

במכירין בעל השור כולי –

Where they recognize the owner of the ox, etc.

OVERVIEW

ברייטא answered that the עדים cannot say we came only ח"נ¹, because the is discussing a case where the עדים know the owner but they do not recognize the goring ox.¹ There is a dispute between רש"י,² who maintains that this answer is only according to תוספות but not ליעודי גברא, and תוספות who will explain that this answer is both according to תוספות and ליעודי גברא.³

תוספות asks:

ואם תאמר אכתי מצו למימר לחיוביה פלגא נזקא קאתינן אקטן שבשורים -

And if you will say; the witnesses can still claim, we came to testify to obligate him to pay a ח"נ from the smallest of his oxen, even if they do not know which ox gored -

כדתנן בהמניה (לקמן דף לה, ב) גבי⁴ זה אומר קטן הזיק -

As we learnt in a משנה in פרק המניה regarding the case where this one said the smaller damaged –

תוספות answers:

ויש לומר דיכול לומר אחד מהם נאבד⁵ -

And one can say; that the owner can claim, one of my oxen was lost, and perhaps he caused the damage, and there is no ox to collect from.

תוספות offers an alternate solution:⁶

¹ מגופו A תם pays only, and if they do not know the goring ox there can be no payment מגופו.

² ד"ה ואין.

³ See the end of the previous תוס' ד"ה אלא [TIE footnote # 7].

⁴ The case there is where two oxen of the מזיק were chasing an ox of the ניזק, who was damaged by one of the oxen. The ניזק claimed that the smaller ox did the damage (and since he is a תם the ניזק may collect only the amount of his value [which is less than half the damage]), and the מזיק claims the larger ox damaged (and therefore he can collect the entire ח"נ); the rule is המע"ה and the ניזק can only collect from the smaller ox. Similarly here the עדים claim we know for sure that one of your oxen gored, therefore you must pay a ח"נ from the smallest of your herd. In any event the עדים can claim that we came to make him pay a ח"נ, but not to make him into a מועד.

⁵ The עדים cannot claim (if אין מכירין השור) that they came to be מחייב ח"נ (from his smallest ox), because (they know that) the owner can claim there is no ox to collect from. [The case in המניה however is when both oxen (the large and the small) are present.] See 'Thinking it over' # 2.

⁶ According to the מהרש"א, this following answer is according to the view of ליעודי גברא (and the גירסא is נגיחה [not הנגיחות as the ב"ה amends it]). According to ליעודי תורה, where they all came on the same day, we can say that the ox was lost after all three עדים testified. However if we maintain ליעודי גברא, the עדים came on three days, so seemingly the first עדים can claim we only wanted to make him pay a ח"נ from his smallest ox, and here we

אי נמי דנאבד אחד מהם אחר כל⁷ נגיחה⁸ -

Or you may also say; that one of them was lost after [each נגיחה] [all the נגיחות] -

תוספות asks:

ואם תאמר דכיון דאין מכירין את השור -

And if you will say; that since the עדים do not recognize the ox -

שלא אותו שנגח ראשונה לא זהו שנגח שניה ושלישית⁹ -

Perhaps the ox that gored the first time is not the same ox which gored the second and third time, so how can we say that the עדים intended to make him a מועד, if we do not know which ox gored?!

תוספות answers:

ויש לומר כגון שלאחר שהעידו כולם ראוהו והכירוהו שהיה עושה כל הנגיחות¹⁰ -

And one can say; that for instance, after all the three עדים testified, they saw the ox and they recognized him that he did all the three נגיחות.

תוספות asks:

ואם תאמר ליעודי גברא אין העדים שהעידו ביום ראשון יכולין ליעד -

And if you will say; if we maintain ליעודי גברא, the עדים who testified the first day cannot make him a מועד with their testimony alone, since they do not even recognize the ox, and he (may have) gored only once -

אלא שחוששין שמא יגח ב'¹¹ וג' וכירו -

The only way we can say that this first set of עדים intends to make him a מועד is (as previously said), that they anticipate that perhaps the ox will gore a second and third time and then all three sets of עדים may eventually recognize

seemingly cannot say that the ox was lost after all the נגיחות for by the first or second נגיחה it was not lost yet.

