Money Matter$

DILEMMAS IN PRACTICAL MONETARY HALACHAH

Volume 2

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Introduction

The articles in this *sefer* were organized from the weekly articles that our organization, the Institute For Dayanim, sends via e-mail. Many of the questions were received by our website www.dinonline.org and some emanated from *denei torah* in our *beis din*, Nesevos Chaim. Almost all of the questions concern monetary law which is discussed in the .Choshen Mishpot section of the Shulchan Aruch

Many people have the mistaken impression that one does not need to ask questions in Choshen Mishpot and if one does, anyone who learned Gemoro or studied to be a rabbi is qualified to answer since Choshen Mishpot depends on logic. Evidence of this phenomena is the volume of responsa of modern poskim. Whereas, there are numerous responsa concerning topics in Orach Chaim and Yoreh Deah there are much less responsa concerning monetary law, which are .discussed in the Choshen Mishpot section of Shulchan Aruch

Actually, this is the opposite of the truth. Questions concerning monetary law and legal disputes, *denei Torah*, are generally much more complex since they emanate from the real life where each case is unique. One must take into account many factors and only then one even knows what the halachic issues are. The next step, which is also difficult, is knowing exactly to what one can compare the issue at hand. In contrast with Orach Chaim and Yoreh Deah where most *sheilo*s are standard and have been decided by the *poskim*, in Choshen Mishpot

the *sheilo*s are generally not exactly what has been decided and one must seek an analogous situation and often this itself is the subject of dispute. While it is true that everything is logical, one must first know and understand clearly what has .been written and only then apply logic

The purpose of the *sefer* is two-fold. The first purpose is to clarify the specific subject at hand. We have attempted to give the reader the full-picture. We start with the original sources. Then we present the way the commentaries interpreted these sources and see how diverse interpretations lead to diverse practical rulings. Finally, we derive a practical ruling based on the decisions of poskim. One who reads the *sefer* will not be able to issue halachic rulings but he will become aware of many issues that previously were not known to him. Many times people, even if they are quite scholarly, violate clear-cut .Torah laws due to lack of basic knowledge

The second purpose is more general-to teach the proper approach to a halachic question especially when dealing with questions in Choshen Mishpot. Since one cannot simply look up the answer to his question, it is imperative that one understand the original sources. Furthermore it does not suffice to find one poseik who ruled on the issue. It is necessary to see how all the major poskim ruled since otherwise one may rule .against the consensus opinion

We have attempted to write in a manner that will benefit all readers. Even one who has a limited knowledge can understand

the answers. At the same time even one who has studied Choshen Mishpot will appreciate the *sefer* since the answers .are never obvious and there always is more to discover

I wish to thank *Hakodosh Boruch Hu* who has given me everything needed to write the *sefer* besides all the other infinite *chassodim* that he has done for me. I also want to pay tribute to my parents z"l who spared no effort to educate me properly. They were people who, because of their noble character, still serve as role models for my siblings and myself and therefore, keep educating us. I also want to thank my wife for doing everything she can to enable me to learn even if it makes her life more difficult. Finally, I want to thank my decades-long *chavruso*, Rabbi Mordechai Plaut, who kindly edited the entire *sefer*. Not only did he make sure the English is perfect but also he made certain that everything is written .clearly and simply

Finally, we reiterate that one should not *pasken sheilos* just based on what is written in this *sefer*. The *sefer* was written only to educate. Every case is unique and whenever one has a *sheilo* he should ask a competent authority and not *pasken* himself and when the *sheilo* involves more than one person they should ask the question together in order to give the .authority the complete and unbiased picture

The Institute For Dayanim

Whereas knowledge of the sections of Jewish law that deal with practical day-to-day living is widespread, knowledge of the sections which deal with monetary law is not. Rabbis train by studying Orach Chaim and Yoreh Deah, the sections of the Shulchan Aruch that deal with day to day living. At the same time people know that they have to ask questions when they have questions concerning day-to-day living. However, when it comes to monetary law, Rabbis are generally not trained and their constituents often believe that whatever seems logical is correct and when they can't resolve the issues themselves they can go to court.

