

תיקנו משיכה בשומרין או לא –

Did they institute pulling by custodians, or not

Overview

רש"י posed a query; whether the חכמים instituted משיכה by שומרים, or not. רש"י explains¹ this query is regarding as to when the שומרים become liable for any mishap; is it from the time of משיכה (or earlier). תוספות disagrees with רש"י and offers an alternate explanation of this query.

הא לא מבעי ליה אי משעת משיכה [או משעת מלאכה] מתחייבים כל חד וחד כדיניה -

The query was not when each one of the custodians, becomes liable, according to his status, whether it is from the time of משיכה [or from the time he works with it]; meaning to become liable for their respective liabilities -

שומר חנם בפשיעה ושומר שכר בגניבה ואבידה ושואל באונסין -

The unpaid custodian, for negligence; the paid custodian, through being stolen or lost; and the borrower, even by unavoidable accidents; there was no such query -

דפשיטא דמשעת משיכה מתחייבים דאם לא כן מאימתי² -

For it is obvious that the are liable from the time of משיכה, for if they are not liable from then, from when else should they be held liable -

דבה שואל (בבא מציעא דף צח,ב ושם) תנן אם אמר לו השואל שלח ושלחה ומתה חייב³ -

For the משנה teaches in השואל, פרק השואל, “if the borrower said to the lender, “send the cow to me through my (or your) agent”, and he sent it and it died on the way, the שואל is liable -

ובגמרא⁴ אמר פרה במשיכה⁵ -

And the גמרא states that one becomes a שואל of a cow through משיכה -

ובשמעתין דשואל קורדום⁶ (שם צט,א) אמר אי לאונסים מאי שנא פרה דמשעת שאלה -

And in the גמרא regarding one who borrows an axe, the גמרא asks, if it is regarding the liability of a שואל for אונסים; why is the axe different from borrowing a cow where the שואל is liable from when he borrowed it; indicating that the גמרא

¹ בד"ה תיקנו.

² By a ש"ח and a ש"ח who are forbidden to do any work with the animal, they are certainly חייב from the time of משיכה, for there is no other time, so presumably since they are חייב משעת משיכה, the same should apply to a שואל (and a שוכר).

³ We see that the liability of a שואל began when there was a משיכה, by the agent, and before he did any work with it.

⁴ ב"מ צד,ב.

⁵ It follows that if he becomes a שואל through משיכה, so at that point he becomes liable for אונסין.

⁶ הונא stated there that if one borrowed an axe and chopped with it, he acquired it. The גמרא is asking what is the relevance of this ruling that he acquired it

assumes that the liability begins by משיכה, before they start using the borrowed item –

In summation; תוספות maintains there was never a doubt that the שומרים are responsible for their respective liabilities from the time of משיכה, even if they did not do any work at all.

תוספות offers his explanation:

אלא אומר רבינו יצחק דמבעי ליה בשואל ושוכר⁷ אי מצי משאיל ומשכיר למיהדר ביה -
Rather, says the ר"י that his query is regarding a borrower or a renter, if the lender or the owner can retract from their commitment -

אפילו משך עד שיתחיל במלאכה או לא -

Even after the שואל or the שוכר made משיכה, as long as they did not begin working with the item, or not -

דאיכא למאן דאמר⁸ גבי שואל קורדום מחבירו ביקע בו קנאו לא ביקע בו לא קנאו -
For there is one who maintains regarding one who borrows an axe from his friend, where the ruling is if the שואל chopped with the axe, he acquired it, if he did not chop with it, he did not acquire it, meaning -

ומצי משאיל הדר ביה וכן בפרה עד שיעשה בה מלאכה -

That the lender can retract, and similarly by borrowing a cow that the משאיל or משכיר can retract until the שואל or שוכר works with it, even after there was משיכה; this is the query of אממר, from when can the owner no longer renege on his commitment -

ופשיט ליה ממתניתין דנתנו לבכורות בנו דקתני הגביהו או שהוציאו מרשות בעלים ומת חייב -
And the גמרא resolved this query from our משנה of 'he gave it for his firstborn son', where it stated in the סיפא, 'if he picked it up or he took it out of the domain of the owners, and the animal died, the thief is liable; the גמרא infers regarding הגביהו - או שהוציאו

מאי לאו שומר ומדמחייב גנב אמשיכת שומר שמע מינה דמשיכה גמורה הוא -
‘Are we not referring to the custodian’; that he took it out מרשות בעלים, and תוספות continues to explain the proof, and since the thief is liable to pay, because of the משיכה of the שומר, this proves that it is a valid משיכה to the extent -

שאין יכול לחזור בו שאם היה יכול לחזור בו לא היה מתחייב במשיכתו⁹ -

That the גנב who gave it to the שומר cannot retract from their agreement, for if the

⁷ By a ש"ח or a ש"ש there is no query, for the owner can certainly take it back whenever he wants. The query is regarding a שוכר or a שואל who made an agreement with the owner to either rent or borrow the item (for a specific time). The question is whether the owner can renege on this agreement even after they made משיכה, as long as they did not begin working with the item.

