## אלא לוקח הוי מדרבי יוסי ברבי חנינא –

## Rather he is a buyer on account of *Rabi Yosi B'rebi Chaninoh*

### Overview

רבא ruled that a husband is considered as if he bought his wife's assets. תוספות discusses when this rule is qualified.

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תוספות asks:

**ואם תאמר ולימא דיורש הוי דהיכא דאיכא פסידא דאחרינא הוי יורש ולא לוקח -**

**And if you will say; but let us sat that** the husband **is an heir** of his wife's estate, **since wherever there is a loss to others, he is considered an heir, and not a buyer -**

**כדאמרינן בסוף פרק יש נוחלין[1] (בבא בתרא דף קלט,ב) והכא איכא פסידא -**

**As** the גמרא **states in the end of פרק יש נוחלין; and here there is a loss** in our case -

**דאם שאלה[2] האשה יתחייב בגניבה ואבידה אי הוי יורש -**

**For if the wife borrowed** something, **the husband will be liable for גו"א if he is** considered **a יורש,** but not if he is considered a לוקח. תוספות explains -

**כדאמר רבא באלו נערות (כתובות דף צד,ב) יתומים שהניח להם אביהם פרה שאולה -**

**As רבא ruled in** פרק **אלו נערות; 'orphans whose father left them over a borrowed cow -**

**ומתה בתוך ימי שאילתה או נאנסה אין חייבין באונסין משמע דבגניבה ואבידה חייבין[3] -**

**And the cow died during the period of borrowing, or an accident** happened; the **יתומים are not liable'; it seems** though **that they are liable for גו"א.**

תוספות answers:

**ויש לומר דלא שוייה רבנן יורש אלא משום פסידא דאלמנתו[4] -**

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[1] The גמרא there rules that whenever there will be a loss to others if we consider the בעל as a לוקח, we then consider him instead as a יורש. (An אלמנה can collect her מזונות from a יורש, but not from a לוקח [since אין מוציאין למזון האשה וכו' מנכסים משועבדים]. See footnote # 4 & 5.)

[2] The case in our גמרא is actually שכרה, but see תוד"ה דאגר that the same applies to שאלה.

[3] The ruling of רבא teaches us that the heirs are liable for גו"א of any borrowed object they inherited (and were not aware that it is borrowed). It is understood (as mentioned here) that if someone purchased a borrowed item (unbeknownst to him) and there was גו"א the buyer does not have to compensate the owner. [The owner must deal with the borrower only.] In our case the woman borrowed an item and brought it into the marriage, with the husband having the right to use it just as she does. The item was then lost or stolen. If the husband is considered a יורש he will have to pay back the owner (as in the דין of רבא); however if he is considered a לוקח, he will not need to pay the owner, causing a loss to the owner. In ב"ב we ruled that if there is a loss to others the בעל is a יורש, not a לוקח, so since there will be a loss to the משאיל if he is a לוקח, we should consider the husband a יורש and hold him liable.

[4] If we would consider the בעל as a לוקח בנכסי אשתו, she would not be able to collect her מזונות from his estate, since אין מוציאין למזון האשה וכו' מנכסים משועבדים. However she collects her מזונות from the יורש(ים). See footnote # 5.

**And one can say that the רבנן did not make him as a יורש** (instead of a לוקח), **only on account of the loss for his widow -**

**כדי שתהא ניזונת מנכסיו כדאמרינן התם[5] -**

**In order that she should be fed from his estate, as** the גמרא **states there -**

**אבל משום פסידא דמשאיל אין לנו לעשות כיורש לחייבו בגניבה ואבידה -**

**However we will not make** the husband **as a יורש to be liable for גו"א because** of the **loss to the משאיל** (we need not be concerned about the משאיל) -

**שאם ירצה לא ישאילנו[6] דמי דוחקו להשאילו[7] והוי כאילו אפסיד אנפשיה:**

**For if he wanted, he need not lend it out, for who forced** the משאיל **to lend it out** to the woman, **so it is like that he caused his own loss!**

## Summary

The husband may be deemed a יורש only for the אלמנה, but not for the משאיל.

## Thinking it over

The גמרא in ב"ב there, when discussing whether a בעל בנכסי אשתו is a יורש or a לוקח, offers a practical difference. If the wife owed money in a מלוה ע"פ, the מלוה can only collect if the בעל is like a יורש, but not if he is a לוקח.[8] How can the גמרא think there that he should be a יורש, since תוס' says here that we are not worried about the משאיל (to make the בעל a יורש), for who asked him to lend, the same should be said concerning the מלוה, who asked him to lend?! The husband should be a לוקח![9]

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[5] The case there is where ראובן married רחל and then he died; ראובן left over a daughter לאה (who inherited his entire estate) and she married שמעון. During this entire time the אלמנה is supported from s'ראבן estate if we consider שמעון as a יורש. However if we consider שמעון as a לוקח from לאה, he will not be responsible for the מזונות of רחל. We want and need to protect the אלמנה that she should receive her sustenance from the estate; otherwise what will she live on.

[6] See 'Thinking it over'.

[7] We need not worry about the משאיל, he should be aware of these eventualities that are possible; if he did not take precautions, why deny the husband his right as a לוקח.

[8] The rule is מלוה ע"פ גובה מן היורשים ואין גובה מן הלקוחות.

[9] See בית שמואל אהע"ז סי' פ"ה ס"ק מ, and טל תורה.