A creditor collects the improvements – בעל חוב גובה את השבח

Overview

שמואל ruled that a lender can collect from the buyers [of the borrower's property] the actual bought property plus any improvements the buyers made in this property (up to the amount of the loan). תוספות discusses whether the בע"ח can collect the שבח which the יתומים (of the לוה) improved the property after their father's (the s'לוה) death.

נראה דגבי אפילו מן השבח שהשביחו יתומים[1] –

It is the view of תוספות that the בע"ח may collect **even from the שבח which the יתומים** (of the לוה) **improved –**

תוספות first explains why we would have thought that the בע"ח cannot collect from the שבח שהשביחו יתומים:

אף על פי שאין להם על מי לחזור[2] –

Even though the יתומים **have no recourse from whom to** be compensated for the שבח which the מלוה will take away -

והוה ליה כמתנה דאמרינן לקמן[3] דלא גבי שבחא –

So their case **should be considered as** a case of **a gift,** regarding **which** רבא **rules later that** the בע"ח **cannot collect the שבח** from a gift, since the recipient of the gift has no recourse,[4] here too one would think that the בע"ח cannot collect the שבח שהשביחו יתומים -

מכל מקום גובה מהן משום דכרעיה דאבוהון נינהו[5] –

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[1] Let us assume that ראובן borrowed a hundred זוז from שמעון, then ראובן dies and his estate which was valued at eighty זוז was inherited by חנוך his son. חנוך improved the field and it is now worth a hundred זוז. The time of loan is due and שמעון wants to collect his debt from the estate which is now worth a hundred זוז. According to תוספות the מלוה can collect the entire estate and the יתומים cannot claim that he should leave them the value of twenty זוז, since this is their improvement and it was not there at the time of the loan or at the time of their father's death. The מלוה collects the entire estate of a hundred זוז.

[2] When the בע"ח collects the שבח from the לוקח the לוקח has recourse. He collects the שבח (plus the קרן) from the מוכר. In fact this is the reason why the בע"ח גובה the שבח from the לוקח, since the לוקח does not suffer a loss. However when the בע"ח collects the שבח from the יתומים of the לוה, they have no recourse. No one compensates them for their lost. We would therefore assume that the בע"ח cannot collect the שבח שהשביחו יתומים, since they are suffering an irreplaceable loss.

[3] רבא further on this עמוד.

[4] The benefactor of a gift does not (usually) offer any guarantee for his gift.

[5] If the father improved to field (to the point that it is the equivalent of the loan), the מלוה obviously collects the entire field with the שבח, because the לוה owes him that amount. The children of the לוה are considered as if they too owe this money to the מלוה and their improvement therefore also belongs to the מלוה. The loan of the מלוה to the לוה entered into the estate of the לוה which the children inherit (assets as well as debits). [If, however, the יתומים bought other property; that is not משעובד at all to the מלוה.]

Nevertheless תוספות maintains that the בע"ח **collects from** the שבח יתומים **because** the יתומים **are the 'feet'** (the extension) **of their father** and just as the מלוה would have collected the שבח of the father (if it did not exceed his loan), similarly he may collect from the שבח of the יתומים

תוספות proves that the בע"ח is גובה the שבח from יתומים:

כדמוכח בפרק יש בכור (בכורות דף נב,א ושם) –

As is evident in פרק יש בכור -

דתנן אין הבכור נוטל פי שנים בראוי כבמוחזק ולא בשבח[6] –

For we learnt there **in a משנה**[7]**; a בכור does not take a double** portion in the assets of the estate **in that which is due** to the estate **as** he takes his double portion in what is **held** in the estate, **and** he also does **not take** פי שנים **in the improvements** that were made in the estate after the father died -

ולא האשה בכתובתה[8] **ולא הבנות במזונותיהן**[9] –

And similarly regarding **a women** collecting **her כתובה and the daughter collecting their sustenance;** in these two cases also they cannot collect בראוי and also not from the שבח.[10] This concludes the משנה there.

ופריך בגמרא והאמר שמואל בעל חוב גובה את השבח –

And the גמרא **challenged** the ruling of the משנה, why cannot the woman and the daughters collect from the שבח for their due; **since שמואל ruled that a creditor collects** from **the שבח.** The woman and daughters are also creditors against the estate of the deceased; why cannot they collect from the שבח?!

