אף על פי שכתוב בו הנפק[1] לא יחזיר –

Even though a הנפק is written in the שטר**, he should not return** it

Overview

ר' יוחנן (according to ר' אבהו) rules that if one finds a שטר with an enclosed הנפק, it should not be returned to the מלוה, and (the גמרא) elaborates: certainly it is not returned if there is no הנפק since there is the possibility that there was never a loan, but even if there is a הנפק (which indicates that there was a loan[2]), nevertheless it is not returned, for we are concerned that the loan was paid. תוספות discusses whether this ruling applies even when the לוה admits that he owes the money,[3] or only when there is no admission by the לוה.

תוספות asks:

תימה דמשמע דאיירי באין חייב מודה כדאמר שמא כתב ללות ולא לוה –

It is astounding! For it appears that we are discussing a case **where the לוה is not admitting** that he owes the money, **as** the גמרא **states** while discussing the case of לא כתוב בו הנפק where he certainly should not return the שטר, because '**perhaps** the לוה **wrote** the שטר with the intention **of borrowing, but he never** actually **borrowed;'** obviously the לוה is not admitting to owing anything,[4] and -

לכך לא יחזיר דחיישינן לפרעון[5] –

Therefore (even in the case of כתוב בו הנפק) the שטר **should not be returned** to the מלוה, **for we are concerned that** perhaps the לוה **paid -**

אבל אם לוה מודה יחזיר דלא חיישינן לקנוניא[6] –

However the indication is that **if the לוה admits** that he owes the money, the שטר **should be returned** to the מלוה, **for we are not concerned for a swindle -**

ולא לשמא פרעו ורוצה לחזור וללות בו כדי להרויח פשיטי דספרא –

And we are also not concerned **that perhaps** the לוה **paid** the loan **and he**

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[1] A הנפק is a writ of בי"ד attached to the שטר that the signatures of the witnesses were authenticated.

[2] It is the מלוה who requests the הנפק (the לוה has no interest in having the שטר מקויים), this indicates that the לוה gave the שטר to the מלוה, proving that there was a loan; otherwise the לוה would not give him the שט"ח.

[3] We do not return the שטר even if the לוה admits, because (since it is a lost שטר) we are concerned perhaps the מלוה and the לוה are conspiring to defraud the לקוחות – a קנוניא. See the גמרא previously on יג,א.

[4] See מהרש"ל, מהרש"א וכו'. See 'Appendix'.

[5] By returning it to the מלוה we may be causing a loss to the לוה that he will pay twice.

[6] When the לוה admits that he owes the money we are not concerned that perhaps the לוה already paid, but he is conspiring with the מלוה by saying 'I did not pay' in order that the מלוה will collect from the לקוחות and the לוה and מלוה will share the profits of this swindle. This concern is too far fetched and is not considered.

wants to borrow again with this שטר **in order to save** himself from paying '**the coins of the scribe';**[7] we are not concerned for this and if חייב מודה the שטר is returned. This concludes the opinion of our גמרא here.

תוספות continues with his question:

וקשה דלקמן (דף יז,א) **אמר רבי יוחנן שטר שכתוב זמנו בו ביום וכתוב בו הנפק יחזיר –**

And this is difficult, for later ר' יוחנן rules, a שטר which (which was found and) **has today's date and it is authenticated, it should be returned** to the מלוה -

ומוקי לה רב כהנא כשחייב מודה –

And רב כהנא established this ruling of ר"י in a case **where the** לוה **admits** that he owes the money -

ודוקא שכתוב בו ביום אבל אין כתוב בו ביום לא יחזיר –

And this ruling (that it should be returned to the מלוה) applies **specifically** only **when it has today's date, however if it is not dated as of today, it should not be returned -**

או משום פשיטי דספרא או משום קנוניא[8] **–**

Either because of פשיטי דספרא or on account of a קנוניא, and from our גמרא here it seems that ר"י not concerned about פשיטי דספרא or קנוניא.

