

Insights from the Meshech Chochma

רב מאיר שמחה הבהן מדווינסק זצ"ל

פרק ש' משפטים תשפ"א

Shulie Plawes

אם גנב יגניב מעמו ושלם לבעהו. (פרק כב' יא)

If (the animal) shall be stolen from (the guardian), he shall pay to its owner.

This pasuk is part of the short Parsha which outlines the laws of the four types of who are entrusted with someone's property. Our pasuk refers to a paid custodian, a שומר שבר, who is held to a higher degree of liability than the שומר חנום, an unpaid custodian, whose rules were reviewed a few pasukim earlier. If the פקודון is lost, stolen or damaged under their watch, their responsibilities are quite different. A שומר חנום is responsible for repaying the owner only if he was determined to be negligent. A שומר שבר, on the other hand, is expected to be more vigilant and therefore has more liability. He is responsible for loss or theft unless the occurrence is beyond his control and can be regarded as accidental.

Rav Meir Simcha points out that with regards to the שומר חנום, the Torah writes, פ' י"ט א' אל שומר חנום... If a man shall give money or vessels to his fellow to safeguard, and it is stolen from the house of the man... but in reference to the שומר שבר our pasuk writes ואמ' גנב יגניב מעמו. As nothing in our תורה שבחתב is inadvertent, this "glaring" discrepancy is clearly there for a reason and Rav Meir Simcha enthusiastically presents us what it is.

He begins by taking us to בבא מציעא מב. where Shmuel tells us: "There is no acceptable method for safeguarding money other than to bury it in the ground." Rashi explains that if the deposit was not guarded in this way, the שומר is considered to have acted negligently and therefore even if he is a שומר חנום, he is liable for theft. Tosafos appears to disagree because he shows us that with regards to a שומר שבר, even if he were to hide the פקודון in a one hundred *amos* excavated hole, he would still be liable for its theft. As Tosafos tells us regarding a case of בלא גנבה לא היא אונס אלא לסתים מזויין: שומר שבר מזויין: שומר חנום is mentioned for the body but שומר שבר is mentioned for the שמירה and חנום is not mentioned for the שמירה but שומר שבר is mentioned for the שמירה and חנום like mentioned for the body. ...for the שומר שבר if he guarded it sufficiently, he is not liable. For a wall of iron around (the פקודון), we determine his liability only relative to his body i.e., if he was not literally with the פקודון at the time of the theft, he is liable.' Rosh, as Tosafos, concludes that there is no theft for which a שומר שבר is exonerated from except for one done by armed thieves. There are Rishonim who disagree with this position. From where did Tosafos and Rosh derive these extreme opinions? Rav Meir Simcha believes that it is from the Torah telling us that the שומר שבר's שומר חנום was stolen from but with regards to the פקודון, it was

stolen **מעמו**. According to Rav Meir Simcha, if one is not being paid to watch an item, it is sufficient to keep it in his home, in a commonly accepted safe place. If one is being paid to guard something, he must always be with it, otherwise he is liable for its theft. Rav Yehuda Kupperman, in his *Shu'ot* on the Meshech Chochmah adds that R' Achai Gaon in saying exactly this: **אי לנוטורי באגרא אנטילמו ליה, אף על גב דאוקמא בדוכתא דנטירותא, וניגנברתא...** i.e., if he was a paid guardian, even if he kept (the *פקודין* in a protected area, he is still liable for its theft as **he has to be with it** and protect it **by day and by night**. Exactly as the underpaid Yaakov Aveinu told Lavan: ...**מידי: נטורי פתק נטורה, גנבתו יומם וגנבתו לילה. היהתי ביום אכלני חרב וקרכ בלילה ותנד שנטתי מעוני would exact it, whether it was stolen by day or stolen by night. This is how I was: By day scorching heat consumed me, and frost by night; my sleep drifted from my eyes.**” A **שומר שקר** is an around the clock job. **מעמו**.

Rav Meir Simcha uses this to lend support and give approval to what, as he puts it, the *Acharonim* write regarding the question of whether a **שומר** can prematurely resign his watch. He is referring to the Machne Efraim (Rav Efraim Navon, 1677-1731) who answers that in **בבא** Rav says that (if he gives his employer ample notice of his leaving) a worker can withdraw from his employment, even in the middle of the working day. The Machne Efraim tells us that a **שומר** attains the status of a **פועל** who can leave. A **שומר** does not. Why so? Because the **שומר**’s responsibility is so extensive-he uses Rav Achai Gaon’s words, **צעריך למיטב בהדה ולנטורי יטמא ולילן**; he is therefore very comfortable applying Rav’s rule to him. Not so with the **שומר** who is clearly not a **פועל** and so, cannot just leave. According to Rav Meir Simcha, once again, **מביית האיש** **מעמו** versus **מעמו**.

Rav Meir Simcha ends this piece by telling us to look at the **Shulchan Aruch Choshen Mishpat** **שаг-ב-ג** where the *Mechaber* discusses the **שומר**’s duties and we see how he blends the opinions of Tosafos and Rosh, consistent with Rav Meir Simcha’s *חצבר*: “...even if he watched it very appropriately, and he placed the coins one hundred amos beneath the ground... even if he put an iron wall to protect it and even if had he been there, he could *not* have prevented it from being stolen, nevertheless, since he was not present when the theft occurred, he is liable... He is only acquitted if armed thieves stole it.” **מעמו**.

As mentioned many times, one of the intentions of our author in writing his sefer was to find Scriptural sources for esoteric *mesorah* from the Beis Midrash of the GRA. He clearly took his “job” very seriously as he did not limit this to the **חצ"ל** of the Talmud per se but even applied it to Rishonim and Acharonim!

לזכר נשמת אבי מורי ר' ישראל מנחם בן ר' שלום ז"ל
 לזכר נשמתAMI מורת רחל בת ר' אלחנן אביגדור ע"ה
 לזכר נשמת חמיה מורי ר' יעקב נתן בן ר' ישראל שלמה ז"ל
 ולזכר נשמת הרב יהודה בן ר' אברהם שמחה (קורטמן) ז"ל
 מחבר הגדות על ספר משך חכמה