v. 1 to v. 2 – just as v. 2 is an oath, so v. 1 (...ונקרב) is for an oath