⁸ (see footnote # 6). רב הונא

⁹ Because it still did not leave his domain. See מפרשי התלמוד footnote # 177-182.

– שומר of the **משיכה** is able to retract, he would not be liable on account of the **גנב**

גמרא. We have resolved at this point that the owner cannot retract after there was **משיכה**. The continues:

ומשני¹⁰ לא גנב שהיה גנב מושכה מבית שומרים ותנא גנב שגנבו מבית שומרים -

And the גמרא rejected this proof; saying, 'no', it was not the שומר who took it out מרשות בעלים, but rather the thief was pulling it out from the house of the שומרים, and the reason the משנה teaches two cases where the גנב removed it, is because the משנה wants to teach us (also) the case where he stole it from the house of the שומרים, in addition to the רישא where he stole it from the owner's house -

¹¹ responds to an apparent difficulty: תוספות

ומיירי שלא נתן לבכורות בנו ולבעל חובו לגמרי דאם כן הוּו בעלים ולא שומר¹² -

And we are discussing a case where the owners did not give away the animal for בכורות or to his creditor, completely, for in that case they would be the owners, not the שומר -

אלא אפותיקי בעלמא עשה להם שאם לא יפרע עד יום פלוני שיהא קנוי להם -

But rather the גנב mortgaged the animal to them, that if he will not pay up by this date, it will belong to them as payment; therefore, they are considered שומרים -

¹³ comments: תוספות

ורב הונא¹⁴ דאמר בפרק השואל דלא ביקע בו מצי משאיל הדר ביה הוה דחי הכי¹⁵ -

And ר"ה who ruled in פרק השואל that if the borrower did not as of yet chop with

¹⁰ It was necessary for תוס' to cite this refutation of the proof (even though this refutation was rejected by אשי, because of the difficulty in understanding this refutation according to תוספות, as explained shortly (footnote # 11), and also רב הונא may rely on this proof (see text by footnote # 14).

¹¹ The ספא of the משנה (which we are now discussing) states, חנם לשואל לנושא שכן, ולשוכר והיה מושכו ומת ברשות הבעלים פטור הגביהו או שהוציאו מרשות הבעלים ומת חייב גמרא just refuted the proof from the רישא by saying that it was the גנב who was מרשות בעלים. So even though it seems like a repetition of the רישא (where the גנב took it out מרשות בעלים also), the גמרא explains that in the ספא he teaches us a new law in a case where the גנב took it out מרשות שומרים (and not מרשות בעלים like in the רישא). [Note: according to this answer of the גמרא we will need to learn that נתנו לבכורות בנו או לבע"ח means that the בעלים gave it to them, not the גנב. This is not the way in which תוספות preferred to learn the משנה. See previous נתנו ד"ה תוס'.] In any event this answer is acceptable regarding the שומרים, however in the first two cases of לבע"ח או לבע"ח that the owner gave it to them, and the גנב stole from them that is not a case of מרשות שומרים, but rather מרשות בעלים (the כהן or the בע"ח, who received the animal as payment). תוספות responds to this difficulty.

¹² So, we could not say that תנא גנב שגנבו מבית השומרים. See previous footnote # 11.

¹³ According to the conclusion of our גמרא, the ruling is (based on the proof of our משנה) that once there was משיכה the owner can no longer retract from his agreement with the שואל ושוכר. The presents a problem for רב הונא.

¹⁴ See footnote # 6.

¹⁵ He will maintains that it was the גנב who was (מרשות בעלים) מוציא, but not the שומר.

the axe, the lender can renege, he (ר"ה) will reject the proof from our משנה in this manner -

ולא חייש לפירכא דבסמוך מה לי גנב מרשות שומר מה לי גנב מרשות בעלים -

And ר"ה is not concerned with the refutation of רב אשי shortly, 'what difference is there whether he stole it מרשות שומר or whether he stole it בעלים'; so why repeat it! רב הונא however, maintains there is a need for the משנה to mention both cases -

An alternate solution; even if ר"ה agrees with the refutation of רב אשי, nevertheless there is no difficulty for רב הונא -