At the same time much criticism has been leveled at the system of batei din that exists today.

The purpose of the Institute for Dayanim is three-fold. The Institute trains rabbis to be experts in Jewish monetary law. Avreichim who enter the program are already advanced Talmudic scholars and they spend eleven years immersed in full-time (even summer vacation is only one week) study in order to become experts in Jewish monetary law. Every month there are written, closed book exams and once a year there is a review period which culminates with comprehensive written and oral exams. At the end of the eleven year period the avreichim receive an advanced semicha degree known as yadin-yadin.

The Institute is now in its third cycle and those who graduated in the first two cycles hold many important positions around the world.

The student population of the Institute is a microcosm of the Jewish people. There, Ashkenazim and Sefardim and Chassidim, Israelis and Chutznicks, frum from birth and ba'alei teshuvo all study together in harmony. At present there are almost two hundred students who study at the Institute's two branches in Yerushalaim and Ramat Beit Shemesh.

The second purpose of the Institute is to operate a beis din of the highest caliber with the highest standard of ethics, Beis Din Nesevos Chaim. The dayanim are graduates of the Institute. Decisions are reached quickly and clear reasons are given. There is no communication between the parties and the dayanim outside of the proceedings. Every document submitted is shared with the other side. All the proceedings are recorded and transcribed and are available to both parties.

The beis din operates under the Israel Law of Arbitration and adheres strictly to the law. As a result, the parties almost always accept the decisions of the dayanim. On the few (less than 1%!) occasions when beis din's decision was challenged in secular court, the court always upheld beis din's decision and often has praised the beis din.

Justice is for all. The price of dinei Torah is minimal. With the express written approval of Rav Eliashev zatsal, beis din conducts dinei Torah in English by means of Zoom. One can

contact the secretary of the beis din by e-mail at beisdin@neto.net.il.

The third purpose of the Institute is to spread correct Torah knowledge to everyone. The Institute operates a popular website (www.dinonline.org) where people can ask their questions in Hebrew, English and Russian. At present there are over a million visits a year.

Additionally, the Institute publishes a monthly high level Hebrew journal known as the Alon Hamishpot. It also disseminates via e-mail two weekly English articles: one on monetary law and one about other timely topics. The articles in this sefer originated in these weekly e-mails. To receive these articles, visit the website and if you wish you can add your name where indicated.

Finally the institute conducts symposia for the public three times a year. Choice of topics is based on public interest. At each symposium three renowned experts speak. Many of these were published in the two-volume Otzar Hamishpot which is found in the Bar Ilan Teshuvot database.

Questions concerning the content of this sefer can be directed to maanesimcha@gmail.com or via the website.

כי נר מצוה

ספר זה יוצא לאור לע"נ

ר' **נתנאל ישראל**

בן ר' **יוסף חיים** ז"ל

נלב"ע י"ז מנחם אב תשס"ט

ורעייתו

מרת **אילה אהובה**

בת **מרדכי בנימין** הכהן ע"ה

נלב"ע י"ד מנחם אב תשס"א

הונצחו ע"י בנם

ותורה אור

נ"נ מצוה

In gratitude to the Yad Mordechai Foundation and in particular to the Moshal brothers, Anthony and Martin for their many years of very generous assistance to the Institute For Dayanim.

This sefer will help advance their cause to disseminate knowledge of how to apply Torah Law to daily monetary issues and business ethics

May this sefer serve to perpetuate the memory of their beloved grandparents

תורה אור

כי נר מצוה

לעי"נ יהודה
בן ישראל חיים

נלב"ע כ"ב שבט תשע"א

ת.נ.צ.ב.ה.

הונצח ע"י בנו

ותורה אור

כי נר מצוה

לע"נ

יו"ט בן אלטון הלוי

ת.נ.צ.ב.ה.

