

ואם הוחמה מחמת המעלה חייב -

And if she became heated on account of the climbing; he is liable

Overview

The משנה first teaches us that if one rented a donkey to go with it in the valley, and instead went on the mountain; if it became heated and died the שוכר is פטור. Then the תוספות states that if it became heated because of the climbing he is חייב. Our תוספות explains how we can determine how it died.

תוספות asks:

ואם תאמר והיכי ידעינן ברישא דקתני הוחמה בהר פטור דשלא מחמת המעלה הוחמה¹ -
And if you will say; in the previous case where the משנה states, 'if she became heated on the mountain (when he was supposed to go in the valley); he is פטור', but how are we to know that the חמור did not get heated because of the climb?!

תוספות answers:

ויש לומר דראינו שלא הוחמה בעלייתה שעלתה בלא טורח והלכה אחר כן הרבה -
And one can say; that we saw that she was not overheated while she was climbing up the mountain, for she went up without difficulty, and walked for a long time (on the mountain) afterwards -
ולא היתה מזיעה ובתר הכי הוחמה ואם כן שלא מחמת מעלה היה ופטור:
And she was not sweating, and only later she became overheated, therefore it is evident that she did not become overheated because of the climb, so he is פטור.

Summary

The ruling of פטור הוחמה בהר, is only in a case where we can ascertain that she was not הוחמה מחמת המעלה (she walked up the mountain without any difficulty, etc.).

Thinking it over

What would be the ruling in a case where it was הוחמה בהר, however we are not certain whether the animal was הוחמה מחמת המעלה or not. Will the שוכר be חייב or פטור?²

¹ How can the משנה make a blanket statement that הוחמה בהר is פטור (since she certainly would have been בוקעה); perhaps she was הוחמה בהר מחמת המעלה (from the exertion of climbing the mountain).

² See # 78-9. אוצר מפרשי התלמוד.