

**And one of them was borrowed to him**

**ונשאל לו אחד מהן –**

## **OVERVIEW**

The גמרא queried; what is the law in a case where he borrowed a cow from two partners and one of the partners was working for the שואל at the time of the שאילה: do we require that the entire owner be נשאל (in order to consider it שמירה בבעלים), and since the entire owner (both partners) was not נשאל he is חייב, or since half the owner was נשאל, he should be exempt from paying half.

תוספות asks:

**תימה מאי קמיבעיא ליה דכיון דאם נשאלו לו כל הבעלים פטור מהכל השתא<sup>1</sup> יפטור מחציו -**  
**It is astounding! What is the query; for since if all the owners would be נשאל to him, he would be פטור from everything, so now he should be פטור from half!**  
**כדאמרין<sup>2</sup> במרובה (בבא קמא דף ע"ב, חמשה בקר<sup>3</sup> אפילו חמשה חצאי בקר -**  
**As רב נחמן stated in פרק מרובה that when the תורה writes חמשה בקר it means even five half-בקר.**

תוספות answers:

**ויש לומר דהתם סברא הוא שישלם לפי מה שגנב<sup>4</sup> -**  
**And one can say; that there (by גנב וטבח) it is logical that he should pay according to what he stole -**  
**אבל שאילה בבעלים אין סברא לפטור והוי כחדוש<sup>5</sup> ואין לך בו אלא חדושו:**  
**However there is no logic that שאילה בבעלים should be exempt from paying, so it is a novelty (a חידוש), and you may only have the חידוש as it is written; the entire owner, but not half an owner; the rule of שמירה בבעלים does not apply to half an owner.**

## **SUMMARY**

<sup>1</sup> It should be considered as if he owes each partner half, and he should be exempt from paying the partner who was נשאל עמו.

<sup>2</sup> The case there is where one was גנב וטבח a שור which belonged to two partners, and he admitted to one of the partners that he was גנב וטבח, thereby freeing himself from paying the קנס of ד' וה' to this partner (since מודה בקנס מודה בקנס ר"נ ruled (in the conclusion) there that he needs to pay (the value of) five half-בקר to the other partner. We see that each partner is considered a separate half entity. תוספות asks that here too he should be פטור from paying half, since one partner was in his employ.

<sup>3</sup> (גניבה וטביחה ומכירה) חמשה בקר ישלם תחת השור reads שמות (משפטים) כא, לז.

<sup>4</sup> Therefore even though he does not pay to the partner whom he admitted to, nevertheless it is logical that he pay the other partner, for he was גנב וטבח (the חידוש there may be that he does not pay the one whom he admitted to).

<sup>5</sup> There is no logical reason why one is פטור if it was שאילה בבעלים (especially since we maintain that היה עמו בשעת (שאילה א"צ להיות עמו בשעת שבורה ומתה). See 'Thinking it over' # 1.

We cannot use logic to resolve a law which is a חידוש!

### **THINKING IT OVER**

1. ואין לך בו אלא חדושו and חידוש is a שאלה בבעלים of פטור answers that the תוספות.<sup>6</sup> Seemingly the rule of 'ד' וה' is also a חידוש, and nevertheless we say בקר חצי בקר; what is the difference between the חידוש of שמירה בבעלים and the חידוש of 'ד' וה'?!<sup>7</sup>

2. Regarding a שואל the תורה writes<sup>8</sup> בעליו אין עמו שלם ישלם. Why did not רמי בר חמא pose his question in the opposite manner, since the חיוב to pay is only when בעליו (עמו), what is the rule if only one of the שותפין were עמו (but the other was עמו), is he completely פטור since not all the בעלים were עמו (only one was עמו) or is he חייב for half. Instead of asking is he פטור from half (or חייב for all), the question could have been is he פטור from all (since it was not עמו completely) or חייב for half.<sup>9</sup>

---

<sup>6</sup> See footnote # 5.

<sup>7</sup> See תוס' ר"פ and רש"י ש.

<sup>8</sup> שמות (משפטים) כב, יג.

<sup>9</sup> See מהרש"א.