

This is the reason; – דיינו טעמא דחיישינן לפרעון ולקנוניא
For we are concerned for payment and a swindle

OVERVIEW

According to אביי who maintains לו עדין בחתומיו זכין (so there is no concern [in our משנה] of כתב ללות בניסן ולא לזה עד תשרי, for even if that happened there is no problem if the מלוה collects from ניסן since (עבו"ל), the reason we do not return the שטר (even if מודה) is because we are concerned that this is really a paid up שטר and the מלוה ולוה are conspiring to swindle the לקוחות and take away their property illegally. תוספות explains why אביי could not have offered a more reasonable concern.

וסברי רבנו¹ אחריות טעות סופר² הוא ולכך לא יחזיר אפילו אין בו אחריות –

And the רבנן of our משנה maintain, that the lack of a **guarantee** in the שטר is merely **a mistake on part of the scribe; and therefore we do not return** a lost שטר **even if there is no אחריות** in the שטר, for even this שטר can be used to collect from משועבדים.

וכן לרב אסי –

And similarly according to רב אסי who maintains that the concern of our משנה is that אחריות assume that רבנן כתב ללות בניסן ולא לזה עד תשרי, he too must maintain that the concern of our משנה is לקוחות and there is concern for טעות סופר.

asks: ³תוספות

תימה אמאי קאמר משום דחיישינן לקנוניא –

It is astounding! Why does אבי state that the reason of לא יחזיר is because we are concerned for a swindle (which is somewhat far fetched) -

לימא משום דחיישינן שמא פרעו וכבר נמחל שעבודו⁴ –

Let אבי state the reason of לא יחזיר is because we are concerned that perhaps the לוה paid the מלוה, and the lien associated with this שטר is voided (and therefore using this שטר again is fraudulent) –

¹ The רבנן in our משנה maintain that we do not return any שטר even if there is no אחריות נכסים in the שטר; where one would seemingly think that it cannot be used against the לקוחות and therefore there should be no concern. תוספות explains that even by אחריות שאין בו אחריות there is concern since אחריות טעות סופר.

² The סופר simply forgot to insert this clause in the שטר but the לווה agreed to (and the מלווה insisted on) it.

³ See 'Thinking it over'.

⁴ Payment of the loan nullifies the שעבוד created by the (עדים who signed on the) שטר. A new שעבוד cannot go into effect (even for a new loan) unless עדים sign on a new שטר.

מלוה explains why the לווה admits that the שטר should be returned to the מלוה:

ועתה רוצה לחזור וללוות בו כדי להרוויח פשיטי דספרא⁵ –

And now the לווה wants to borrow with this שטר again in order to gain the coins that he has to pay the scribe, therefore he is saying, 'return the שטר to the מלוה' (so he will be able to receive an additional loan from the מלוה, without paying the שטר for a new סופר).

מלוה explains why the מלוה agrees to this scheme:⁶

ומלוה נמי רוצה בדבר שיטרוף מזמן מוקדם⁷ –

And the מלוה is also agreeable to this scheme, for he will be able to collect from an earlier date.⁸

תוספות answers:

ויש לומר משום פשיטי דספרא לא יפסיד ללקוחות ממון⁹ מרובה¹⁰ –

And one can say; the לווה will not wish to cause the לקוחות to suffer a loss of so much money, so that the לווה will merely gain the דספרא פשיטי.

תוספות anticipates a difficulty:

אף על גב דרב אסי חייש לכתב ללוות ולא לווה ועתה רוצה ללוות¹¹ –

Even though that רב אסי is concerned that לווה ולא לווה and now he wants to borrow and therefore the לווה admits that the שטר be returned to the מלוה -

ומפסיד ללקוחות משום פשיטי דספרא –

And he is causing a loss to the לקוחות because of the דספרא פשיטי; this contradicts what תוספות just said that the לווה will not cause a loss so that he will gain the דספרא פשיטי?!

