

היכא דלא מפריך קל וחומר אית ליה דיו¹ –

Where the ק"ו is not refuted, he agrees to דיו

OVERVIEW

maintains that קרן בחצר הניזק נ"ש for we derive it from a ק"ו. We do not say דיו (since קרן ברה"ר pays only a ח"נ, it should only pay a ח"נ בחצר הניזק), because if we will say דיו the ק"ו will be ineffective. On the other hand we do say דיו to limit the payment of קרן בחצר הניזק that it is only מגופו, not מן העלייה, since the ק"ו is still effective to have him pay a נ"ש. Our תוספות explains why we cannot say the reverse (ח"נ but מן העלייה).

asks:

ואם תאמר ונימא איפכא קל וחומר לשלם מן העלייה² ודיו לחצי נזק³ -

And if you will say; but let us say the opposite; the ק"ו teaches us that קרן בחצר מן העלייה pays הניזק, and דיו teaches us that the קרן בחצר הניזק pays ח"נ (from the עלייה) –

answers:

ויש לומר דהכי שפיר טפי דכי אמר דיו לענין מגופו לא משנינן מחצי נזק כלל מכמו שהיה -
And one can say that this way (which the גמרא states, נ"ש מגופו) **is more acceptable, for when we say דיו regarding that he pays מגופו, we are not changing at all from the ח"נ as it was** (the initial חצי נזק was מגופו and now also he is paying a חצי נזק מגופו) -

אלא שאנו מוסיפין עליו עוד חצי נזק אחר -

Only that we are adding another ח"נ (also מגופו); it is like he is paying the original ח"נ (which was [originally] and is [now] מגופו) and an additional ח"נ -

אבל אי אמרת דיו לחצי נזק עקרת ליה לגמרי מחצי נזק קמא -

However if the ק"ו will be for מן העלייה and you will say the דיו to limit it to ח"נ, you have completely uprooted the payment from the initial ח"נ; there remains nothing from the initial payment -

¹ דיו teaches us that the rule being learnt from the ק"ו (the למד) cannot be stronger than the source of this rule (the מלמד). In our case קרן has two weaknesses; it pays only a ח"נ, and only מגופו. However ר"ט maintains that if we will say דיו for both these weaknesses, the ק"ו from שו"ר would be ineffective. Therefore we ignore one weakness (ח"נ) and say that קרן בחצר הניזק pays a נ"ש, but we accept the other weakness (מגופו משלם) on account of דיו.

² If שו"ר who are פטור ברה"ר, nevertheless they pay בחצר הניזק, מן העלייה בחצר הניזק, so קרן which is חייב ברה"ר, should certainly pay מן העלייה בחצר הניזק.

³ The ק"ו will be effective for קרן paying בחצר הניזק, and דיו will be effective to limit the payment of מן העלייה בחצר הניזק to pay only a ח"נ.

דמפקא ליה מתשלומי גופו ומוקמינן אתשלומי עלייה⁴ -

Since you have taken it out of גופו payment and established it for עלייה payment -

ובכל צד שאנו יכולין לעקור קל וחומר ולקיים⁵ דיו⁶ יש לנו לקיים:

And in any manner which we can uproot the ק"ו and sustain the דיו, we need to sustain it in that manner

SUMMARY

Changing from מגופו to מן העלייה (even if both are a ח"נ) is a greater change than from ח"נ to נ"ש (if both are מגופו).

THINKING IT OVER

Seemingly the difference between מגופו and מן העלייה is (also) only in quantity (if the damage is more than גופו is worth, he will receive less if he is משלם מגופו than if he is משלם מן העלייה). This difference is not in all cases (only in cases where גופו is not worth the היזק). However the difference between ח"נ and נ"ש is in all cases. It would seem that changing from ח"נ to נ"ש is a greater change than from מגופו to מן העלייה!

⁴ There is therefore no similarity between the original ח"נ which is מגופו to the new ח"נ which is מן העלייה (even though they both pay a ח"נ. See 'Thinking it over'.

⁵ A ק"ו wants to derive as much as possible for the למד; while דיו wants to limit what we can learn for the למד so that it should not exceed the למד. If we derive anything new (albeit minimal), we have validated the ק"ו. However if we give the למד something which is not in the למד (albeit minimal), we have contradicted (the logic of) דיו. Therefore it is necessary to limit what is being derived from the ק"ו (when there is an issue of דיו) to the minimum.

⁶ A ק"ו is limited by the rule of דיו. However ר"ט maintains that if by utilizing דיו the ק"ו becomes ineffective we do not utilize דיו. However if even by utilizing דיו, the ק"ו is still effective; then the rule of דיו is supreme; meaning that we limit the ק"ו to the greatest extent, that the new rule (למד) should be as close as possible to the initial rule (למד), which דיו requires. In our case by saying דיו for מגופו retains a semblance of the original rule (ח"נ מגופו) plus an addition (another מגופו (ח"נ). However if the ק"ו teaches us מן העלייה, it is completely different than the original rule of קרן, which is מגופו.