הונצח ע"י בנו

אלי ושרה לוי ומשפחתם

ותורה אור

כי נר מצוה

Dedicated in Loving

Memory of

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May the publication of this sefer be a zechus for his neshama

Adam and Murielle
Avissar

Aventura, Fla

ותורה אור

Commerce

1

Competition in the Esrog Business

I want to sell esrogim this year at a very cheap price. Specifically, I can sell esrogim in open boxes at the price that chessed organizations charge for esrogim in closed boxes. I am not doing anything that is not fair and honest. Is there anything wrong with my doing so?

Answer:

In order to answer your question, we must study the rules of competition.

The general rule is that the Gemara permits and even encourages competition. Thus, the authoritative opinion of R. Huna the son of R. Yehoshua (*Bava Basra* 21B) is that one may open a store right next to an existing store. In the time of the Gemara there was an issue of taxes and there was a leniency for fellow residents of the city since they paid local taxes and the proprietors of stores who did not reside in the city did not pay. However, now since the local authorities assess all stores equally this exclusion is not pertinent. This is ruled by the Shulchan Aruch (156, 5): "If a store exists in an alley, its owner may not object to someone who wishes to open a competing store." The Rama merely adds that the first store can object to the opening of a rival store if its proprietor does not reside in the same city since then he doesn't pay local taxes.

Nowadays, even though the exception for non-residents does not apply, it does apply if the competition works off the books, thus avoiding paying any taxes. This could apply in the esrog business since many of

the vendors don't pay taxes. Therefore, if you don't pay taxes and the competition does, they could object to your competition.

However, there are situations where competition is not permitted. A very basic ruling was issued by the Aviyosof (*Ra'avyo* cited by *Mordechai*, *Bava Basra* 516). He was asked about a store which was opened near the entrance to a dead-end alleyway which already had a store situated deep inside the alleyway. (In those times stores were usually in a person's house so one couldn't simply rent another store.) He ruled that the second store was not allowed to open a competing store in that location. He reasons that anyone who wished to purchase an item which was carried by the first store would now first pass by the new store and the original store would lose his entire clientele. The Beis Yosef (*Siman 156*) does not follow this opinion but the Ramo (*Darkei Moshe* note 4) rules that the Ra'avyo is authoritative. In fact, the Rama used this Ra'avyo to issue a landmark ruling in an issue affecting all European Jewry.

That issue involved the publication of the Rambam's *Yad Hachazakah*. The Maharam of Padua had recently published a corrected version of the Rambam. A non-Jew had a personal issue with the Maharam and decided to publish the Rambam as well and sell it at a cheaper price, effectively ruining the Maharam's business since the Maharam could not compete with the wealthy goy who could afford to sell at a loss.

The Ramo (*Responsa* 10) ruled that no Jew was allowed to buy a copy of the gentile's Rambam until the Maharam sold out all of the copies of the Rambam that he had printed. He gives three sources for his ruling. One is the previously cited Ra'avyo. The Ramo explains that the rationale of the Ra'avyo is that one may not engage in actions that will certainly damage his competition. Competition is permitted but not unfair competition. This is similar to laws nowadays forbidding dumping.

The Chasam Sofer (*Choshen Mishpat*) understands that the position of the Ra'avyo and Ramo is that one may not compete in a way that will destroy a rival's livelihood even if nothing unfair is done. This is the general consensus of the poskim. Thus, the Maseis Binyomin (res 27), for example, ruled that one Jew may not turn to the local authorities to buy the right to import a product such as sugar when another Jew owns that right. The reason was that the government only granted the concession to one person and if one Jew would offer the government a better deal, he would effectively cause the first Jew to lose his livelihood.

This ruling that one may not open a business that will ruin his competition's livelihood is the consensus of the poskim. Many of these poskim say that the source for this rule is the interpretation of Tosafos (*Bava Basra* 21B) of the Gemara which forbade a fisherman to spread his nets in the vicinity of another fisherman's nets.