ומשני מקולי כתובה שנו כאן ומזון בנות נמי תנאי כתובה ככתובה דמי –

And the גמרא **answered** there, **the משנה here teaches us (some of) the leniency of a כתובה, and the מזון הבנות** which is a **condition** inserted **in the**

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[6] A בכור takes two portions of the estate compared to the other brothers. If there are three brothers in total, the assets are divided into four equal parts. The בכור receives two parts while the two remaining brothers receive one part each. This applies to all the assets that were present at the time of death. If the estate inherited money after the father's death (the father's brother died childless), that money is divided equally among the three brothers. This means that a בכור does not collect בראוי (potential assets) כבמוחזק (actual assets). Similarly if the property increased in value after the death, all brothers share equally in that amount. This is the meaning of ולא בשבח. The בכור receives two portions only in the amount of the estate as it was worth when the father died.

[7] The משנה begins on ב,נא and continues to א,נב.

[8] A married man is obligated to write a כתובה to his wife where upon his death she receives two hundred זוז if she was a בתולה (when they originally married) or one hundred זוז if she was married previously plus any other money he wishes to give her upon his death (or divorce).

[9] In addition to his obligation to his wife in the כתובה, the חכמים included an additional obligation of supporting their daughters (after his death) until they are married off. See רש"י יד,ב ד"ה למזון.

[10] If the estate at the time of death did not have sufficient assets to pay for the כתובה or for the מזון הבנות, and later the assets increased either because the estate inherited more property (ראוי), or the יתומים improved the estate (שבח), the אשה and the בנות cannot collect their due from these additional assets.

כתובה is considered **as a כתובה**[11] and the same leniency applies to that as well, and therefore their debt cannot be collected from the שבח. This concludes the citation of the משנה and the גמרא there.

תוספות concludes his proof:

והתם משבח יתומים מיירי –

And in the גמרא **there we are discussing the שבח of the יתומים;** who improved the value of the estate -

דאי משבח לקוחות אם כן מאי אריא דלא טרפי בנות משבח –

For if we are discussing **the improvement** made by **the buyers** of the estate, [**if** this **is indeed so], why** does the משנה **teach** us **that the daughters cannot collect from the שבח** of the לקוחות -

והלא מגוף הקרקע נמי לא טרפי –

When is it not so that they cannot even collect from the original קרקע!

דאין מוציאין למזון האשה והבנות מנכסים משועבדים[12] **–**

For the משנה taught us **that we do not extract** payment **from נכסים משעובדים to feed the woman and the daughters!** Obviously we cannot be discussing לקוחות -

אלא ודאי בשבח יתומים מיירי –

But rather the משנה there **is certainly discussing שבח יתומים -**

ודוקא כתובת אשה ומזונות דקילי לא גבו משבח אבל שאר בעלי חוב גבי –

And only specifically regarding אשה כתובת **and מזון** הבנות **which are** considered a **lenient** lien, **we do not collect from שבח** יתומים; **however** regarding **other בע"ח** (where there is no leniency) they indeed **collect** משבח יתומים.

תוספות mentions that there is a different explanation of מזון הבנות:

ורש"י פירש התם מזון הבנות כגון נשא אשה ופסק לזון בתה ה' שנים –

However רש"י explained there מזון הבנות to mean, where **for instance** a man **married a woman and made up** with her **to sustain her daughter** (from a previous marriage) **for five years.**

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[11] The lien of a כתובה on the estate of the husband is not as strong as the lien of a בע"ח against the properties of the לוה. The reason is that the בע"ח gave the לוה money and therefore the חכמים protected him to insure that he receives his entire loan. However the אשה ובנות did not give the deceased anything; it is merely a commitment which was placed on him, therefore the rights of the אשה ובנות is limited and they cannot collect the שבח from the יתומים. [The estate did not receive anything from the אשה ובנות.] In addition the חכמים did not want to make the lien of כתובה too excessive in order that the men would be more likely to consent to marriage without worrying that their assets would be confiscated to support their wives.

[12] The reason מזון (האשה) והבנות is not collected from לקוחות is because it is not a fixed amount and the לקוחות cannot know how much protection they need to avoid being liable.

ולפירושו אין ראיה דמצי מיירי בשבח לקוחות[13] –

And according to his explanation there is no proof that we are discussing שבח יתומים **because we may** also **be discussing the שבח לקוחות,** since in this type of a situation the daughters can collect from the לקוחות (since the expenses are fixed [five years]). However they cannot collect from שבח לקוחות because of מקולי כתובה שנו כאן.