תוספות expands the contradiction:

וכן לעיל (דף יג,ב) **אוקי רבי יוחנן מתניתין דמצא שטרי חוב לא יחזיר**[9] **בחייב מודה –**

And similarly previously ר"י established the משנה of מצא שט"ח לא יחזיר in a case **where the לוה admits** owing the money, and the reason we do not return the שטר to the מלוה -

ומשום קנוניא[10] **דסברי רבנן דאין בו אחריות גבי (לוה) נמי ממשעבדי**[11] **–**

Is because we are concerned for a **קנוניא since the רבנן maintain that** even a שטר **without** נכסים **אחריות also collects ממשעבדי -**

(ותניא כוותיה דרבי יוחנן[12]**) –**

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[7] The fee for writing a new שטר. The concern here is if this is indeed so that it is a used שטר, then legally this שטר is void and it cannot be used to collect from לקוחות. We are concerned that the מלוה will collect with this שטר from the לקוחות. This concern does not involve such a blatant swindle as קנוניא (for the only concern is maybe the מלוה will collect from the לקוחות; however it is possible that the לוה will pay him and all will be legal), nevertheless ר' אבהו is not חושש even for such a 'minor' swindle. See 'Thinking it over'.

[8] The גמרא (on יז,א) only mentions the חשש of פשיטי דספרא, but not the חשש of קנוניא, since there we are discussing a case of בו ביום and we are not חושש for a קנוניא when the שטר is dated בו ביום (see מהוד"ב on תוספות יז,א ד"ה רב כהנא).

[9] The רבנן of that משנה maintain that לא יחזיר even if there is no אחריות נכסים written in the שטר.

[10] ר' יוחנן does not actually mention the חשש of קנוניא. However the גמרא there subsequently uses this explanation. See also רש"י there ד"ה ממשעבדי.

[11] It is not clear why תוספות mentions this here (see נח"מ).

(and we learnt in a ברייתא supporting the view of **ר"י).** We find in two (other) places that ר"י is concerned לקנוניא (and פשיטי דספרא) and therefore we do not return a found שטר even כשחייב מודה, however here it seems that he is not concerned for קנוניא and פשיטי דספרא, and we will return the שטר where the לוה admits. How can we reconcile these conflicting statements?!

תוספות answers:

ויש לומר דאמוראי נינהו ואליבא דרבי יוחנן –

And one can say; that the two contradictory statements reflect the view **of different אמוראים regarding** the opinion of **ר"י -**

דרב כהנא יעמיד הכא מלתא דרבי יוחנן אף כשחייב מודה[13] ומשום קנוניא[14] –

For רב כהנא (who maintains that we are חושש for קנוניא or פשיטי דספרא) **will establish this ruling of ר"י** (that we do not return a שטר שכתוב בו הנפק) **even** in a case **where the לוה admits** that he owes the money. **And** the reason we do not return it is **because** we are concerned for a **קנוניא** (this is the view of רב כהנא) **-**

ורבי אבהו דמפרש דוקא כשאין חייב מודה –

And רבי אבהו who explains this ruling of ר"י (that we do not return a שטר שיש בו הנפק), is discussing **specifically only** a case **where the לוה does not admit** and therefore we do not return it -

אבל כשחייב מודה יחזיר דלא חייש לקנוניא –

However when the לוה admits owing the money, the שט"ח **should be returned, for we are not concerned for a קנוניא;** therefore ר' אבהו -

יעמיד נמי מתניתין דלעיל כשחייב מודה ומשום שמא כתב ללות ולא לוה[15] כרב אסי[16].

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[12] Others omit this phrase. Those that include it, will explain that this bolsters תוספות difficulty with ר' אבהו here who (seemingly) maintains אין חוששין לקנוניא, while the גמרא which cites the ר"י תניא כוותיה דר"י (seemingly) maintains that we are חושש לקנוניא. See footnote # 19.

[13] Even though תוספות previously determined from the words שמא כתב ללות ולא לוה that we are discussing a case of כשאין חייב מודה, nevertheless (according to תוספות) the words beginning with לא מיבעי and onwards are the words of ר' אבהו and not the words of ר"י. All that ר"י said was המוציא וכו' לא יחזירו לבעלים, and רב כהנא will interpret that even כשחייב מודה because דחיישינן לקנוניא.

[14] Similarly s'ר"י explanation (on יג,ב) of the משנה follows the view of רב כהנא.