Rav Moshe Feinstein zatsal ruled this way as well. He ruled (*Choshen Mishpot* 2, 31) that one may not open a store to sell religious objects in a neighborhood that already had one such store in case there was only enough business to support one such store. He forced the second store to close. This was also the ruling of the Levushei Mordechai (*Choshen Mishpot* 12). He wrote, however, that if beis din forbids competition, beis din can also set the prices so that the clients will not suffer as a result of the lack of competition.

Rav Moshe in another response (*Choshen Mishpot* 1, 38) also followed this approach. He was asked to rule in a dispute between a local rebbe who supported himself from his shteibel. The rebbe was not popular with a group of his mispallelim who opened another shul a few blocks away from the rebbe. The rebbe argued that by opening a rival shul he would lose his livelihood.

Rav Moshe ruled in favor of the rebbe. The teshuvo is very interesting since the breakaway group had a number of strong arguments to justify

their actions. One was that the rebbe cursed them and called them "communists". Another was that they davened ashkenaz and the shteibel davened sefard. Rav Moshe brushed all these arguments aside with the argument that it is forbidden to compete in a manner that would cause the rebbe to lose his livelihood. There is another interesting din in this teshuvo. The other poskim do not discuss the amount of what is called a livelihood. Rav Moshe writes that it is what an average person of his stature earns.

The esrog business is a seasonal business and the people who engage in it on a retail level like yourself do not do it for their livelihood. Rather, it serves to supplement people's income. Therefore, it would seem that you need not worry that you will force others to sell for cheaper than they have in the past as long as you play fair and don't do anything to actively take away other people's customers.

2

An Arrovoh tree Planted by One Neighbor in Common Property

One of the neighbors planted an arrovoh tree in the yard of the building. There are twenty residents of the building and the yard is owned jointly by all of them. The neighbor who planted didn't ask anyone for permission, but also no one raised any objection. Furthermore, he didn't ask for and no one paid him anything for his work. Are the arrovos considered his? Do we need to ask his permission before taking arrovos? Does he need to ask our permission before taking arrovos? Can he or we sell arrovos?

Answer:

In order to answer all of your questions we must determine what happened halachically when the neighbor planted the tree. Since the land on which he planted the tree belongs to all of the neighbors, this case is determined by the Gemoro (*Bava Basra* 42B) that rules that when a partner improves common property he is considered a *yoreid* with permission. As we discussed in previous articles, when one works without being hired he is called a *yoreid*. This Gemoro is thus saying that the tree is not his, but since he improved the joint property he is entitled to payment for his work. Again, he is certainly not the owner of the tree.

Since the tree grows on joint property the partners can tell the neighbor who planted the tree that they want the tree and then it is theirs. The reason is because he is just a *yoreid* meaning that he

improved the joint property. They will have to pay him for planting the tree but probably this is easily worth it for the neighbors.

As we mentioned earlier, since the one who planted the tree is a neighbor, he is considered a *yoreid* with permission. As with every *yoreid*, in order to determine how much to pay we have to consider two factors: the expenses of the one who improved the property and the gain of the owners. In determining the expenses, we must take into account two factors: the cost of the raw materials and the cost of the labor. The raw materials in this case are probably just whatever was planted. Often people merely take the arrovoh from their own lulav and plant it. In this case, the cost is nothing.

The other factor is labor. It is clear from the Rishonim (for example *Rashi Bava Metsiyo* 117 B *im hashevach*) and ruled by the Shach (306, 5)) that labor is a cost. In case someone was hired to plant the tree, the neighbors would need to reimburse the one who paid for the planting. In case he planted it himself, they would need to pay him the amount that people charge for this kind of work. Usually it does not take long to plant and one can hire a child to plant, so this expense is also quite minimal.

In order to determine the value of the improvement to the common property, we must first understand what the Gemoro means by improvement. As Rashi (*Kesubos 80A cf kemotsei*) writes, the owner does not pay the one who improved the property the entire value of the appreciation of his property. Rather he must pay the amount a person would pay in order to make the improvement.