תוספות disagrees with this פירש"י:

אך לא נהירא דלא שייך בהו תנאי כתובה[14] –

However this explanation **is not acceptable for** the concept of **תנאי כתובה is not applicable** in that case. This is not considered a תנאי כתובה.

תוספות mentions an anticipated question:

והא דאמר בהמקבל (לקמן דף קי,א) יתומים אומרים אנו השבחנו[15] ואין השבח שלך[16] –

And regarding **that which** the גמרא **states in** פרק **המקבל; the יתומים claim, 'we improved** the property **and** therefore **the improvement is not yours' -**

משמע דלא גבי משבח יתומים –

Indicating that a בע"ח **does not collect from שבח יתומים,** in a seeming contradiction to תוספות view; תוספות responds -

התם מיירי כשעשה אפותיקי ואומרים אנו השבחנו –

There we are **discussing** a case **where** the לוה **made** this field **an אפותיקי** for the מלוה **and** the יתומים **claim, 'we improved** the field, and therefore -

ותן לנו היציאה כדין יורד לתוך שדה חבירו שלא ברשות[17] –

Pay us for the expense of the improvement **as the law is** regarding **one** who **enters his friend's field without permission** and improves it; where he is entitled to be compensated for his expense.

וכן מוקי התם במסקנא כשעשאה אפותיקי:

And indeed in the conclusion there the גמרא **establishes it where it was**

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[13] See 'Thinking it over' # 1 & 2.

[14] Supporting one's own daughters is a תנאי כתובה which the חכמים insisted on adding to the כתובה. However supporting the wife's daughters is a voluntary act based on mutual consent of husband and wife.

[15] The case there is where the מלוה claims that the father improved the field and therefore the מלוה is entitled to collect the שבח for his debt, while the יתומים claim that they improved the field and therefore the מלוה cannot collect the שבח for his debt. The question there is who is obligated to prove his point; the בע"ח or the יתומים. In any event it is obvious that if the יתומים were משביח the מלוה would not collect from their שבח.

[16] These words 'ואין השבח שלך' are not mentioned in the גמרא; and according to the conclusion of תוספות they are (somewhat) inappropriate.

[17] The argument between the בע"ח and the יתומים was not whether the מלוה can collect the שבח, for since it was an אפותיקי, not only can the בע"ח collect the שבח for his loan, but he can also collect the שבח even if it is more than his loan, since the field in an אפותיקי; it is considered as if it his field. The only claim the יתומים have, is to be paid for their expense as a יורד לתוך שדה חבירו שלא ברשות, which they are entitled to. However the מלוה claims that the improvement was made by their father, and therefore (since they were not the יורד), he owes them nothing.

made as an אפותיקי.

Summary

A בע"ח collects from the שבח which the יתומים improved (even though they have no recourse), since they are an extension of their father and are required to pay back his loans. However if the improved property was an אפותיקי the מלוה is required to compensate them for their expenses.

Thinking it over

1. תוספות states that according to פירש"י it is possible that the משנה of אין הבכור וכו' בראוי כבמוחזק ולא לכתובת אשה ולמזון הבנות, can be discussing collecting from לקוחות.[18] Seemingly how can we establish the משנה of אין הבכור נוטל וכו' ולא בשבח by לקוחות, for this indicates that a regular בע"ח of the אבי יתומים can collect from the שבח לקוחות of the אבי יתומים.[19] However since we are now maintaining that the בע"ח cannot collect שבח from יתומים for they have no recourse, similarly the בע"ח should not be able to collect the שבח לקוחות (that bought it from the אבי יתומים), since these לקוחות have no recourse, for their מוכר (who is the אבי יתומים) is deceased?![20]

2. In the same vein; how can we explain that the בכור does not take פי שנים in the שבח לקוחות but the יתומים (as a whole) collect שבח לקוחות? What right do the יתומים have to collect anything from the לקוחות who purchased properties from their father, let alone שבח לקוחות?![21]

3. When a מלוה collects the property and שבח from the יתומים; is he required to compensate them for their expenses?[22]

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[18] See footnote # 13.

[19] If the אבי יתומים owed money to a בע"ח (just a he owes for כתובת אשה וכו') and sold fields to לקוחות, then (the אשה ובנות cannot collect בשבח לקוחות but) the מלוה can collect משבח לקוחות.

[20] See מהרש"א and בל"י אות תקג.

[21] See נח"מ.

[22] See בל"י אות תקד.