

לא מבעיא שומר חנם שמסר כולי –

There is no doubt if an unpaid watchman transferred, etc.

Overview

ר"א ruled that if a שומר transferred his deposit to another שומר, the original שומר retains his status. He is פטור for any loss that he would have been פטור had he not transferred it. This rule is certainly valid if a ש"ח transferred his deposit to a ש"ש, wherein he increased the level of שמירה. Our תוספות will explain what is meant that the (חנם) שומר is פטור.

פירוש¹ דפטור אם נגנבה או נאבדה –

The explanation of this ruling (that if a ש"ח transferred it to a ש"ש then the ש"ח is (certainly) פטור), is **that the ש"ח is פטור if it was stolen or lost** (from the ש"ש) -

ומיהו שומר שכר כי משלם משלם לבעלים –

However concerning the ש"ש, **when he pays** (for a ש"ש is liable for גניבה), **he pays to the owners** and not to the ש"ח (even though the ש"ח hired him and is paying him for guarding the deposit) -

כדאמרין בהמפקיד (ב"מ לו,ב) דהלכה כר' יוסי² –

As the גמרא rules in פרק המפקיד that the law is according to ר"י -

דאמר אין הלה עושה סחורה בפרתו של חבירו:

Who maintains that this one (the (חנם) שומר) **cannot make a** (profit from a) **business with his friends** (the owner's) **cow**. The ש"ח cannot collect the money from the ש"ש for himself, at the expense of the owner. The monies that the ש"ש pays go to the owner of the cow.³

Summary

If a ש"ח transferred a פקדון to a ש"ח and it was lost or stolen; the ruling (according to ר"א) is that the ש"ש is פטור and the ש"ש pays the owner.

Thinking it over

1. Why cannot תוספות say that we are discussing⁴ נאנסה; in which case both are פטור, and we need not be involved with the מחלוקת of ר"י ורבנן?

¹ Perhaps תוספות is negating that he is not פטור if the ש"ש was פושע. In such a case the ש"ח will be חייב; since he would have been חייב if he was the פושע. See רש"י ד"ה שומר שמסר.

² The משנה there (לה,ב) states that if renter (שוכר) lends out his rented cow and it died באונס; the חכמים maintain that the borrower (שואל) pays the renter (for a שואל is חייב באונסין), and the renter is exempt from paying the owner (for a שוכר is פטור באונסין). The renter profits and the owner loses. ר"י argues and maintains that the borrower pays the owner directly; the renter cannot profit at the expense of the owner.

³ See 'Thinking it over # 2.

⁴ The concluding case of פטור לש"ח שמסר לש"ח פטור (see רש"י ד"ה אלא) is discussing נאנסה.

2. We can seemingly differentiate between the *מחלוקת* of ר"י ורבנן which is in a case of a ש"ש who gave it to a שואל, and our case where a ש"ח gave it to a ש"ש. When the ש"ח gave it to a ש"ש, the ש"ח is paying the ש"ש for the שמירה (however when a ש"ש transfers it to a שואל, the ש"ש is not paying for it); it is possible that in this case, even ר"י would agree that the payment goes to the ש"ח and not to the owner. Why does תוספות assume that even in this case, ר"י would maintain that the ש"ש pays the בעלים?⁵

⁵ נח"מ See.