[15] ר' אבהו also agrees that ר' יוחנן establishes the משנה in a case of כשחייב מודה (as it states clearly on יג,ב), however ר' אבהו maintains that the reason of לא יחזיר is not because of קנוניא but because שמא כתב ללות בניסן ולא לוה עד תשרי, as רב אסי initially explained the משנה. See 'Thinking it over'. [The reason תוספות writes שמא כתב ללות בניסן ולא לוה עד תשרי, see footnote # 18 that according to תוספות יב,ב ד"ה כתב ללות ולא לוה and not ולא לוה עד תשרי is that he still did not borrow and he wants to borrow now in תשרי, therefore it is appropriate to refer to this שטר as כתב ללות ולא לוה. This is not the same as a קנוניא, however. By a קנוניא there is no intent of borrowing at all, just to perpetrate a swindle on the לקוחות, however by כתב ללות there is intent to borrow; the only problem is that the מלוה may collect from the earlier לקוחות שלא כדין].

[16] We do not return this שטר because the מלוה may collect illegally from the לקוחות who bought קרקע from the לוה between ניסן (when the שטר was written) and תשרי (when the loan took place and the שעבוד began).

Will also establish the previous משנה (where the חכמים maintain לא יחזיר) in a case **where the לוה admits.** We do not return it because of the concern that **perhaps he wrote** the שטר in ניסן in order **to borrow but he did not borrow** until תשרי **as רב אסי** explains the משנה -

אבל היכא דליכא למיחש לכתב ללות ולא לוה כמו בשטרי הקנאה[17] –

However in a case where there is no concern of כתב ללות בניסן **ולא לוה** עד תשרי, **as** for instance **by שטרי הקנאה -**

או כתוב בו הנפק[18] כי הכא יחזיר דלא חיישינן לקנוניא –

Or in a case **where there is a הנפק written in** the שטר **as** is the case **here** in the ruling of ר"י, if the לוה is מודה, the שטר is returned to the מלוה, **for we are not חושש לקנוניא.**

תוספות responds to an anticipated difficulty:

וגמרא דנקט לעיל[19] טעמא דקנוניא סבר כאביי דאמר עדיו בחתומיו זכין לו[20] –

And the גמרא previously, which mentioned the reason of קנוניא, agrees with אביי who maintains עדיו בחתומיו זכין לו and therefore there can be no concern of כתב ללות בניסן ולא לוה עד תשרי -

או אקרי וכתיב[21] לא אמרינן[22]:

Or even if that גמרא does not agree with אביי, but it maintains that **we do not suspect that it happened** that the שטר was **written** without the מלוה lending the

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[17] See רש"י יג,א ד"ה בשטרי. A שטר הקנאה is where the לוה pledges his assets to the מלוה regardless if there will be a loan or not. Therefore, even if כתב ללות בניסן ולא לוה עד תשרי, the מלוה may legally collect from ניסן.

[18] See תוספות יב,ב ד"ה ולא that the חשש of כתב ללות בתשרי ולא לוה עד ניסן means that we suspect that he wants to borrow now (which is in תשרי), but not that he borrowed already, עיי"ש. Therefore if there is a הנפק we cannot have that חשש that perhaps he wants to borrow now, for since there is a הנפק it is obvious that there already was a loan. See footnote # 2.

[19] דף יג,ב; indicating that according to ר"י we are חושש לקנוניא, which contradicts ר' אבהו here. See footnote # 12. The question is why indeed did the גמרא assume the reason of קנוניא (like רב כהנא) and not the reason of כתב ללות ולא לוה (like ר' אבהו).

[20] This means that [regardless when the לוה transfers the שטר to the מלוה] the עדים acquire the right for the מלוה to collect from the לקוחות from the date of the שטר (and not from the date of the transfer or loan).

[21] See previously יג,א. If we do not maintain עדיו בחתומיו זכין לו (like אביי), then עדים cannot write a שטר for the לוה unless they see the loan (for we are concerned that perhaps there will be no loan until later and the מלוה will collect from the earlier לקוחות שלא כדין), or unless it is a שטר הקנאה. The גמרא explains that even though this שטר which was found is not a שטר הקנאה and presumably the עדים saw the loan, so there should be no concern for כתב ללות ולא לוה, nevertheless we do not return the שטר for perhaps 'אקרי וכתיב'; it happened that the עדים mistakenly wrote a שטר for the לוה without seeing the loan. Others disagree with this concern (and say the only concern is קנוניא, meaning the לוה paid already).