In the time of the Gemoro the general arrangement (*Gemoro Kesubos* 80A) was to give land to a sharecropper. Therefore, the owner had to pay the *yoreid* the amount one would pay a sharecropper. However, nowadays people just hire an hourly worker to do this kind of work. Therefore, the amount one needs to pay for the

improvement is the same as the amount they would need to pay for expenses. Therefore, if the neighbors want the tree they will need to pay for the labor and the raw materials.

We should stress that the one who planted the tree has no right to refuse to give the neighbors the tree. He even cannot remove the tree as is stated in the Shulchan Aruch (375, 2). The reason (See *Nimukei Yosef Bava Metsiyo* **58B) is because when the neighbor planted the tree in the common property he effectively gave all the neighbors the tree. Therefore, if they desire the tree, it will be theirs.**

It is like giving a present. If the recipient wants it, he may keep the present. Here it isn't free for them, but the tree was given to all the neighbors if they wish to pay for it.

It should be noted further that the neighbors do not need to pay in cash. When one hires an employee, the employer must pay the employee's compensation in cash (See *Tosafos Bava Kama* **9A cf** *Rav Huna***). However, a** *yoreid* **is not an employee. Therefore, he cannot demand to be paid with cash. Therefore, the neighbors may allow the one who planted to take an amount of arrovos from the tree whose retail value is the amount that is due to him as payment for having planted the tree.**

Even if the neighbors do not immediately ask to keep the tree but wait a while, and even for a few years, once they pay, most Rishonim (See *Rashbo's* **commentary to** *Bava Kama* **21A and the** *Ketsos* **363, 5) maintain that the neighbors' ownership takes effect retroactively. Thus, if the one who planted sold arrovos from the tree before they decided they want the tree, he will have to turn over the proceeds of his sales to the neighbors when they pay him the amount they owe him for his having planted the tree (as per the above plus a fee for selling the arrovos).**

It should be noted further that the neighbors also do not have to agree to leave the tree. If they wish they can tell the one who planted to uproot his tree (*Shulchan Aruch* 375, 2). However, they have to be honest. If they tell him to remove the tree and then pick the arrovos themselves they will have to pay for the tree as per the above (See *Shulchan Aruch* 375, 3).

We should note further that it is not advisable for the one who planted the tree to just take arrovos as long as no one says anything. The reason is that, as the Machane Efraim rules and the Mishna Beruro (658, 10) cites his opinion, one should generally pay for his four species before Succos since according to the Torah one needs to pay in order to acquire a movable object. Since the neighbors may later acquire the tree retroactively if/when they pay the planter what they owe, it will turn out that retroactively he never paid for and perhaps didn't even own his arrovos before Succos.

In conclusion: It is in everyone's best interest for the neighbors to settle with the one who planted, paying what he deserves and then they can decide whatever they want to do with the arrovos.

3

Does a Store have to Refund the Delivery Fee if it Sent Improper Merchandise

I recently saw an advertisement from a store that they had a bookcase for sale. When we spoke on the phone, I asked if the bookcase that they advertised was plywood and when the storeowner replied affirmatively I ordered one. It was clear that a critical factor in my order was that the seller said it was plywood. The store uses a trucking company to whom I had to pay one-hundred-fifty dollars for delivery. When I unpacked the furniture I saw that it was pressboard, which is inferior to plywood. The storeowner agreed to refund the amount I paid for the bookcase. I feel the storeowner should reimburse me as well for the one-hundred-fifty dollars I spent on delivery. Am I correct?

Answer:

The owner was certainly required to reimburse you for the bookcase since the sale is classified as a mekach to'us. The source is a Terumas Hadeshen (res 322) who writes that if it is clear that you would have not purchased the other type of object, the sale is a mekach to'us. Thus your question is a general one: Does one who sold an item whose sale was canceled since it was a mekach to'us need to refund the transportation costs that were paid by the buyer?

