

21.8.4

97a (משנה ב') → 98b (או דלמא אפסיקא לה שאלה ביני וביני תיקו)

I שכירות ושאלה and disputes about liability: משנה ב'

- a If: someone borrows, then rents a cow (½ day/½ day, or 1 day/1 day) Or: שואל 1 and שוכר another (from 1 owner) & it died
- i Scenario1: owners claims that the death happened to borrowed one/ at time of שאלה
- 1 Response: שומר doesn't know
 - 2 Result: liable
 - (a) Note: this seems to refute ר"י's position of ברי ושמה
 - (b) Block: as ר"י answered (elsewhere), he is liable when there is already a שבועה and he can't swear
 - (i) Example (ר"בא): when A claims 100, B admits to 50 but doesn't know about the other 50 – חייב
 - (ii) Applications:
 1. in this case: if there were 2 cows, lender claims both died during time of שאלה and שואל cedes to one and claims that he doesn't know about the other → since he can't swear, must pay
 2. in next case: if there were 3 cows, 2 given as שאלה and 1 as שכירות, and he claims that the 2 dead ones were the שאלות; שואל cedes that one of the שאלות died but doesn't know if other was שאלה or שכורה
 - a. note: according to ר"ח, who requires מקצת הודאה ומקצת כפירה to generate שבועת השומרים, add one cow to each scenario, and in each case, שואל utterly denies liability for one of them...
- ii Scenario2: שומר claims that the death happened to rented one/at time of renting
- 1 Response: owner doesn't know
 - 2 Result: exempt
- iii Scenario3: both claim ודאי to their benefit (lender claims שאלה, user claims שכורה)
- 1 Result: שומר takes an oath that it died as שכורה and is exempt
 - (a) Question: why take an oath at all? Respondent isn't addressing claim at all?
 - (i) Answer: via שבועה גלגול; lender makes user swear that the animal died כדרכה; not מחמת מלאכה
 1. And: once he's taking that oath, he can administer the oath that it was a שכורה
- iv Scenario4: if neither knows
- 1 Result: split (as per סומכוס: חולקין)
- II מלמל question: if he borrowed בבעלים, then, before returning it, rented it בבעלים – what is the status?
- a Lemma1: is the שכירות a new obligation, and there is no exemption of עמו בבעלים OR
- b Lemma2: is the שכירות a continuation of the original one, and the presence of the בבעלים is continued
- i If: we follow lemma2: what if we flip the order (rented first בבעלים, then borrowed without בבעלים) and it died כדרכה
- 1 Lemma2a: since the liability for death can only be associated with שאלה, the שכירות בבעלים doesn't continue OR
 - 2 Lemma2b: since there is some carry-over liability (גניבה ואבידה), the presence of owner also carries
 - (a) If: we follow lemma2a (no carry over), if borrowed בבעלים, rented w/o בבעלים then borrowed again (w/o בבעלים)
 - (i) Lemma2aα: does the original שאלה return (and it's בבעלים) OR
 - (ii) Lemma2aβ: does the שכירות interrupt it
 - (b) And if: if rented בבעלים, borrowed w/o בבעלים then rented again (w/o בבעלים)
 - (i) Lemma2aα: does the original שכירות return (and it's בבעלים) OR
 - (ii) Lemma2aβ: does the שאלה interrupt it
- c Answer to all: תיקו (but see רמב"ם below who, as per his general approach, accepts all לומר as אם תמצי לומר)

רמב"ם הלכות שאלה ופקדון פרק ב הלכה י

שאלה בבעלים ושכרה שלא בבעלים פטור שהשכירות תלוי בשאלה, אבל אם שכרה בבעלים וחזר ושאלה
שלא בבעלים או ששאלה בבעלים וחזר ושכרה שלא בבעלים וחזר ושאלה (שלא) בבעלים או ששכרה בבעלים
וחזר ושאלה שלא בבעלים וחזר ושכרה (שלא) בבעלים כל אלו ספק שמירה בבעלים הוא.