

## They are testifying against me now

## השתא הוא דקמסהדי בי –

### OVERVIEW

The גמרא states that if we maintain גברא לייעודי, if the testimony regarding the three נגיחות of the ox were delivered in one day the owner will not be required to pay a נ"ש for the following נגיחות, since he can claim, 'I was only warned this one time'. נגיחות תוספות discusses the status of the ח"נ he pays for the future נגיחות.

תוספות asks:

**תימה לרבינו יצחק דמכל מקום קנס לא הוי אפילו למאן דאמר<sup>1</sup> (לעיל דף טו, א) פלגא נזקא קנסא -**  
**The ר"י is astounded! For notwithstanding that he may not be considered a מועד,**  
**nevertheless the חצי נזק he will pay for the future נגיחות will not be considered as a**  
**fine, but rather it will be a monetary payment<sup>2</sup> even<sup>3</sup> according to the one who**  
**maintains that the half-damage which a תם pays is a fine -**  
**דמכי נגח שלש נגיחות יצא מחזקת שימור<sup>4</sup> -**

**Foe once he gored three נגיחות the ox lost his presumption of being guarded.**

תוספות answers:

**ונראה לתרץ דאין חצי נזק חלוק כיון דהוי קנס בחד דוכתא הוי קנס בכל דוכתי -**  
**And it seems that the answer is that we cannot differentiate in the payment of**  
**ח"נ; so since in one place it is a קנס (by a 'regular' תם), it is a קנס in all instances -**  
**כדאשכחן גבי שלשים של עבד<sup>5</sup> דאפילו העבד שוה שלשים לא פחות ולא יותר -**

<sup>1</sup> Previously (on טו, א) there is a dispute whether the half נזק which a תם pays is monetary (the view of רב פפא), or it is punitive (לאו בחזקת שימור קיימי). ר"פ maintains that an ox is not considered guarded (רב הונא בריה דרב יהושע) and therefore by all rights the owner should pay a נ"ש, but the תורה took pity on the owner for the first three נגיחות and allowed him pay only a ח"נ. However ר"ה בד"י maintains that an ox is בחזקת שימור קיימי, and therefore the owner should not pay anything, but the תורה imposed this fine of a ח"נ to encourage the owner to provide additional guarding for his animal. The difference whether it is ממון or קנס is in a case where the owner admitted that his ox gored (when it was a תם). If פלגא נזקא ממונא he has to pay, however if פלגא נזקא קנסא, the rule is פטור. Our Tosfos argues that in this case where we know he gored three times already, so even though he is not considered a מועד (if we maintain גברא לייעודי), nevertheless the ח"נ will be considered ממונא according to everyone, even the מ"ד who maintains the by a (regular) תם it is קנסא.

<sup>2</sup> The question of תוספות is that the גמרא there (טו, ב) states that (even according to the קנסא פלגא נזקא קנסא) there is a case where פלגא נזקא ממונא and that is by צרורות. The inference from that גמרא is that it is only by צרורות that פלגא נזקא ממונא, but according to תוספות question there is another case by קרן where פלגא נזקא ממונא, namely in this case where the (three) עדים came בבת אחת. See מהר"ם. See 68 # אצור מפרשי התלמוד and onwards for alternate explanations.

<sup>3</sup> See 'Thinking it over' # 1.

<sup>4</sup> The only reason ר"ה בד"י maintains קנסא פלגא נזקא קנסא is because חסם שוורים בחזקת שימור קיימי (they are docile by nature); however this ox has proven that he is not בחזקת שימור.

<sup>5</sup> The payment of שלשים של עבד is deemed a קנס since the same amount is paid regardless of the value of the עבד. If it would be ממון, the payment would be commensurate with the value of the עבד.

**As we find regarding the thirty שקלים that need to be paid to the master if the ox killed a slave (עבד כנעני), that even if the slave is worth exactly thirty שקלים, no less and no more<sup>6</sup> -**

**מכל מקום הוי קנס ואי מודה ביה מיפטור:**

**Nevertheless it is a קנס payment, so if the master admits that his ox killed the עבד, he will be exempt** from paying the עבד של שלשים, since מודה בקנס פטור. The same is true by קרן that all payments of ח"נ are always deemed to be a קנס, regardless whether in a particular case (as ours) the ox is not deemed to be שימור.

### SUMMARY

Every ח"נ of קרן (according to the נזקא קנסא) as well as every עבד של שלשים is considered a קנס, even if there is reason to consider it ממון.

### THINKING IT OVER

1. קנס<sup>7</sup> מ"ד פלגא נזקא קנסא writes that 'even' according to the תוספות. What does תוספות mean with the word 'even'; the question is only according to the ח"נ (obviously the one who maintains ממונא נזקא קנסא it certainly will not be a קנס)?!<sup>8</sup>

2. Seemingly the comparison of ח"נ to עבד does not seem appropriate. We know that by an עבד one is required to pay שקלים ל' regardless of the value of the עבד. It is therefore understood that this payment is a קנס. The fact that one עבד is worth ל' does not change the purpose of the payment.<sup>9</sup> However here the reason the ח"נ is a קנס is only because the ox is שימור, once however we know the ox is not שימור, how can we say it is a קנס, he has to pay ממון because he is not בחזקת שימור?<sup>10</sup>

---

<sup>6</sup> In this case it would seem to be a monetary payment, for he is paying the owner the full value of his עבד. See 'Thinking it over' # 2.

<sup>7</sup> See footnote # 3.

<sup>8</sup> See # 71. אוצר מפרשי התלמוד.

<sup>9</sup> See footnote # 6.

<sup>10</sup> ביאור ראובן לר' ראובן אגושביץ.