This very question is discussed by the Rama who is cited by the Tur (232, 20). He rules that if the seller was aware of the defect, he has to reimburse the customer for his expenses, but if he was unaware he is not liable. He explains that the reason the seller is liable in case he was aware of the defect is because the expenses are considered *garmi*.

The reason the Rama says the psak depends on whether the seller was aware of the defect, is because he maintains, like many others, (See *Shach* 386, 6) that the reason one is liable for causative actions, which are classified as *garmi*, is a fine, a *knass*. We find in the Gemara (*Gittin* 53) in a case where a person mixed someone else's food with terumo (causing its value to decline since the possible buyers of the food are now only kohanim who may eat terumo) that fines were imposed only if the action was done on purpose and not if it was done by mistake.

We should note that the Rama did not require that the seller intended to hurt the customer. He just required that the seller be aware of the defect. The reason is that even those who rule that one is not liable for accidental *garmi* agree that if the one who damaged was careless, he is liable. This can be derived (See e.g. *Noda Biyehuda CM* 1, 37) from the Gemara (*Bava Kama* 99B) which rules that if an expert said that a coin was not counterfeit and actually it was, the expert is liable. Even though the expert did not intend to damage the one who requested his opinion, nonetheless he is liable because he is considered to have been careless. Similarly in your situation, since the seller should have known that the bookcase was pressboard he is liable, according to the opinion of the Rama. We should note that the Shulchan Aruch (232, 21) rules like the Rama.

Several Acharonim question the Shulchan Aruch's decision to follow the opinion of the Rama. They note that there is a major dispute between the Rambam and Ra'avad (*Zechiya* 6, 12) in a case where a couple became engaged and the bride subsequently broke the engagement. The dispute

is whether the bride must reimburse the groom for the expenses he incurred which are customary for grooms who become engaged.

The Rambam maintains that the bride must reimburse the chosson for his expenses unless she can justify her breaking the engagement. Thus, for example, if the groom paid for an engagement party the bride will have to reimburse him. The Rambam's reason is because she caused him a loss. The Ra'avad disagrees and maintains that the bride is not liable.

The Acharonim ask that it would seem that the Rama's ruling is only in accordance with the opinion of the Rambam but the Ra'avad would disagree and it is not clear that the Rambam's position is decisive. However, the Beis Mayer (*Responsa* 17) disagrees and writes that in his opinion even the Ra'avad would agree with the Rama because in the case of the engagement the bride initially intended to wed. It was only later that she changed her mind, and that is why the Ra'avad ruled that she is not liable for the expenses of the groom. However, in the case of a blemish, the seller right away engaged in an action that would cause a loss to the customer. Therefore, even the Ra'avad would agree that the seller is liable.

We should note that the question of these Acharonim is only relevant in cases like yours where the store had only one type of bookcase for sale and that is what you ordered. However, if the store sold both pressboard and plywood bookcases and the problem is that they sent you a pressboard bookcase instead of the plywood bookcase that you ordered, then there is no question that this cannot be compared to the Ra'avad. The reason is that we wouldn't classify this as a mekach to'us. Rather the store simply never delivered what you ordered and they still owe you the bookcase that you ordered which they must still deliver to you using the money that you paid for delivery.

We should note further that the Shulchan Aruch (232, 21) rules that the sale is canceled as soon as you inform the seller of the defect. Therefore, it is the seller's responsibility to bring the bookcase back to his store, or he can sell it in your city to a different customer, if he finds one.

In conclusion: You are correct in demanding that the store refund the money you paid for delivery.

4

Using Mother's Money to Purchase Drugs which she Needs

My mother is Boruch Hashem elderly and basically of sound mind. However, sometimes her judgments are not rational. For example, sometimes the doctor will prescribe medicine for her but she won't buy the medicine because she doesn't want to spend the money. She needs the medicine and she isn't poor but she doesn't like to spend money. I am a signatory on her account and I take care of the banking for her. Therefore, I can use her money in the account to buy the drugs without telling her that she paid for the drugs. She will just think that I was nice to her and bought her the drugs, and she'll take them. Am I allowed to do that or is that considered stealing because it is her money and she decided that she doesn't want to spend her money on this? Furthermore, even if it is permitted, perhaps it is *geneivas da'as* because she will think that I paid for the drugs when, in fact, she paid for them herself?

