

Let these last ones say, etc.

לימרו הנך בתראי וכולי –

OVERVIEW¹

The גמרא asked why are the בתראי liable for the הזמה, they can claim we were not aware that we are making the ox into a מועד. Our תוספות explains their claim and why it does not apply to the קמאי.²

עדים³ explains that the question is only from the third set of

מקמאי לא הוי מצי למפרך דמוכח מילתא דלייעודי קאתו מדהמתינו⁴ עד נגיחה ג' -

The גמרא could not have asked from the first two sets of עדים, for it is evident that they came to make him a מועד, since they waited until the third נגיחה and did not come to testify in the previous two days when they saw the נגיחות.

תוספות asks:

ואם תאמר מאי קאמר מנא ידעינן דכל דקאי בבי דינא כולי -

And if you will say; what do the עדים mean when they say, 'how do we know that whoever is standing in the בי"ד, etc. is planning to testify regarding this ox'; this is not a valid question; for -

לוקמא כגון שהיו אחרונים במעמד כשהעידו כת ראשונה⁵ -

Let us establish this ברייתא in a case where for instance the last set of עדים were present when the first set testified, so they can no longer claim, we did not know, etc. –

תוספות answers:

ויש לומר דעל כרחך איירי כשהעידו כת שלישית תחלה -

And one can say; that perforce we are discussing a situation where the third set testified first -

דאי כשהעידו לבסוף אם כן תקשה מקמאי דדלמא לחיוביה פלגא נזקא קאתו -

For if the third set testified last, then there will be a difficulty from the first sets; why are they חייב, for perhaps they only came to obligate the owner to pay

¹ See 'Overview' to the previous קמאי הנך ולימרו הנך בתראי.

² תוס' ד"ה ולימרו הנך בתראי (who interprets the גמרא that the third ניזק brought all the three sets of עדים [for now the owner will have to pay him a נ"ש for the third נגיחה; in accordance with רש"י]) explains that the first two sets of עדים certainly only came to make him a מועד, since it was the third ניזק who brought them; there is no other purpose for their testimony.

³ תוספות cannot use רש"י's explanation (see footnote # 2), for according to תוספות the third ניזק does not receive a נ"ש so he did not bring the first two sets of עדים (for they serve no purpose to him); they came on their own, therefore there is no proof that לייעודי תורא בעי. [It certainly could not have been the fourth ניזק who brought them, because there would still not be any נ"ש payment unless he was warned first.]

⁴ See later in this תוספות (footnote # 7) for a clarification of this proof.

⁵ See 'Thinking it over' # 2.

a - ח"נ

דליכא הוכחה במה שהמתינו עד נגיחה שלישית -

For there is no proof from the fact that they waited until the third

דשמא לא היה להם פנאי לבא לבית דין להעיד -

For perhaps they had no time to make it to בי"ד and testify; the only way we can be sure that they came to make him a מועד, is -

אלא כשהמתינו⁶ עד כשהעידו כת שלישית⁷ אז מוכחא מלתא דלייעודי קאתו:

Only if they waited until the third set testified, then it is evident that ליעודי קאתי.

SUMMARY

The קמאי cannot excuse themselves, since they came after the third set testified; however the third set can excuse itself since they could have not been aware of the previous sets.

THINKING IT OVER

1. The תוספות seems to be going in circles. We cannot ask מקמאי because they testified after the בתראי; but why do have to say this, let us say the קמאי testified before the בתראי and the question indeed is from the קמאי?⁸

2. תוספות previously stated⁹ that unless we know for sure that they are coming to make him for a מועד (as the גמרא shortly concludes [but does not know yet]), they can always claim, 'we came to make him pay a ח"נ'. Therefore what is תוספות question that let us establish the case where the third set was there when the first sets testified,¹⁰ nevertheless they can claim we only wanted to make him pay a ח"נ, we did not know that he would gore a fourth time?!¹¹

⁶ They were in בי"ד when the third set came to testify, and they chose to wait until that testimony concluded; this certainly indicates that ליעודי תורא באו, otherwise they should have testified first.

⁷ It will be necessary to say that when תוספות initially wrote 'מדהמתינו עד נגיחה ג', he meant until the third set will testify on ג' נגיחה. See footnote # 4.

⁸ See אוצר מפרשי התלמוד # 23 & 24.

⁹ See footnote # 5. [TIE footnote # 43]. כגב, (כד, א) תוס' ד"ה ולא

¹⁰ See footnote # 5.

¹¹ See נחלת משה.