

He jumped; all are exempt

קפץ כולן פטורין –

OVERVIEW

The משנה teaches that if one of the counted animals in the מעשר בהמה process jumped back into the corral where the animals, who are waiting to be counted and tithed, are; the rule is that all the animals, both those that were counted and those waiting to be counted, are פטור from מעשר.¹ Our תוספות argues that this מנוי should be בטל ברוב and therefore he and certainly all the others should be מחויב במעשר.

asks: תוספות

תימה דלפטל ברובא² וליחייבו כולהו במעשר –

It is astounding! For the מנוי, which jumped back in, should be nullified by the majority of the other animals, and they should all be obligated to be tithed!

anticipates various answers to this question and rejects them all:

דהא דדבר שבמנין לא בטיל³ היינו מדרבנן –

For that which we rule **that something which is counted is not בטל**, that will not explain why there is no מעשר חיוב, because granted that animals are a מדרבנן, nevertheless the rule that a דבר שמנין is not בטל **is only** מדרבנן, however התורה מן התורה, and since מעשר is a חיוב מן התורה, the requirement to be מעשר overrides this rabbinic ruling.⁴

rejects an additional potential answer: תוספות

וקבוע נמי אין שייך אלא בדבר שהאיסור וההיתר ניכרין וידועין –

¹ See רש"י ד"ה כולן. Those that were not counted are פטור because since the תורה writes תחת השבט (whoever will pass under the whip as the tenth, will be מעשר); this precludes anyone who already passed תחת השבט. In this case there is always the doubt that the previous מנוי who already passed תחת השבט (and is exempt) is part of the group of ten.

² מן התורה, something which is אסור is nullified ברוב. If one piece of נבילה meat became mixed up with two pieces of כשר meat, the rule is that one may eat all three pieces of meat, since the נבילה was ברוב. Here too the מנוי (who is ממעשר) became intermingled with other animals who are מחויב במעשר; the rule should be that all the animals in this mixture are מחויב במעשר since we follow the רוב.

³ The חכמים made a rule that items which are prominent (חשוב) are not ברוב בטל. One way of establishing if an item is a דבר חשוב is to see how it is sold, if it is sold by weight or volume it is not a דבר חשוב (and it becomes ברוב בטל) however if it is sold by the piece (דבר שמנין) then this shows that it is a דבר חשוב and it is not ברוב בטל. Cattle are generally sold by the piece and are considered a דבר שמנין and therefore are not ברוב בטל.

⁴ The ruling מדרבנן is only לחומרא that it is not בטל if the דבר שבמנין is a אסור; however we cannot use this לקולא, to exempt these cattle from מעשר בהמה, since מה"ת it is ברוב בטל.

And the rule of ⁵קבוע כמחצה על מחצה דמי is applicable only in a case where the prohibited and permitted items are recognizable and known -

ולא ידע מאיזה לקח כגון ט' חנויות⁶ -

But he did not know from where he took it, as for instance in the case of nine stores, etc. where the כשר and נבילה stores are known. However here we do not know which animal jumped in and is not fit for מעשר and which are fit for מעשר. In this case the rule of מחצה על מחצה דמי כל קבוע כמחצה does not apply. It should therefore be ברוב.

Tosfos rejects another proposed solution:

ובריה⁷ נמי לא הוי כדפרישית בחולין⁸ (דף צה,א) -

And this מני is not considered a בריה (which is not ברוב) as I explained in מסכת חולין.

Tosfos rejects one final suggestion:

ואין לומר שלא נשאר בעדר רק אחד דליכא רובא -

And we cannot answer that only one animal remained in the corral, into which the מני jumped, so there is no רוב of animals that are מחויב במעשר -

דלשון לתוכן לא משמע הכי:

Because the expression 'into them' does not indicate so; the word 'them' indicates there was more than one animal remaining in the corral. The question remains why is the מני who jumped back, not ברוב, and there should be a חיוב to be מעשר? Tosfos does not answer this question. See הרא"ש.

SUMMARY

Why do we not say that the מני שקפץ is ברוב?

THINKING IT OVER

How could Tosfos even assume that here it is a case of קבוע?⁹

⁵ קבוע means set or fixed. See following footnote for the difference between קבוע and פריש.

⁶ The case of ט' חנויות is in a city where nine butchers sold כשר meat and one butcher sold נבילה meat. The rule is that if one finds meat in the street we presume it to be כשר since the majority of the stores (and of the meat sold in this community) are כשר therefore we say we follow the רוב and פריש מרובא פריש כל דפריש מרובא פריש (whatever separated itself [from the stores] it is assumed that it separated itself from the majority of כשר stores). If however one purchased meat in a store and he is uncertain from which store he purchased it we rule that since the stores are קבוע they are set and fixed in place, therefore we have a לימוד from a פסוק that כל קבוע כמחצה על מחצה דמי (see כתובות טז,א). It is considered as if there were equal amounts of איסור והיתר and there is no רוב and the meat is (מספק). See 'Thinking it over'.

⁷ A בריה means a creature. A whole creature, for instance a שרץ, is not בטל if it was mixed with היתר.

⁸ A בריה is not בטל if it was born with this איסור (for instance a שרץ). Here however this מני was originally also מחויב במעשר; it became פטור ממעשר only once it was counted, this is not considered a בריה. It would seem that Tosfos maintains that a בריה is not מדאורייתא בטל (see, however אמ"ה # 126).

⁹ See נח"מ.