

כגון שקבל עליו שמירת גופו כולי –

For instance; he accepted upon himself to protect it, etc.

Overview

The גמרא states that by שומרים if the animal they are guarding is involved in damages, the rule is that a תם pays a ח"נ and a מועד pays a נ"ש. The גמרא concludes that the ברייתא is discussing a case where the borrowed ox damaged the borrower's ox.¹ The reason the משאיל is liable to pay is because the ברייתא is discussing a case where the שואל only accepted גופו שמירת, but not נזקיו. Our תוספות will explain why the גמרא did not offer the opposite option.

איפכא² לא מצי למימר כגון דאזקיה תורא דשואל לתורא דמשאיל –

The גמרא could not have said the opposite; 'for instance that the borrower's own ox damaged the ox which was lent and we are discussing a case -

וכגון שקבל עליו שמירת נזקיו ולא קבל עליו שמירת גופו –

Where for instance the שואל accepted upon himself to prevent the ox from damaging others, but the שואל did not accept upon himself to protect the lender's ox from being damaged.' Therefore the שואל would be required to pay (only) a ח"נ if his ox was a תם.³ The reason the גמרא does not offer this option, is -

דמילתא דלא שכיח הוא –

because it is uncommon that one lend his animal under such conditions; where the שומר is only liable for שמירת נזקיו and not liable for שמירת גופו.⁴

anticipates a contradiction to the previous assumption:

ואף על גב דבהכיר בו שהוא נגחן אמרינן סוף [פרק שור] שנגח ד' וה' (לקמן מה,ב) –

And even though, concerning the case where the שומר חנם recognized that the ox he was offered to watch is a goring ox, רבא states in the end of פרק שור שנגח ד' וה' that -

סתמא דמילתא דלא אזיל איהו ומזיק אחריני קביל עליה –

The general assumption is that this שומר חנם accepts upon himself to prevent this goring ox from going and damaging others, however the שומר -

דאתו אחריים ומזיק ליה לדידיה לא קביל עליה –

¹ In the case of the other three שומרים, the ברייתא can be discussing a case where the שומר of the שור of the שומר damaged the שור of the בעלים and the שומר pays a ח"נ because it is an אונס (as far as שמירה is concerned). However a שואל is חייב (even) באונסים; therefore it is necessary to discuss it where שמירת גופו only.

² See 'Thinking it over' #'s 1&2.

³ The משאיל cannot claim you are responsible (even) for אונסין, for the שואל can reply, 'I specifically excluded myself from being liable for damages your ox.' The שואל is liable as a מזיק, not as a שומר.

⁴ An owner (of an animal) is more concerned that he receives his animal back intact; than being concerned that his animal may cause damage. (See footnote # 7.)

does not accept upon himself the responsibility that other oxen should not come and gore the designated ox⁵. It is evident from that גמרא the exact opposite of our assumption here; that a שומר is more prone to guard that the ox should not damage, than he is likely to guard that the שור נגחן should not be damaged.⁶

responds; that even though that by a ש"ח, there is this likelihood, nevertheless -
בשואל לא שייך למימר הכי –

By a שואל it is not possible to assume so; that he should not be liable for the ox being damaged -

דמסתמא שואל קבל עליה שמירה מעולה:

For the assumption is that a שואל accepts upon himself a superior guarding; meaning that the owner will certainly require that the שואל guard against any damage befalling the borrowed animal.⁷

Summary

In the case of a שואל the owner is more concerned about שמירת גופו than שמירת נזקיו (even by a שור נגחן).

Thinking it over

1. asks why the גמרא does not discuss an opposite case. What would be gained by discussing the opposite case, as opposed to the present case?!⁸

2. What would be the חידוש if the גמרא would have established the case as תוספות asks?⁹

⁵ there (ד"ה וסתמא) רש"י point out that when one accepts שמירה for a שור נגחן he is only concerned about the ox damaging others; he does not entertain the thought that the שור נגחן will be damaged.

⁶ תוספות may be asking that let us establish our ברייתא in a case where the שומר recognized that it was a goring ox, and therefore the שומר accepted שמירת נזקיו and not שמירת גופו as רבא explains it there. See תוספות רבינו פרץ.

⁷ When a שואל is borrowing and using the animal, the owner is first and foremost concerned that no damage befall the animal, even if it is a שור נגחן (since it is being used); however when an animal (especially a שור נגחן) is being delivered to be watched by a ש"ח, the main concern is that the שור נגחן do no damage.

⁸ See מהרש"א (הארוך).

⁹ See מהר"ם שי"ף. The way the גמרא presently established the ברייתא is explained in the following תוספות ד"ה ולא.