He surely abandons them – אפקורי מפקר להו

Overview

רמי בר חמא resolved the query whether זנוזל"ח is חייב or פטור, from our משנה which states that by שן ברה"ר (even though it is פטור, nevertheless) ואם נהנית משלמת מה שנהנית. It is considered לא חסר (to the בעל הפירות) even though they are eaten up, because we assume that when someone leaves his פירות in a רה"ר he is מפקיר them.[1] תוספות will qualify this assumption.

לא לגמרי דאם כן אפילו מה שנהנית לא משלם[2] אלא מתייאש מהם –

The owner is **not** מפקיר the פירות **completely, for if indeed** he is מפקיר them completely the בעל הבהמה **should not pay even מה שנהנית, but rather he despairs from** retrieving **them -**

שסבור שיתקלקלו[3] מחמת שרבים דורסים עליהם עד שלא יבואו[4] לדמי[5] מה[6] שנהנית:

For the owner **assumes that since many tread upon them,** the פירות **will be ruined,** to the extent **that they will not be worth** any more **than** the value **of מה שנהנית.**

Summary

The גמרא, when it states אפקורי מפקיר להו, means that he is מתייאש but not מפקיר.

Thinking it over

1. According to רב"ח why is it that if he was מתייאש from the entire חפץ (and there is no חסר at all) there would be no חיוב at all;[7] however in the case of a חצר דלא

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[1] See רש"י ד"ה מפקר.

[2] If the owner is מפקיר the פירות (even implicitly) they have no owner, and anyone can take them and keep them. There is no cause for the (original owner) to be paid even מה שנהנית, since it no longer belonged to him.

[3] On one hand he is not מפקיר them (therefore it still belongs to the owner), on the other hand he assumes that it will be ruined (so he is not a חסר, because he anticipated this loss). He did not, however, assume that it would become totally worthless (but rather it could be worth even less than מה שנהנית). See footnote # 5 & 6.

[4] Others (see מהר"ם) amend this to read יבואו לדמי **אלא**.

[5] רב"ח is proving from our משנה (where it states משלמת מה שנהנית) that זנוזל"ח is חייב; even though the לא חסר did not suffer a loss, the נהנה must pay for his הנאה. In the case of the משנה the owner assumes that his פירות (which are worth now $100) will be worth (even) less than מה שנהנית (let us assume that the מה שנהנית is $30, and the owner assumes that it will be worth $10). The fact that the בעל הבהמה must pay מה שנהנית ($30) even though the loss to the owner is only $10 (for that is what he assumed his פירות will be worth); the extra $20 that the בעל הבהמה is paying is a payment for זנוזל"ח, this proves that זנוזל"ח is חייב. See 'Thinking it over' # 2.

[6] Had the owner assumed that it would be totally worthless (see footnote # 3), then there would be no חיוב even for מה שנהנית. See שטמ"ק בשם הרא"ש. See 'Thinking it over # 1.

קיימא לאגרא (where the owner is not a חסר at all) we are not certain whether he has to pay or not?![8]

2. The law concerning זנוזל"ח is that if there is a slight חסר, then the נהנה must pay for his entire הנאה (even if it is more than the חסר).[9] In the case of משלמת מה שנהנית, since there is a slight חסר for the בעל הפירות,[10] it cannot be considered a case of זנוזל"ח; how can רב"ח prove anything from our משנה (where he is חסר) to the query of זנוזל"ח, where there is no חסר at all?![11]

3. In the abovementioned case (where he is מתייאש עד שלא יבואו לדמי מה שנהנית), and someone destroyed the פירות (but did not derive any benefit from it); how much is he required to pay?[12]

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[7] See footnote # 6.
[8] See בל"י אות פג ד"ה אבל.
[9] See תוס' כא,א ד"ה ויהבי.
[10] See footnote # 5.
[11] See בל"י אות פ"ג ד"ה אולם.
[12] See בל"י אות פ"ג ד"ה ומה.