⁷ The owner can still claim that an ox was lost after each נגיחה, so the עדים can never claim we only wanted to be מהרש"א. This is according to the ח"נ a מחייב.

⁸ The ח"ה amends this to read הנגיחות (instead of נגיחה). According to the ח"ה, this answer disagrees with the first answer which states that since the owner could have claimed an ox was lost, the עדים cannot claim we came to make him pay a ח"נ. The second answer disagrees and states that we must be discussing a case where the owner actually claimed that one ox was lost (after all three נגיחות) therefore the עדים are not believed to claim we only wanted to make him pay a ח"נ.

⁹ This question of תוספות is not to be confused with the גמרא's question of ליה מייעדי. The גמרא is discussing how the בעלים received a warning since he does not know which ox to guard. The גמרא answers guard them all. תוספות is discussing how the שור becomes a מועד, and answers that they eventually recognized him.

¹⁰ In their original testimony they did not know who the ox is (therefore they are not coming ח"נ), but after all three testified, they then recognized the ox and told the owner and ב"ד that it is this ox. This answer is for ליעודי גברא; there will be a different explanation for ליעודי תורה as תוספות will shortly explain.

¹¹ The ח"ה amends this to read שנית ושלישית וכירוהו (instead of וג' וכירו).

him; if that is the case -

ומטעם¹² זה יכולים נמי לומר לחייבו חצי נזק באנו כשיכירו¹³ -

So for the same reason the עדים can also claim, 'we came to make him pay a ח"נ when we will recognize him!

In summation: The only reason we assume (according to ליעודי גברא) that all three כתי עדים are coming to make him into a מועד (even though that at the time of their testimony they did not recognize the ox and he only gored once or twice), is because the ox may gore in the future and they will recognize that it is the same ox and he will become a מועד; if we are assuming that they anticipate that (the ox will gore again and that) they will recognize the ox, then it is just as possible that they only came to make him pay a ח"נ when they will recognize the ox.¹⁴

לייעודי תורא continues that there is a difficulty even if we maintain

ואפילו כי אמרינן ליעודי תורא דמצינו למימר דמיירי כשהכירוהו¹⁵ עד שנגח שלשה נגיחות -

And even if we maintain ליעודי תורא (where there is a simpler method to explain how they can make him into a מועד without their anticipation that they will recognize the ox), **for we can say that it is a case where they recognized him by time he gored three נגיחות**, but they did not testify yet (when each כת saw the נגיחה) -

ולאחר שלשה ימים כשבאו להעיד נתערב בין שוורים אחרים הדומים לו¹⁶ -

And after these three days (on which the ox gored), **when the עדים came to testify**, this ox (whom they initially recognized) **got mixed up with other oxen who were similar to him** so they could not identify him -

או שכחו מה שור היה ואין מכירין אותו בשעת העדות דהשתא ודאי ליעודי קאתו¹⁷ -

Or the עדים forgot which ox it was that gored, so that they do not recognize him at the time of the testimony, so now in this case the עדים certainly came to make him a מועד -

ואף על פי שאין מכירין אותו ישלם נזק שלם כשיגח נגיחה רביעית -

¹² We initially said that since they do not recognize the goring ox, their intention was not to be מחייב ח"נ. However the only way they can intend to make him a מועד (if they do not recognize him), is if later they will recognize him; in that case they can still claim we only came to be מחייב ח"נ, when we will recognize him.

¹³ The כשיכירוהו amends this to read כשיכירוהו (instead of כשיכירו).

¹⁴ In fact it is more likely that they will recognize him, (to make him pay a ח"נ) than they will recognize him and he will gore more times (to make him a מועד).

¹⁵ All three עדים agreed that it was this one ox that gored three times. See אוצר מפרשי התלמוד # 43.

¹⁶ However according to ליעודי גברא we cannot give this example, for on the first day the first set of עדים testified that they do not recognize the שור, therefore the only way they can make him a מועד is by 'anticipating' that he will gore again and they will recognize him.