⁵ The לווה pays for the writing of the שטר; otherwise the מלוה will not lend him the money.

⁶ Seemingly the מלוה should want an authentic שטר, not a bogus one.

⁷ If the לווה would write a new שטר for the new loan, the מלוה will be able to collect only from those לקוחות who bought from the current day and onwards; however if the לווה uses the original שטר, the מלוה will be able to collect fraudulently even from those לקוחות who bought from the original date and onwards.

⁸ The advantage of this חשש (that he wants to borrow again with this same שטר) over the חשש of קנוניא is that in this חשש the מלוה and לווה are not perpetrating a major fraud; their main intention is to use the שטר for a new loan. The לווה will only save the דספרא פשיטי (and is not harming anyone). Even the מלוה who agrees to this because he may gain an advantage that he will be able to collect from the old לקוחות (but not necessarily so); the fraud is not that blatant because the לווה may pay him (or the מלוה will collect from the new לקוחות [those that bought after this loan took place]). However according to the חשש of קנוניא, the לווה and מלוה are perpetrating a major fraud; they are planning to steal the properties of the לקוחות and that is the only reason why they want the שטר to be returned to the מלוה. It is difficult to suspect two people of taking such brazen fraudulent action.

⁹ This is akin to the מרז"ל that אין אדם חוטא ולא לו; there has to be a [substantial] gain for one to sin.

¹⁰ However in the חשש of קנוניא the לווה (and the מלוה) stand to gain a substantial amount of money, therefore it does not concern them that the לקוחות will lose a huge sum of money. See footnote # 13 (parenthetically).

¹¹ See ד"ה ולא means that he intends to borrow now.

responds: תוספות

היינו משום שכבר נתן לסופר ואינו רוצה להפסיד –

There it is because he already paid the סופר and he does not want to lose the money he already paid (for he did not borrow with this שטר yet) –

ועוד שסובר המלוה¹² שיצא הקול משעת כתיבה –

And in addition the מלוה assumes that there was publicity concerning this loan from the time the שטר was written (in ניסן), therefore there is no undue (or unfair) loss to the לקוחות for they were aware of the loan

משעת כתיבה – אבל כשלוח ופרע לא הפסיד פשוט שנתן לסופר –

However in the חשש which תוספות suggests where he borrowed and paid, the לוח did not lose the coin he gave to the סופר, because he already received (a loan and) a loan –

ועוד¹³ שירא המלוה ששמעו הפריעה¹⁴ ואהלואה שנית לא נכתב השטר:

And furthermore the מלוה is reluctant to go along with this scheme because he is afraid that people heard regarding the payment of the initial loan, and that the שטר was not written for this second alone, therefore he will not go along with the לוח and there is no חשש.

SUMMARY

People will not cause undue loss to others unless they gain substantially. Therefore there is a concern of קנוניא for (even though there is great loss to the לקוחות) there is a substantial gain to the מלוה ולוח. There is no concern of making a new loan on the old שטר for there is significant loss to the לקוחות and minimal gain to the לוח (and the מלוה is concerned that he may be found out). There is concern for לוח does not want to lose the פשיטי דספרי and there is no significant loss to the לקוחות for they are already aware of the loan משעת כתיבה.

THINKING IT OVER

What is the connection between opening remarks (regarding אחריות¹⁵ and the subsequent question?¹⁶ טעות סופר

¹² לקוחות explains why the מלוה is not reluctant to lend on this שטר when he might cause a loss to the לקוחות.

¹³ תוספות adds that even if the לוח is greedy to save the future פשיטי דספרי, however the מלוה will refuse to go along with his scheme. (This ועוד applies [also] previously, before the words אסי.)

¹⁴ The מלוה is afraid that ב"ד will nullify his שטר and he will lose his money.

¹⁵ See footnote # 3.

¹⁶ See מעין החכמה and אבני קודש.