

אמר רבא לפום חורפא שבשתא כולי –

Rovo said; the mistake is according to the sharpness, etc.

OVERVIEW

נכסי מלוג queried whether a husband who borrows from his wife's מלוג is considered a שואל or a ש"ש. This indicates that under certain circumstances (גו"א or אונסין) the husband is liable for his wife's מלוג. To which רבא responded לפום שבשתא; that he is not liable since it is שאילה בבעלים. Our תוספות discusses another refutation to רמי בר חמא.

הוי מצי למיפרך רבא ממתניתין דבפרק אלמנה דיבמות (דף סו, א ושם) -

- מסכת יבמות in פרק אלמנה in משנה רב"ח from the רבא could have asked on

דתנן נכסי מלוג אם פחתו פחתו לה¹ אלמא אינם באחריות הבעל² -

For the משנה states there regarding נכסי מלוג, that if they depreciated, she suffers the depreciation; indicating that the husband is not liable for the מלוג -

אלא דעדיפא פריך³ -

However, רבא asks a better question.

אי נמי ההיא מתניתין איכא לאוקמא בקרקע⁴ שנתמעט מדין שומרין:

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Or you may also say; that we can establish that משנה by קרקע⁵, which is excluded from the rules of watchmen -

כדאמר בהזהב (לעיל דף נו, א) שומר חנם אינו נשבע⁶ שומר שכר אינו משלם⁷ -

¹ The משנה there states that the man may use the assets that the woman brings into the marriage (like slaves for instance). If the slaves died (or lost their value) it is her loss; meaning that the husband when he divorces her is not liable to pay her the loss of value. [This is in contrast to צאן ברזל where the husband guarantees her the initial agreed upon value of the assets she brings into the marriage; in this case if they appreciate, the husband receives the profit and if they depreciate the husband suffers the loss.]

² How can רב"ח ask whether he is liable as a ש"ש or as a שואל, since the משנה states he is not liable for any loss at all. See 'Thinking it over' # 1.

³ See 'Thinking it over' # 2.

⁴ It seems that תוספות had the גירסא as יבמות וכו' but not מתו אם (see footnote # 1), for how could we say מתו by קרקע. See רש"ש. Alternately תוס' may mean עבדים (see footnote # 1) which are also exempt from שומרין (since (הוקשו לקרקעות).

⁵ However by מטלטלין, we may have thought that he is liable; were it not for the fact that it is שאילה בבעלים as רבא states.

⁶ If a שומר was given קרקע (fruits, or עבדים) to watch, and there was damage; the ש"ח does not need to swear, additionally the ש"ש does not need to pay. See שומר ד"ה שומר that they are פטור even from פשיעה.

⁷ See the גמרא on נו, ב, that we derive this from a כלל ופרט וכלל, which is written both by a ש"ח וש"ש, which excludes anything which is not מטלטל וגופו ממון (i.e. שטרות וקרקעות and עבדים שהוקשו לקרקעות).

As the משנה states in פרק הזהב regarding קרקע that a ש"ח does not swear and a ש"ש does not pay -

והוא הדין שואל⁸ דוכי ישאל קאי⁹ אמאי דקא איירו קראי לעיל:

And, concludes תוספות, the same rule applies to a שואל that he is exempt from paying by קרקע, for the פסוק of וכי ישאל is referencing this which was being discussed previously in the פסוקים, namely the מטלטלין by a ש"ח and ש"ש.

SUMMARY

The גמרא could have asked from יבמות but chose to ask better, or we can establish the משנה there by קרקע where there is no שומרין.

THINKING IT OVER

1. שואל proves from אם פחתו פחתו לה that the husband is not liable as either a שואל or a ש"ש.¹⁰ However one can argue that he is liable, and when the משנה states אם פחתו פחתו לה, that is only when the value of the assets decreased because of market fluctuation, but not if the husband caused the loss (by his lack of diligence), when he is either using or watching the item, where he will be חייב by either גו"א (as a ש"ש) or even אונסין (as a שואל).¹¹

2. עדיפא פריך¹² Did הו"א understand in his תוס' that the question from יבמות is stronger, if so we need to explain the difference between the הו"א and the מסקנא, and if not, so why bring it up at all?

⁸ Seemingly by שואל there is no such כלל ופרט וכלל (see footnote # 7), so perhaps the דיני שואל apply even to קרקע (ועבדים).

⁹ The פסוק of שואל follows immediately after the פרשיות of ש"ח וש"ש. The וכי ישאל (with a וי"ו) is to be understood to mean that if he borrows any of the items mentioned previously by a ש"ח וש"ש, he has the rules of a שואל, but not if he borrows (ועבדים) קרקעות; in that case there is no דין שאילה at all,

¹⁰ See footnote # 2.

¹¹ See מעייני החכמה.

¹² See footnote # 3