

I meant his opponent

שכנגדו קאמינא –

OVERVIEW

In the case of רעיא according to ר"ה there would be a חיוב שבועה on the רעיא. However, אביי asked how can the רעיא swear; he is a גזלן and unfit to swear! זירא explained that the opponent (the owners) swears (and collects). מתוך שאינו יכול לישבע משלם explains why here the ruling is not משלם.

asks: תוספות

ואם תאמר מאי שנה דבחשוד על השבועה שכנגדו נשבע ונוטל –

And if you will say; why is there this difference; that by someone who is suspect regarding an oath, the ruling is that his opponent swears and collects -

אמאי לא אמרינן מתוך שאינו יכול לישבע משלם –

Why do we not rule that since he cannot swear; he pays -

כדאמר גבי חמשים ידענא וחמשים לא ידענא¹ (לקמן דף צח,א) –

As we rule regarding the case of fifty I know (and owe) and fifty I do not know (if I owe) -

ובנסכא דרבי אבא² (שבועות דף לב,ב) –

And in the case of נסכא דרבי אבא. In both these cases the defendant cannot swear and we rule that since he cannot swear he must pay. Seemingly we should rule here as well, since the רעיא cannot swear (for he is a גזלן), he should pay; why do we rule that שכנגדו נשבע ונוטל.

answers: תוספות

ויש לומר הכא אי אמרינן משלם לא שבקת ליה חיי –

And one can say; here by the רעיא if we would rule that מתוך שאינו יכול לישבע משלם, you will 'not let him live' -

דכל העולם יביאוהו לידי שבועה³ ויטלו כל אשר לו⁴ –

For everyone will cause him to be in a situation where he is required to swear and (since he cannot swear) they will take away all that he owns.

¹ The case is where the מלוה claims the לווה owes him a hundred (זוז). The לווה admits to owing fifty but is unsure regarding the remaining fifty. The מלוה is אמת במקצת; however he cannot swear that he does not owe the other fifty, since he is unsure.

² The case of נסכא דר' אבא is explained in (TIE) ובכחילה ג,ב ד"ה ובכחילה.

³ People will lend this רעיא (small) sums of money, and will claim that he owes them more, the רעיא will respond (truthfully) that he owes less, he will then be אמת במקצת and will be required to swear. If we rule מלאה, he will not be allowed to swear and will be required to pay the sum claimed falsely by the מלוה.

⁴ Therefore (it seems) the חכמים were מתקן that שכנגדו נשבע ונוטל (for the benefit of the דבור).

ועוד דהתם אמר ליה שבועה דאורייתא אית לי עליך או תשבע או תשלם – offers an additional distinction:

And furthermore, there (in the cases of חמשיך ידענא and נסכא דר"א), the claimant say to the defendant, I have the right to make you swear a שבועה דאורייתא; either swear or pay, and since he cannot swear he must pay -

אבל הכא הוא ברצון ישבע אם נניחנו ולכך לא ישלם⁵:

However here the רעיא will gladly swear if we allow him, so therefore (since the בי"ד is preventing him from swearing) he does not pay, but rather שכנגדו נשבע ונוטל.

SUMMARY

Generally the rule is that משאיל"מ; however if by implementing this rule it will cause undue losses then we say שכנגדו נשבע ונוטל. Alternately, if בי"ד is preventing him from swearing, then we say שכנגדו נשבע ונוטל.

THINKING IT OVER

Is there any (practical) difference between the two explanations of תוספות⁶?

⁵ The חכמים were מתקן (for the benefit of the תובע) that שכנגדו נשבע ונוטל.

⁶ See בל"י אות קיה and נח"מ.