

Why; it is guarding with the owner

אמאי שמירה בבעלים היא –

Overview

ruled regarding partners that each one is considered as a שומר to the other; meaning that each partner is liable¹ for the assets of their partnership if it was lost or stolen when it was in the possession of one of the partners.² The גמרא asked why should they be liable since this is a case of שמירה בבעלים.³ Our תוספות qualifies and clarifies this question.

פירוש⁴ אם התחילו שניהם לשמור יחד⁵ -

The explanation as to when it is considered שמירה בבעלים is if they both began to guard (the items of their partnership) **simultaneously**, so that -

כל אחד בשעה שהוא משמר חלק חבירו חבירו נמי משמר לו חלקו⁶ -

Each one of the partners, at the same time that he guards his partner's share, his partner is guarding his share

ואף על פי שאין עמו במלאכה בשעת אונס⁷ -

And even if the other partner was not in his employ at the time of the accident -

כיון שהיה עמו בתחילת שמירה בעליו עמו קרינן ביה⁸ -

Nevertheless **since** the partner was with him (in his employ) at the beginning of the guarding, we call it בעליו עמו, and he is פטור –

תוספות proves this point:

כדתניא (בבא מציעא דף צו,א) היה עושה עמו בשעת שאלה -

¹ A שומר (a paid custodian) is liable to pay for the גניבה ואבידה (if the item he was watching was lost or stolen).

² The partner is liable (even though he is not receiving payment), since his partner will also watch the items (another time; see רשב"ם מג,ב ד"ה ונעשין). This is considered payment to render him to be a ש"ש. This means that if \$100 worth of goods were lost, the שומר must pay his partner 50\$.

³ There is a rule which applies to the responsibility of all types of custodians that if the owner of the item was in the employ of the custodian, the custodian has no liability for the item which is by him. See כב,יד where שמות (משפטים) states, אם בעליו עמו לא ישלם, (if the owner is with him [in his employ] he need not pay).

⁴ Perhaps תוספות writes 'פירוש' to exclude the שמירה ד"ה רשב"ם ד"ה שמירה who writes בשעה שמעון מחלק שמעון בשעה וכיון שהיה ראובן משמר מחלק שמעון בשעה (see also the רשב"ם in footnote # 2).

⁵ Let us assume they own 20 pots in partnership. After they bought the pots each partner took half the pots to store them in their respective homes.

⁶ When partner # 1 (ראובן) is guarding the ten pots, half of these pots belong to שמעון, and at the same time שמעון is guarding half of his pots on behalf of ראובן, so ראובן is working for שמעון (guarding his pots), but שמעון is also working for ראובן by guarding s'ראובן pots (and vice versa). Therefore it is considered שמירה בבעלים.

⁷ When the item was stolen or lost from ראובן, at that time שמעון was no longer watching the other pots (perhaps they were sold already), nevertheless ראובן is פטור.

⁸ See (end of) footnote # 3.

As the ברייתא taught, if the owner was working for (with) the borrower, at the time of the borrowing⁹ -

אין צריך להיות עמו בשעת שבורה ומתה -

It is not necessary for the owner to be with him (in his employ) when the borrowed cow broke or died, for he is פטור regardless, since he was in his employ בשעת שאלה -
היה עמו בשעת שבורה ומתה צריך להיות עמו בשעת שאלה¹⁰ -

However. If **the owner was employed with the borrower at the time it broke or died,** that is not sufficient to exempt the שואל from paying, but rather **it is necessary that he be employed by the borrower at the time of borrowing –**

qualifies (that the שמירה must not begin simultaneously):

ואפילו¹¹ לא התחילו שניהם לשמור יחד¹² -

And even if both of them did not begin guarding simultaneously -

מכל מקום האחרון פטור שהראשון היה עמו במלאכה בשעה שהתחיל השני¹³ לשמור:

Nevertheless the last one to guard is פטור, since the first one was in his employ at the time the second one began to guard.

Summary

The פטור of בעלים בבעלים is if the owner was in the employ of the שומר when the שמירה began.

Thinking it over

According to תוספות that we require שמירה בבעלים at the beginning, why did the גמרא not answer the question of 'ואמאי שמירה בבעלים הוא', that we are discussing a case where there was no שמירה בבעלים together at the same time, so one of them can be a ש"ש?¹⁴

⁹ The פטור of בעליו עמו (see footnote # 3) is written regarding a שואל (a borrower) specifically, however the גמרא derives that it applies to all the שומרים i.e. שומר שכר ושוכר. i.e. שומר חנם, שומר שכר ושוכר.

¹⁰ The same applies here by the שותפין as long as they both started guarding simultaneously, it is considered שמירה בשעה גניבה ואבידה, regardless what the situation was בבעלים.

¹¹ See 'Thinking it over'.

¹² was guarding and שמעון was not guarding yet.

¹³ began guarding first (so he is in the employ of שמעון) at 8:00am and שמעון began guarding at 1:00 pm while ראובן was still guarding. Therefore שמעון is פטור מגניבה ואבידה, since ראובן (the [partial]owner was working for him when שמעון began his שמירה. However ראובן is חייב to שמעון for his loss since שמעון was not employed by ראובן, when שמעון began his שמירה.

¹⁴ See and footnote # 11.[Seemingly the conclusion of תוס' by writing פטור by תוס' explains the difficulty on שמואל who states ש"ש זל"ז, נעשין ש"ש זל"ז, which indicates that there are both ש"ש, on which the גמרא asks that they cannot both be ש"ש, since it is שמירה בבעלים for at least one of them.]