ובהאיש מקדש (קדושין דף מז,ב ושם) איכא תנא כרב הונא -

For in האיש מקדש there is a תנא who agrees with ר"ה, for he maintains -

דאפילו במלוה יכול לחזור כל זמן שלא הוציאו כל שכן שאילה¹⁶ -

That even by a loan, the lender can retract as long as the borrower did not spend the loan money, so the owner can certainly retract by שאילה -

וג' מחלוקות בדבר דלרב הונא לא תקנו משיכה בשומר¹⁷ -

And there are three differing views in this matter; for according to ר"ה they did not institute משיכה by a שומר, and the owner may retract as long as the item was not used yet -

ולרבי אלעזר תקנו כדקאמר התם¹⁸ ופליגא דרבי אלעזר -

And according to ר"א the חכמים instituted משיכה by שומרים, as the גמרא states there, 'and ר"א argues with ר"ה' -

ולרבי אלעזר נמי מדאורייתא יכול לחזור -

And even according to ר"א, the owner can retract מה"ת, even after the משיכה -

אלא שחכמים תקנו דלא מצי הדר ביה משעת משיכה¹⁹ -

However, the חכמים instituted that once there was משיכה, the owner can no longer retract -

ועוד קאמר התם²⁰ ופליגא אדרבי אמי -

And the גמרא also states there that ר"ה argues with אמי -

דאמר רבי אמי המשאיל קורדום של הקדש לחבירו מעל²¹ וחבירו מותר לבקע בו לכתחילה -

For ר' אמי ruled if one lends an axe, which belonged to הקדש, to his friend, the

¹⁶ Regarding a מלוה, the לווה, obviously, does not return the same money which was lent to him, so this means that the money belongs to the לווה, and nevertheless the מלוה can retract the loan and get the money back, even though the לווה owns it, as long as it was not spent, so certainly by שאילה, where the item never belongs to the שואל, and he must return the item which he borrowed, the owner can surely retract from the agreement, if the item was not yet used.

¹⁷ This is the first opinion.

¹⁸ ב"מ צט,א.

¹⁹ This is the second opinion.

²⁰ See footnote # 18.

²¹ Once one is (בדק הבית) מועל בהקדש, the item becomes חולין, therefore the borrower may use it.

lender committed מעילה, and the friend (the borrower) may chop with this axe even לכתחילה. From that גמרא -

משמע דסבר דקנה מדאורייתא²² דאי מדרבנן ומעל משום דמדרבנן אין יכול לחזור -

It seems that the borrower acquired it מה"ת through the משיכה, for if he is קונה it only מדרבנן (like the view of ר' אלעזר), and the reason the משאיל is מעל, is because he cannot take it back; so, it is considered as if it left his רשות -

כמו נתנה לבלן²³ בפרק הזהב (בבא מציעא דף מח, א ושם) -

Like the case of 'נתנה לבלן' in פרק הזהב -

אם כן הוי חומרא דאתי לידי קולא²⁴ דחבירו מותר לבקע בו לכתחילה:

In that case if will be a stringency, which will cause a leniency, since his friend (the שואל) will be permitted to initially chop with it.

Summary

There was no doubt by אמימר that all שומרים are liable from the time of the משיכה. The query was regarding a שואל ושוכר; at what point can the owner no longer retract from their agreement; משעת משיכה or from when they began to work with it. There are three opinions; 1) משעת משיכה מה"ת, 2) משעת משיכה מדרבנן, 3) משעת מלאכה.

Thinking it over

According to תוספות the query of אמימר is whether or not the owner can retract from his commitment to the שואל or שוכר, after the משיכה, as long as they did not begin working with the item.²⁵ Why should the law be different by a שואל ושוכר than from a buyer or a gift recipient, where once משיכה was made, no one can retract?!²⁶

²² This is the third opinion.

²³ This means he gave money of הקדש to the bathhouse attendant in order that he should wash him. See the גמרא there. See the גמרא (נתנו לבלן) that this piece (קונה מדרבנן) should be at the end of תוספות, as support for תוספות contention that עיי"ש. קונה מדרבנן, it does not matter if you are קונה מה"ת, if you are not קונה מה"ת.

²⁴ If we assume that התורה there is no משיכה לשומרים, so מה"ת it never left the רשות of the משאיל, therefore there was no מעילה, and the ax is still הקדש, so the שואל is not permitted to use it; but now that you are being מחמיר on the משאיל and saying that he committed מעילה, but by doing that you are מקיל on the שואל by permitting him to use it (when מה"ת he is not permitted to use it). This proves that according to אמי the שואל is מה"ת.

²⁵ See footnote # 7.

²⁶ See נחלת משה.