

And an ordinance for an ordinance

ותקנתא לתקנתא –

OVERVIEW

The גמרא concluded that concerning the רעיא, if we do not agree with ר"ה, we cannot institute the ruling of שבועת היסט. The רעיא cannot swear since he is שכנגדו, and we cannot make the שכנגדו swear, since both היסט and שכנגדו are תקנות חכמים and we do not institute a תקנה for another תקנה. Our תוספות explains why we do not implement the third option.

ומתוך שאינו יכול לישבע משלם¹ לא שייך הכא כדפרישית²:

The rule of ‘since he cannot swear he pays’, is not applicable here as I explained previously.

SUMMARY

The rule of משאיל"מ is not applicable in the case of רעיא.

THINKING IT OVER

If the rule of משאיל"מ would have applied by the רעיא, what would have been the ruling; that the רעיא pays for the sheep (without anyone swearing), or that the owners collect only after they swear regarding how many sheep were delivered to the רעיא?³

¹ When there is a חיוב שבועה on the defendant and he cannot (or does not) swear, he is obligated to pay. This is not a תקנה, but rather it is inherent in the obligation to swear. Seemingly here too by שבועת היסט if he does not take the oath he should pay!

² תוספות צ"ב ד"ה ה"נ (בסוף עמוד ב'). See (TIE footnote # 10). ג,ב תוד"ה בכוליה and/or תוספות ה,א ד"ה שכנגדו. According to תוספות on ה,א (specifically the second answer) he is not considered לישבע, for he is prepared to swear, therefore there is no משלם. According to תוספות on ג,ב there is no rule of מתוך on any שבועה דרבנן. [It was necessary for תוספות ד"ה שכנגדו to explain why we do not say מתוך by the רעיא (even though there is no מתוך by a רבנן) because in that תוספות we were still following the opinion of ר"ה that there is a דאורייתא on the רעיא (so תוספות explained why, nevertheless, we do not say מתוך).]

³ See סוכ"ד אות מ.