

A person tied it; he is liable

קשרו אדם חייב –

OVERVIEW

rules that if a person tied a דליל (of הפקר) to the foot of a תרנגול and it caused damage by someone tripping on the דליל (after it came to a rest), the קושר is חייב a ש"נ. There is a dispute between רש"י and תוספות regarding this ruling.

לאו דוקא קשרו¹ שהוא הדין אם היה במקום המוצנע והניחו במקום התורפה שפשע בו -
It does not necessarily mean that he is liable only if he tied it, for the same rule applies (that the person involved with the דליל is חייב) even if the דליל was initially in a concealed place and a person placed it in an exposed place where it is accessible for the תרנגול that he is חייב, since he was negligent in placing an object where it may cause damage (which is a תולדה of בור)² -

ואפילו לא הגביהו ולא קנאו -

And he is liable even if he did not pick up the דליל and did not acquire it, for one is liable for בור even if it does not belong to him.

פרש"י cites and disagrees with תוספות:

ודלא כמו שפירש הקונטרס³ דקנייה בהגבהה כשקשרו ויש לו להאי דליל בעלים -
And not like רש"י explained that the reason the קושר is חייב is because he acquired the דליל by raising it when he tied it to the תרנגול, so this דליל has owners (namely the קושר) and therefore he is חייב. תוספות rejects this reasoning -

דכל תקלה שהניחה ברשות הרבים מיחייב ביה משום בור אף על גב שלא זכה בה -
For any obstacle which one placed in a רה"ר, one is liable for it on account of בור even though he did not acquire this obstacle, but rather it is הפקר (nevertheless one is חייב for it is considered his בור).

תוספות proves that one need not own a בור in order to be liable for its damages:

דעד כאן לא פליגי רב ושמואל (לקמן דף כח,ב) אלא בדלא אפקריה⁴ –
For the dispute between רב and שמואל is limited only to a case where he was not מפקיר the obstacle -

¹ See עמוד ד"ה אבל previously on this תוספות.

² It is actually a בהמה בור המתלגל ברגלי בהמה (see previously ו,א). He is חייב here for placing the דליל in the רה"ר where it eventually became entangled and damaged after it came to a rest.

³ ד"ה קשרו. See 'Thinking it over' # 1.

⁴ If one caused damage by placing an obstacle which he owns in the רה"ר, according to רב it is considered a תולדה of שור (and is חייב even if כלים were damaged by it), and according to שמואל it is considered בור (and if it damaged כלים it is פטור, just like בור). See 'Thinking it over' # 2.

אבל בדאפקריה בין לרב בין לשמואל היינו בור:

However, where he was מפקיר the obstacle, it is considered the מזיק of בור, whether according to רב or according to שמואל. Therefore even if he did not tie it on the תרנגול, rather he just placed it where it is accessible, he is חייב since it is (his) בור.

SUMMARY

According to רש"י the קושר is חייב only if he acquired it (and is certainly not חייב if he only placed it במקום התורפה), while תוספות maintains that even if he only placed it במקום התורפה (and did not tie it), nevertheless he is חייב, because בור does not require an owner.

THINKING IT OVER

1. What would the ruling be if he tied the דליל to the תרנגול in the רה"י and did not acquire it (he did not raise it higher than three טפחים); is he חייב or not?⁵
2. Why was it necessary for תוספות to mention that רב ושמואל argue אפקריה;⁶ בדלא אפקריה what is relevant here is that by אפקריה all agree that it is בור?

⁵ See חי' ר' נחום אוח' ס"ה (בד"ה ואם) and נחלת משה.

⁶ See footnote # 4. In any event both רב ושמואל agree that he is (certainly) חייב by אפקריה!