

The renter says, the rented cow died, and this one says, I do not know; he is exempt

Overview

The משנה ruled that in a case where the שוכר claimed מתה שכורה and the משאיל was unsure, the שוכר is exempt and is not even required to swear that מתה שכורה. Our תוספות discusses why there is no חיוב שבועה on the שוכר.

responds to an anticipated difficulty:¹

ואף על גב דבכל שבועת שומרים המפקיד משביעו מספק שהוא אינו יודע אם נאנסה -
שומר And even though that by every oath of custodians the depositor adjures the שומר
on a doubtful claim, for the מפקיד does not know whether it was נאנסה or not -

הכא שאין יודע אם מתה השאולה אין להשביעו מספק -
Here, however, when the משאיל does not know whether the שאולה died or the
שוכר died, he cannot adjure the שוכר on a doubtful claim -

דהוי כאילו אומר המשאיל ספק לי אם השאלתיך אם לאו² -
For our case is like as if the משאיל states, I am doubtful whether I lent it to you
or not -

שעל אותה טענה אין השואל חייב לישיבע³ -
For on such a claim the שואל is not obligated to swear -

ועוד דהכא אפילו משאיל אומר ברי אמרינן דאינו נשבע אלא על ידי גלגול:
And furthermore we see that in the case here even if the משאיל states with

¹ The rule is that every שומר who claims that there was an אונס (and therefore פטור [except for a שואל]), is required to swear that it was an אונס and he watched it properly (he was not פושע). This שבועה is required even though the מפקיד is not certain whether he was פושע or it was an אונס. This teaches us that by שומרים even though there is no ברי claim against the שומר, he is obligated to swear in order to substantiate his claim. Seemingly in our case as well since the שומר is claiming that he is not liable (for שכורה מתה), he should at least be obligated to swear in order to substantiate his claim, regardless whether the משאיל has a ברי טענת against him (שאולה מתה) or even if the משאיל is unsure (איני יודע). See 'Thinking it over'.

² Obviously there was a שאילה, but nevertheless that is only relevant if שאולה מתה; however since the משאיל is not sure whether שאולה מתה or שכורה מתה it is as if he is saying, 'maybe I lent you a cow and maybe not' (for if שכורה מתה there is no relevance in the fact that there was a שאולה).

³ We would understand that if the משאיל says to the שואל perhaps I lent you my cow and the שואל responds either I returned it to you or you never lent me, there would be no question of a חיוב שבועה. There is a marked difference between this case and the regular השומרים. By שבועה השומרים we know that a deposit was given, we know it was not returned, therefore there is an obligation on part of the שומר to swear in order to remove this obligation of returning the פקדון. However in this case of האם השאלתיך ספק לי we are not sure if there ever was an obligation, therefore there is no need for a שבועה. [This is similar to the difference between פרעתיך יודע אם where all agree that the לווה is חייב or פרעתיך איני יודע where the הלכה is that the לווה is פטור.] In our case (of שכורה מתה והלה אומר איני יודע) we are not certain that there is any obligation, for if שכורה מתה the שוכר is פטור and there is no reason to assume that שאולה מתה. [We are assuming as was stated in the previous ביום that the משאיל concedes that it was נאנסה.]

certainty that שאולה מתה, the שוכר **would not** be required to **swear**,⁴ **unless** he would need to swear **through**⁵ a גלגול שבועה. Otherwise there is no שבועה.

Summary

There is no obligation to swear שבועה השומרים if there is no clear indication that the שומר has a clear liability.

Thinking it over

The תורה requires a שבועה השומרים only by claims of נאנסו (or נגנבו by a ש"ח). There is no source for any other שבועה (where we are not sure whether שכורה מתה or שאולה מתה). What is תוספות question that there should be a שבועה here?!⁶ What שבועה would this be?!

⁴ This may be a proof to תוספות answer that since we see that even by a טענת ברי there is no requirement to swear; this proves that the שבועת השומרים is only if we know with certainty that there is an obligation on the שומר; however since we cannot ascertain that it was שאולה מתה there is never an obligation to swear. See עב סקמ"ב for a novel interpretation..

⁵ See the גמרא on צח,ב.

⁶ See footnote # 1.