¹⁷ They cannot intend to make him pay a ח"נ, because when they testified they could not point out the שור. Their only intention could be to make this ox, which they all initially recognized and knew that it was the same ox, to become a מועד, as תוספות will immediately explain.

And even though they do not recognize the ox (so how could he pay a נ"ש), nevertheless the owner will pay a ג"ש, when it will gore a fourth נגיחה -

כרבי אחא דאמר בריש המוכר פירות (בבא בתרא דף צג, א ושם) בידוע¹⁸ שזה הרגו -

Like אהא ר' who said in the beginning of פירות, פרק המוכר פירות, it is known that this one killed him; the same will apply here. All this explains how we can explain the ברייתא according to the view that ליעודי תורא¹⁹.

In summation; according to ליעודי תורא it is not necessary to say that the three עדים are coming to make him a מועד (even though they do not recognize the ox), because of what they anticipate may happen in the future (that the ox will gore again and they will recognize the ox [as we said according to ליעודי גברא]), because here they are all coming together (not in three separate days as it is by ליעודי גברא) knowing that he gored three times and they already recognized the ox that it was the same one for all three times, therefore the next time his ox will gore we will assume that it is this one and he will have to pay a נ"ש. Nevertheless there is still a difficulty.

now concludes his question - תוספות

ומכל מקום אותם שהכירו²⁰ תחילה²¹ יכולים הם לומר לחייבו חצי נזק באנו כשיכירו²² -

But nonetheless those עדים that testified initially can still say, 'we came to make him pay a ח"נ when we will recognize him' -

דלייעודי גברא נמי לא מצי אמר אלא שחוששין שמא יגח שנים או שלשה ויכירוהו -

For as we said previously that according to ליעודי גברא they also cannot say we came now to make him a מועד, but rather there is the concern that perhaps he will gore a second and third time and the first עדים will recognize him, similarly according to ליעודא תורא, we can say they came to make him pay a ח"נ when they will recognize him.²³

¹⁸ ruled if there was a known wild camel in the herd and another camel was found killed next to this wild camel, it is assumed that this wild camel killed it. Similarly here, since we know that one ox of this herd is a מועד, when an ox from this herd gores we assume it is the מועד that gored and he will have to pay a נ"ש. See 'Thinking it over' # 2.

¹⁹ The advantage in explaining the ברייתא according to ליעודי תורא is that we do not have to say that the first עדים anticipated that there might be future נגיחות to make him a מועד (as we explained according to ליעודי גברא [see footnote # 12]), but rather they already knew when they testified in בי"ד that one ox gored three times. Nonetheless there is still a difficulty with ליעודי תורא as well, as תוספות continues to explain.

²⁰ The מהר"ם amends this to שהעידו (instead of שהכירו)

²¹ It is not logical to say that the third set of עדים (with whose testimony the ox becomes a מועד immediately), are testifying only to be מחייב him a ח"נ; however when the first two sets testify (even though they came on the same day [and they knew of the testimony of the other עדים (see footnote # 15 & 19)]), nevertheless when they testify, the ox is not a מועד yet, so they can still claim that they are coming לחייבו ח"נ in 'anticipation' that they will recognize him.

²² This should read כשיכירוהו (according to the הגהות הב"ח; not כשיכירו).

²³ This question on ליעודי תורא is only according to שיטת התוספות that the answers (including השור ואין מכירין השור) are explaining the ברייתא even according to ליעודי גברא. This means therefore that רבינא agrees to the concept that the עדים anticipate recognizing the ox later and therefore they intend to make him a מועד (otherwise how can he explain

In summation: we can still argue that the first two sets of עדים came only to be מחייב a ח"נ, when they will recognize him, as we said according to ליעודי גברא.

answers: תוספות

ויש לומר דאי לחייבו חצי נזק אתו לא היה להם להעיד כלל עד שיכירוהו -

And one can say; that if their intent is לחייבו ח"נ they should not testify at all until they recognize the ox, for nothing is accomplished now with their testimony -

אבל ודאי ליעודי אתו -

But rather they are certainly coming to make him a מועד, so they need to do that now even before they recognize the ox -

כי בין ליעודי תורא ובין ליעודי גברא צריכין להעיד קודם נגיחה רביעית -

Because whether we maintain ליעודי תורא or whether ליעודי גברא they need to testify before the fourth נגיחה -

דאין הבעלים מתחייבים עד שיודיעוהו תחילה ולכך צריכין למהר להעיד קודם הכרה -

Since the owners are not obligated to pay a נ"ש until they are previously warned, so therefore these עדים have to hurry and testify even before they recognize the ox, so that when the fourth נגיחה takes place the owner will be חייב.

