

היכא דלא שני מאן משלם – Where he did not change, who pays

OVERVIEW

The משנה states if one rented a cow with the intent of using it to plow a field in a valley, but he actually plowed a field in a mountain and the plow broke, the renter is liable to pay the damage. The גמרא subsequently asks, 'what is the rule if he did not change, but actually plowed in the valley and the plow broke, who is liable (meaning¹ which one of the two workers who work the plow are liable)'. Our תוספות explains why in the case where he did change (from a valley to a mountain), we do not discuss which worker is liable (but rather assume that the שוכר is liable).

תוספות asks:

ואם תאמר היכא דשני נמי אמאי לא משלם אחד מן הפועלים שפשע² בשבירת הקנקן -
And if you will say; even in a case where the שוכר changed (from the valley to the mountain), why should not one of the workers, who was negligent in breaking the plow, pay (instead of the שוכר) -

ותיבעי נמי מאן משלם -

And the גמרא should query also in this case (where he changed from the valley to the mountain), which worker pays (instead of assuming that [only] the שוכר pays)!

תוספות answers:

ויש לומר דהיכא דשני לא משלם -

And one can say that in a case where the שוכר changed from a בקעה to a הר, the workers do not pay. תוספות explains -

דמיירי שהמשכיר את הפרה הוא שוכר את הפועלים לילך עם פרתו ולעשות מלאכת השוכר -
For we are discussing a case where the משכיר (the owner) of the cow, he hires the workers to accompany his cow³ and they should do the שוכר's work of plowing -
ולחכי לא משלם דאמרו ליה למשכיר אנו לא התנינו עמך אלא לחרוש בבקעה -

So therefore they do not pay (in a case of שני), for the hired workers say to the משכיר, 'we stipulated with you to plow only in a בקעה -

ולא קבלנו שמירת הקנקן בהר אלא בבקעה ואם היינו חורשים בבקעה לא היינו שוברים -
And we did not accept caring for the plow in a mountain, but rather only in a

¹ In this case, where the שוכר did not change where he plowed, but rather plowed in the valley as agreed upon, it is obvious that the שוכר is not liable for breaking the plow; the question is only which one of the workers is liable.

² Even if the שוכר is liable to the משכיר, nevertheless the workers should be liable to the שוכר.

³ See 'Thinking it over' # 2.

valley, and indeed if we would have plowed in the valley we would not have broken the plow, therefore we cannot be held liable'.

ומכל מקום שכירות שלנו לא נפסיד כי דעתך היה שנעשה כמו שירצה בעל השדה⁵ -
responds to an anticipated difficulty:⁴

But nevertheless we do not lose our wages (even though we plowed the mountain – not in the valley as initially agreed upon), **for it was your intention that we should do what the owner of the field** (the שוכר) **desires -**

כי הייתי⁶ סבור שלא יחרוש אלא בבקעה:

Since (I) [you] assumed that he will plow only in the valley.

SUMMARY

The workers are not liable if the שוכר changed from a בקעה to a הר, since they only accepted responsibility for plowing in a בקעה. They are not negligent for plowing in the הר since the assumption is that they do whatever the שוכר wants.

THINKING IT OVER

1. The משנה in the רישא mentions another case of שינוי, when he stipulated to plow in the הר and plowed בבקעה, where the ruling is that the שוכר is פטור. Seemingly one of the workers should be חייב.⁷ Why did not the גמרא ask by this case of שינוי, which worker is חייב (and why does not תוס' address this issue)?!

2. In his question תוספות (seemingly) assumed that the שוכר hired the workers.⁸ Why cannot we apply תוספות answer in this case as well?

3. Is there a dispute between רש"י and תוספות as to who the workers are?

⁴ The workers (initially) understood that their job was in the בקעה (therefore they are not liable for the breaking in the הר); however they should not receive their wages since they deviated from the instruction to work in the בקעה.

⁵ The workers instructions were to do the work as the שוכר requires, in the בקעה. On one hand they never assumed responsibility for plowing בהר (which exempts them from paying for the broken plow), on the other hand they are required to do what the שוכר wants (since the owner told them to service the שוכר in any way he needs [for the owner (mistakenly) assumed that he would plow בבקעה]), therefore they deserve their wages. They assumed that when the משכיר told them בבקעה it is only because the משכיר mistakenly assumed that the שוכר will plow בבקעה, but not that he restricted them solely to the בקעה.

⁶ The marginal note amends this to read הייתי (instead of הייתי). This explains why the משכיר told his workers to do as the שוכר requires. See מהרש"א.

⁷ See נמוקי יוסף (See however להרמב"ם).

⁸ It is only in answer (see footnote # 3) that תוספות writes; דמיירי שהמשכיר את הפרה הוא שוכר את הפועלים וכו'.