

פרק שלישי- העפקיד Introduction to

The 3rd chapter (or 13th of תיקון) deals with a related theme to אבדה – the responsibilities of a שומר who is charged with watching another's goods. The תורה defines three categories of שומרים in שמות כב-יג. There are, however, four kinds of שומרים (and שומר אבדה fits into one of these categories, as ר' יוסף discussed) – see below. **General rule:** Any שומר who claims that the item was lost, damaged or otherwise not returnable in proper condition due to an event which for which he is not liable may take an oath and be exempt from payment – or, should he elect to avoid taking an oath, may pay. There are the ארבעה שומרים:

1. שומר חנם – watches as a favor (for free) and is liable only for loss due to neglect (פשיעה)
2. שומר שכר – watches for hire – is liable in case of גניבה ואבדה but exempt for אונסין
3. מתה מחמת מלאכה – is liable in all cases except מלאכה
4. שומר שוכר – renter – dispute יהודה ר'מ"ר if he is a שומר חנם or שומר שכר

21.3.1; 33b (משנה א) → 34b (תיקון)

I 'משנה א' שומר acquiring rights to collect כפל and ד' וה' after paying for loss

- a If: someone was שומר מפקיד animals or vessels with a ש"ח and they were stolen or lost
 - i If: he chose to pay rather than swear (although he may swear and be exempted)
 - 1 Then: if the גנב was found, he pays כפל (or ד' וה' – to the שומר)
 - ii But if: he took the oath
 - 1 Then: if the גנב was found, he pays כפל (or ד' וה' to the owner)
 - ii Analysis:
 - i Need for both בהמה and כלים:
 - 1 If: only stated בהמה, סד"א, that he "earns" כפל of בהמה when paying since taking care of it was a רוחה
 - 2 If: only stated כלים, סד"א, that כפל is his since it isn't all that much (maximum 2x), not בהמה (could be 4/5) – קמ"ל – אין אדם מקנה דבר שלבל"ע – שומר – שומר cannot sell rights of collection of כפל to the שומר – שומר
 - (i) Note: even ר"מ, who allows selling the fruit of a tree before blossoming – does so as it is expected
 1. But: we don't know that the animal will be stolen, or the thief be caught, or he'll pay (perhaps he'll admit to it and be exempt as per בנקס)
 - (b) Answer1 (רבא): as if owner said "when it is stolen from you and you decide to pay, it is yours as of now"
 - (i) Block (ר' זירא): if so, he should keep shearings and foals (which, even if he pays, go to owner)
 - (ii) Rather (ר' ז'ר): as if he added "except for shearings and foals"
 1. Question: how do we determine this?
 2. Answer: we assume that he is willing to forgo/sell external (unexpected) profit, but not שבוהא דגופא
 - (c) Answer2 (רבא – version2): as if he said: "when it is stolen and you pay, it is sold just before the גנבה"
 - (i) Difference: ר' ז'ר's challenge, or a case where the cow was out of רשות שומר (e.g, marsh) just before גנבה
 - ii Discussion of "if he chose to pay":
 - 1 ד' יוחנן: as long as he expressed readiness to pay, the כפל (+) is his
 - (a) Note: wording of משנה leads to conflicted inferences → no help
 - (b) Support: ברייתא stipulating that if he states that he'll pay and then גנב found – שומר keeps כפל
 - 2 ד' פפא: if a ש"ח admits to neglect, he is already the "owner" of כפל; could've exempted himself by claiming גנב
 - (a) Same: with ש"ח if he claims גנב; could've exempted himself by claiming אונס
 - (b) But: שואל doesn't acquire כפל by agreeing to pay; only exemption is מתה מחמת מלאכה which is uncommon
 - (i) Alternate version: he does acquire via agreeing to pay; he could've exempted via מתה מחמת מלאכה
 - (c) Dissent (ר' זירא, quoting אב"י): שואל must pay in order to acquire rights to כפל
 - (i) Reason: since he gets all the הנהא, words alone cannot function as vehicle for קנין
 - (ii) Support: ברייתא which stipulates that if the שואל initiated (קידם) and paid, he collects כפל
 1. Note: this certainly works well with version 1 of ר"פ, but unclear if it challenges version 2
 2. Could be: "initiated" means "and said"
 - a. Challenge: we interpreted שלם in our משנה as an oral commitment to pay – same here
 - b. Block: in the ברייתא, there is the added קידם, not used in re: שוכר
 - c. Rejection: they aren't taught together that the difference is meaningful
 - 3 Changing his mind and other variations on the oral commitment serving as acquisition of rights of כפל
 - (a) Obviously: if he declined to pay, then agreed to do so - he acquired rights
 - (b) But: if he commits to pay and changes his mind – has he backed off or is just stalling?
 - (c) Additional questions: what if he agreed to pay and died and sons refused to pay; what if the sons paid; what if he paid to the heirs of the מפקיד? What if the heirs paid the heirs? What if he paid ½ or had 2 cows and paid for one; if 1 was שומר for partners and paid 1, or partners were שומרים and 1 of them paid? If he borrowed from a woman and paid her husband or a woman who borrowed and her husband paid? - תיקון