[22] The ברייתא that supports ר"י, merely states that the מחלוקת is כשחייב מודה (as ר"י does); however, it does not explain why the רבנן maintain לא יחזיר. It is the גמרא there which explains that the reason of the רבנן is משום קנוניא (since they hold like אביי or אקרי וכתיב לא אמרינן). However ר' אבהו can say that both ר"י and the רבנן (according to the ברייתא maintain לא יחזיר) because שמא כתב ללות בניסן ולא לוה עד תשרי, because he disagrees with אביי and maintains also that we are concerned for אקרי וכתיב.

money; therefore it had no choice but to explain the משנה in a case of כשחייב מודה and we are concerned לקנוניא.

Summary

There are two opinions regarding the view of ר' יוחנן that we do not return a שטר שיש בו הנפק. According to ר' אבהו it was taught only כשאין חייב מודה, however כשחייב מודה we return it for there is no חשש of כתב ללות ולא לוה and we are not concerned לקנוניא. However, according to רב כהנא the ruling applies even כשחייב מודה, because חיישינן לקנוניא.

Thinking it over

According to תוספות it appears that ר' אבהו is not חושש for פשיטי דספרי,[23] but he is חושש for [24](עד תשרי) ולא לוה (בניסן) כתב ללות. Seemingly in both cases he may be causing a loss to the לקוחות (but not definitely, for if the לוה pays there is no loss). Why the distinction between the two?!

Appendix

תוספות states that it is apparent that ר' יוחנן is discussing a case כשאין חייב מודה since the גמרא writes (regarding the case of אין כתוב בו הנפק) that we certainly do not return the שטר since 'שמא כתב ללות ולא לוה'.[25]

Superficially it seems obvious that we are discussing כשאין חייב מודה, for if the לוה is מודה how can the גמרא say שמא כתב ללות ולא לוה (in the case where אין בו הנפק) or חיישינן לפרעון (in a case where כתוב בו הנפק), when the לוה admits that he owes the money.

However this is not a conclusive proof; for it is possible that even though the לוה is מודה that he owes the money, nevertheless we do not return the שטר, out of concern that כתב ללות ולא לוה or חיישינן לפרעון, meaning that we are concerned that perhaps the מלוה and the לוה are making a קנוניא against the לקוחות, and really the לוה never borrowed the money or he already paid the money. This alone, then is not sufficient proof that we are discussing כשאין חייב מודה.

תוספות proof may be as follows; if we assume that we are discussing a case כשאין חייב מודה, meaning [preferably] that the לוה is not present (or that he claims I do not owe you), then we can understand why the גמרא uses the

[23] See footnote # 7.
[24] See footnote # 15.
[25] See footnote # 4.

reason (for not returning the שטר) of כתב ללות ולא לוה by אין בו הנפק and the reason of חיישינן לפרעון in a case where כתוב בו הנפק. The לוה is not present. In a case of אין בו הנפק there is more reason not to return the שטר since it is possible that there was never a loan (and even if there was perhaps it was paid), and the חידוש of ר"י is that even if we know there was a loan (since כתוב בו הנפק), nevertheless לא יחזיר for חיישינן לפרעון.

However if we assume that the לוה is present and claiming that he owes the money (and the reason we do not return the שטר is because חיישינן לקנוניא), then there is no difference whether there is a הנפק or there is no הנפק. If we do not believe the לוה and we are חושש לקנוניא then why are we more sure by אין בו הנפק that it should not be returned than by יש בו הנפק?! In either case it is just as likely (or unlikely) that they are making a קנוניא. And furthermore why does the גמרא give a different reason by אין בו הנפק (that כתב ללות ולא לוה) than by יש בו הנפק (that חיישינן לפרעון), there should be only one reason which is that חיישינן לקנוניא. The fact that the גמרא gives a different reason by אין בו הנפק (that כתב ללות ולא לוה) proves that the לוה is (not present and is) not admitting. Therefore (as mentioned previously) there is a lesser חידוש by אין בו הנפק (since there is the possibility that there never was a loan) than יש בו הנפק where we assume there was a loan.

This is perhaps what תוספות means when he says כדאמר שמא כתב ללות ולא לוה, meaning that since the גמרא gave a different reason by אין בו הנפק than by יש בו הנפק (and did not say [ולקנוניא] חיישינן לפרעון in both cases), this proves that we are discussing a case of כשאין חייב מודה, ודו"ק.