

23.8.4; 72a (משנה ו') → 72b (מחלתו זו היא התראתו)

1. אם במחלתו ימצא הגנב והכה ונת אין לו דמים: אם זרחה השמש עליו דמים לו שלם ישלם אם אין לו ונמכר בגנבתו: שמות כב, א-ב  
 2. או באיבה הכהו בידו ונת מות יומת המכה רצח הוא גאל הדם ימית את הרצח בפגעו בו: במדבר לה, כא  
 3. שפך דם האדם באדם דמו ישפך כי בצלם אלהים עשה את האדם: בראשית ט, ו

- I ו' משנה: status of an intruder – judged based on the inevitable outcome (parallel to בסר"מ)
- a If: he caused damage while intruding
- i If: he has "blood" (i.e. the homeowner would be liable for killing him) – laible for damages
- ii But if: he has "no blood" – he is exempt from damages
- b Rationale behind מחתרת (רבא):
- i חזקה a person will defend his possessions with his life
- 1 Therefore: the intruder knows that he may be confronting a homeowner and is ready to kill for the theft
- 2 Consequently: the assumption of "self-defense" is employed – הבא להרגן השכם להרגו
- c דב: if someone took items from property in context of מחתרת – exempt (from returning them)
- i Reason: he "acquired" them with his blood (i.e. since he could have been killed – מ"מ – קלב"מ)
- ii דבא: only accept רב's dictum if they are broken (no liability for נזקין); if extant – must return (as השבת הגזלה)
- 1 Self-correction: in any case –
- (a) Argument: if he were not a "freely killed" intruder (see below) and they were broken – he'd be liable
- (i) Implying: they are in domain of גזלן → if not broken, must return → קלב"מ exempts him
- 2 Self correction back: it is only in גזלן's domain vis-à-vis אונסין; but isn't fully owned by גזלן
- (a) Analogy: שואל
- 3 Analysis from our משנה: if he breaks vessels – exempt → if he steals them (and they are בעיין) חייב
- (a) Block: even if he steals them – פטור; "broken" invoked to teach - if his life isn't forfeit – liable even for נזק
- (i) Challenge: this is obvious – he is a מזיק
1. Defense: even if he broke it inadvertently
2. Block: אדם מועד לעולם – whether or not he intends the damage (קשיא)
- (b) Challenge: if someone steals a pouch on שבת – liable (as liabilities aren't concurrent)
- (i) But: if he dragged it out – exempt, as liabilities are concurrent and קלב"מ
- (ii) And: final ruling – he is only exempt if the money was lost; if it is בעיין, still must return, despite שקילה
- (c) Story: רבא (or רבה) had some rams stolen במחלתו and when thieves wanted to return, he refused
- (i) Reasoning: (even though רב is rejected when the כלים are בעיין), since רב said it – החמיר על עצמו
- d interpreting vv. 1:
- i ברייתא #1: reads end of א: כב: with beginning of ב: כב: – burden of proof on homeowner
- ii ברייתא #2: reads ב: כב: – burden of proof on intruder
- 1 Resolution: if father is intruder – burden of proof on homeowner that he would kill (default – האב על הבן – רחמי)
- (a) But: anyone else (even son) is intruder – assumption is that he'll kill unless "clear as day" otherwise
- iii ברייתא (שבת-חול "דמים" plural of שבת and חול) – both אין לו דמים and חול דמים לו: ברייתא
- 1 Understood: in re: אין לו דמים – not liable for killing him even on שבת, when there is no מיתת ב"ד
- 2 But: how do we understand יש לו דמים?
- (a) Answer: it means that we violate שבת to rescue him (e.g. under a cave-in) even though he was במחלתו
- iv ברייתא – anyone may kill him (not just הבית חזקה, in spite of חזקה only applying to him); ומת – any form of death
- 1 Question: why not subsume the latter under רוצח (v. 2)? (Answer: v. 2 reads מות יומת – extending methods)
- 2 Question: why not infer our rule from רוצח? (Answer: רוצח and גוה"ד are טובים שני)
- v מחתרת extends to any form of entry; reason for singling out מחתרת (i.e. tunneling in)
- 1 Answer1: common reality – this is how most גנבים break in
- 2 Answer2: מחתרת is considered the התראה (i.e. needs no other התראה) – מחתרתו ד"ה מחתרתו and עיין רש"י ד"ה מחתרתו
- e הונא ר': a קטן who is pursuing another to kill him may be killed → no need for התראה
- i Challenge (ר' חסדא): once a baby is born, 'tho mother's life is in danger, he may not be killed (as רודף)
- 1 Answer: the baby isn't the רודף – heaven is.
- ii Support: one who sees a רודף should point out his error (v. 3); but no need for התראה and acceptance on his part
- 1 Block: that is a case of a חבר, following בר יהודה (התראה) ר' יוסי בר יהודה
- iii Challenge: ruling that once the warning is administered; if he concurs – פטור (for killing); if he accepts מיתה חייב – עונש מיתה
- 1 Answer: that is a case where the warning person couldn't stop the murder (e.g. other side of river)
- (a) Therefore: the murderer will go through due process → needs proper התראה (or as per התראתו)