וכן פירש רבינו חננאל דהך מתניתין בין ליעודי תורא בין ליעודי גברא ובעיין לא אפשיט²⁴ -

And the ח"ה also interpreted in this manner, that this ברייתא is both according to ליעודי תורא and ליעודי גברא and the query was not resolved whether ליעודי תורא or ליעודי גברא.

asks: תוספות

ותימה דלא משני שאין מכירין השור המנוגח -

And it is astounding! Why did not the גמרא answer that the עדים do not recognize the ox that was gored; so we cannot say לחייבו ח"נ; only to make him a מועד -

אי נמי שנגח שור של הפקר או של כנעני או שהעידו שנגח שוורים של עצמו -

Or it could have also answered that it gored an ownerless ox, or one belonging to a כנעני, or they testified that he gored his own oxen; in all these cases there is no payment, so the purpose of the testimony is to make him a מועד when he will gore an ox for which we can charge him.

answers: תוספות

ואומר רבינו יצחק דשמא אין העדאה מועלת אלא בפני חיוב -

the ברייתא according to גברא (ליעודי גברא), it follows therefore that they can just as easily anticipate recognizing the ox in order לחייבו ח"נ. [However if we maintain that רבינא is only answering according to תורא then there is no question, for perhaps רבינא does not consider the entire concept of 'anticipation'.]

²⁴ However according to רש"י that the answers are only according to ליעודי תורא, we have resolved the query that it is ליעודי תורא.

And the ר"י answered that perhaps a warning testimony is not valid unless there is an obligation to pay²⁵ (at least in principle) -

ולכך לא מצי למימר שאין מכירים השור המנוגח דאי אין מכירים שמא הוא דכנעני או דהפקר:
And therefore רבינא could not have said that they do not recognize the gored ox (where seemingly it would be a valid warning since in principle there is an obligation to pay if it belongs to a fellow Jew), **for if they do not recognize him, perhaps the gored ox belongs to a כנעני or it is הפקר** where in principle there is no obligation to pay, so the warning is not valid.

SUMMARY

The answer of רבינא (that מכירין בעל השור ואין מכירין השור) explains the ברייתא according to לייעודי גברא and לייעודי תורא. They cannot be coming to be מחייב him a ח"נ from the smallest of his herd, because he can say the animal that you testified about was lost. The ox becomes a מועד when they recognize him later. Nevertheless they cannot claim לחייבו ח"נ when we will recognize him, for then they should have testified after they recognized him; however they need to testify now to make him a מועד in order to warn the owner. A warning is valid only if the goring requires a payment.

THINKING IT OVER

1. תוספות explains in detail what the intent of the עדים was; whether to be מחייב ח"נ or make him a מועד, when they recognize him, etc. However the fact here is that these עדים are זוממין, they concocted this whole story, so obviously there were in collusion from the beginning to make him pay a נ"ש; there is no issue of recognizing an ox that never gored, no issue of anticipation; this was simply a frame up on part of the עדים, so of course they intended to do the worst harm possible and make his ox a מועד so he will pay a נ"ש!²⁶

2. How can תוספות say that when there is a fourth נגיחה we will assume it was that ox,²⁷ when תוספות previously said²⁸ that the owner can claim the ox was lost?!²⁹

²⁵ This explains why it cannot be כנעני or הפקר, כנעני של עצמו or שוורים for in these cases there is no obligation at all. However it does not explain why it cannot be where they do not recognize the gored ox (where in principle there is an obligation to pay); תוספות continues to explain.

²⁶ See מהר"ם שי"ף.

²⁷ See footnote # 18.

²⁸ See footnote # 5.

²⁹ See # 39 אוצר מפרשי התלמוד.