

מה לבור שכן שלא ברשות –

Why is he liable by a pit; for it is indeed done without authorization

OVERVIEW

The גמרא states that the צד השוה comes to include the case of damage due to the waters flowing from private sewer drains – פותקין ביבותיהן. The גמרא asked, if the waters damaged after they came to rest and the owners were מפקיר them, it is similar to בור (and no צד השוה is required). To which the גמרא responded that it is different from בור, for a בור is made without permission, however the homeowners are permitted to empty their sewer drains into the רה"ר (that is why a יוכיח from שור is required [the שור also has permission to be in the רה"ר, and nevertheless he is חייב (for קרן) and (צד השוה) is derived from a פותקין ביבותיהן]).

If a person digs a בור in his רשות and he is מפקיר the surrounding רשות, but not the בור; he is חייב (for the בור is שהזיק). However if he was מפקיר the בור and the רשות, according to רש"י he is (still) חייב,¹ while תוספות maintains that he is פטור (it was dug ברשות and it is not his ממון).

שור (of צד השוה) can only be derived from a פותקין ביבותיהן תוספות will explain that (בור הנעשה ברשות), but it cannot be derived from בור alone (even from a ברשות).

anticipates a difficulty and resolves it:

דאפילו עשאו ברשות² ואחר כך הפקיר³ כיון שהפקיר היינו שלא ברשות⁴:

For even if he made the בור with permission, and then he renounced his ownership (of his רשות and his בור); nevertheless since he was מפקיר the בור, it is tantamount to creating it שלא ברשות. Therefore we cannot derive 'drains' from בור

¹ See לקמן כח,ב רש"י ד"ה דאפקרינהו ותוס' ד"ה ה"מ.

² He made the בור in his רשות היחיד.

³ This would seemingly make it ברשות, similar to the 'drains'. If we maintain that הפקיר רשותו ובורו is חייב (as רש"י rules; see footnote # 1), (anticipated) תוספות question is that we can derive the חיוב of 'drains' directly (without a צד השוה) from בור, in a case where he was מפקיר רשותו ובורו. In both instances it was done ברשות and now it is הפקיר. [The difficulty with this interpretation is that תוספות maintains that הפקיר רשותו ובורו is פטור (see footnote # 1). Alternately, (anticipated) question is that we can derive 'drains' from בורו ולא הפקיר רשותו (where תוספות agrees that he is חייב); if this will be challenged that בורו ולא הפקיר רשותו (as opposed to the drain water), we can say יוכיח ברה"ר (where it is not ממון and he is חייב). When we will then ask שכן אינו ברשות, we will answer הפקיר רשותו (where it was dug ברשות). The 'drains; can be derived through a צד השוה of בור exclusively (הפקיר). The difficulty with this interpretation is that it seems from תוספות that we can derive 'drains' directly from בור, without a צד השוה at all. See 'Thinking it over' # 1.

⁴ The act of being מפקיר (his בור and) his רשות is an act of creating a ברשות; he has no permission to leave a בור immediately adjacent to the רה"ר.

(alone), since בור is always considered שלא ברשות (as opposed to drains, which are ברשות), therefore we require the שור יוכיח.

SUMMARY

The act of making a בור accessible to the public through הפקר is tantamount to creating a בור שלא ברשות.

THINKING IT OVER

1. The case of פוקתין ביבותיהן entails creating a בור ברשות, which is הפקר. The גמרא rules that he is חייב for damages. However, by הפקיר רשותו ובורו, which is also a בור הפקר that was made ברשות, he is פטור from paying according to תוספות.⁵ What is the difference between these two cases?!⁶

2. How do we know that הפקיר רשותו ובורו or הפקיר רשותו ולא הפקיר בורו is חייב; perhaps only a בור that was dug initially ברשות is חייב?!

⁵ See footnote # 1 & 3.

⁶ See סוכ"ד אות יט.