

For they are indeed מועדין, etc.

שכן מועדין וכולי –

Overview

The גמרא here states that (according to one view) if the תורה would have written just בור and one other אב, we would be able to derive from them all the other אבות except for קרן. The reason why קרן could not be derived from this צד השוה is because the אבות of the צד השוה are מועדין מתחילתן (however קרן is not a מועד מתחלתו). If however we were to maintain that by קרן there is more reason to be חייב since it is להזיק כוונתו, then we could also derive קרן from the abovementioned צד השוה. It is not clear what the גמרא means that the other אבות are מועדין מתחילתן (as opposed to קרן). It is also not clear who maintain these two opposing opinions concerning קרן; whether there is more reason or less reason to hold קרן liable.

In the גמרא later¹ there is a dispute concerning the חצי נזק that a תם pays, whether it is a קנס or it is ממון². The גמרא explains that this depends whether we maintain that סתם שוורים are בחזקת שימור (then ח"נ is a קנס³) or whether (ממון⁴ ח"נ is) לאו בחזקת שימור are סתם שוורים.

שכן מועדין מתחילתן rejects a possible explanation of תוספות:

אין לפרש שמשלמין נזק שלם דאם כן קרן נמי אתיא כיון דלא כתיב –

We cannot explain that the meaning of שכן מועדין וכו' is **that** בור וחד מאינך **pay a נזק שלם** initially (as opposed to קרן which pays a ח"נ), **for in that case let us derive that קרן should also pay a נ"ש** initially, **since קרן is not written** in the תורה.⁵

תוספות offers his explanation:

אלא מפרש רבינו תם דמועדין מתחילתן היינו שדרכן להזיק –

Rather, explains the ר"ת that the term מועדין מתחילתן means that it is common for these אבות to cause damage; they are initially prone to damage - **מה שאין כן בקרן דסתם שוורים בחזקת שימור קיימי למאן דאמר פלגא דניזקא קנסא**

¹ דף טו, א.

² One of the differences would be if the מזיק admitted that his שור תם gored. If ח"נ ממונא, then he is חייב; however if ח"נ קנסא then the דין is that מודה בקנס.

³ The oxen are considered to be guarded and not prone to cause damage (by goring); therefore מן הדין the owner should not be liable. However the תורה punishes the בעל השור in order that he should guard them more carefully.

⁴ Oxen are considered to be prone to gore. In reality the owner should therefore pay a נזק שלם. However the תורה took pity on the owner, since he was not sufficiently warned as of yet, and obligated him to pay only a ח"נ. (It would seem that that even according to this מ"ד, the מזיק of קרן is less דרכו than the other מזיקים.)

⁵ The גמרא is now discussing whether we can derive קרן from the צד השוה, if קרן were not written in the תורה. If קרן is not written then we cannot say that קרן does not pay initially a נ"ש, for there is no קרן at all. In fact we will derive from the צד השוה that קרן will initially pay a נ"ש.

However it is uncommon for קרן to cause damage, since oxen in general are considered to be guarded, according to the one who maintains that the חצי נזק that a תם (of קרן) pays is punitive; not a monetary obligation.⁶ This explains why קרן cannot be derived from the צד השוה, for it is the only מזיק that is בחזקת שימור and is not להזיק.⁷

צד השוה continues to explain the other view that קרן can be derived through a

ולמאן דאמר אדרבה קרן עדיפא⁸ היינו למאן דאמר דפלגא ניזקא ממונא –

And the one who maintains that there is more reason for קרן to be liable (than the other אבות); this is referring to the one who maintains that the ח"נ is a monetary payment and not (merely) punitive –

שדרכו להזיק ולא קיימי בחזקת שימור –

since it is common for קרן to cause damage, for oxen are not considered to be in a guarded state.

ולא כמו שפירש הקונטרס דלא איתפרש היכא:

And it is not as רש"י maintains that it was not made explicit anywhere who is the מ"ד that maintains עדיפא.

Summary

The dispute whether קרן can be derived from the צד השוה, is dependent on the dispute whether שוורים are בחזקת שימור or not.

Thinking it over

According to the ר"ת, the גמרא should have said עדיפא דקרן דקרן עדיפא because כוונתו להזיק חומרא or שוורים לאו בחזקת שימור קיימי, etc.; why mention להזיק which the other מ"ד (who maintains that שימור קיימי בחזקת שימור) also agrees to?!⁹

⁶ See 'Overview'.

⁷ It appears that the חומרא of שימור, cancels out (and outweighs) the חומרא of להזיק.

⁸ עדיפא is קרן, as the גמרא states, for (in addition to דרכו להזיק as are the other אבות) it is also בחזקת שימור which we do not find by the other אבות.

⁹ See נח"מ וכו'.