Answer:

The Gemara (*Kesubos* 67B) discusses your mother's type of behavior. The Gemara's case was where a person has money but doesn't want to buy the food he needs. The Gemara says that we give him money and after he buys what he needs we ask him to pay it back. The Gemara asks that this will work once but next time he won't accept our help since he already knows that he will have to repay the money. The Gemara replies that we only make his estate repay after his death. However, the

Gemara concludes that this is only one opinion and the consensus is that if he wants to save his money we don't have to help him.

The question which we have to ask is what the consensus opinion found wrong with the first opinion.

We can decide this question from a ruling of the Maharam of Rottenberg (*Responsa*, *Prague* 39). He was asked about a person who was taken into captivity by goyim who were willing to release him if he paid a ransom. However, he did not want to spend his money on ransom. The Maharam ruled that we pay the ransom and force him to repay once he is free. He writes that one of his sources is the Gemara which we cited. He says that the only reason the consensus opinion is against the first opinion is because the people would be repaid only after his death. However, ransom is a once-in-a-lifetime event. Therefore, we pay the ransom and make him repay right away. This is the ruling of the Shulchan Aruch (*Yoreh Deah* 252, 11) making it the authoritative approach.

Thus, we can derive that really the correct approach is to force a person to sustain himself. It is only that in normal circumstances we do not have an approach that enables us to do so, so we cannot implement this approach. However when we can follow this approach, we force a person to spend the money needed to sustain himself.

The question we have to now ask is whether this means that only beis din can force a person to sustain himself, or maybe anyone who is able to, may coerce the unwilling person?

We can decide this question from another ruling of the Shulchan Aruch (*Even Ho'ezer* 70, 8). A married person is obligated to provide food and other sustenance to his wife. The Shulchan Aruch rules that if a person went away and did not arrange to provide for his wife, beis din may sell his assets if necessary in order to sustain his wife. Additionally, anyone who owes money to the husband may give the money he owes to the wife and thereby pay back his debt. The Beis Shmuel (70, 27) rules

further that anyone else who has access to the husband's assets also may give them to the wife. The Shach (128, 8) agrees with the Ramo (128, 1) that this is true for any debts that a person has: any person who has access to the borrower's assets may use them to pay the borrower's debts.

Since we saw earlier that each person is responsible to sustain himself – just like a husband must support his wife – therefore, one who has access to a person's assets – since the person "owes himself" money for his own sustenance – may use that money to pay for his sustenance. Therefore, you who have access to your mother's assets, *should* use the money for your mother's sustenance.

We should further mention that even though the above rulings were explicitly about food and about redeeming from captivity, one can derive that the same is true for medical needs. A source for this is the Gemoro (*Kesubos* 52B) that rules explicitly that a husband must provide for his wife's medical needs because these are included in the responsibility to feed and to redeem his wife from captivity. Therefore, any rulings we have concerning food and releasing from captivity apply equally to providing for one's medical needs. Therefore, you should utilize the access you have to your mother's assets to provide all her medical needs. Of course, you should not let her know because then she may thwart your plans. This is similar to what the Gemara says when we don't have access to the assets of someone who doesn't want to use his money to sustain himself.

Your second question is that perhaps this is prohibited due to *geneivas da'as*. It is true that this is *geneivas da'as* because she will think you are being nice to her in that you are willing to pay her expenses from your own pocket, when actually she is paying her own expenses. We see in the Gemara (*Chulin* 94A) that an action that creates a false impression of friendship or honor is forbidden because of *geneivas da'as*. For example,

the Gemara writes that one may not pressure someone to be his guest if he knows in advance that the person will not agree.

However, this case is different because one may and should use *geneivas da'as* in order to force a person to do what he is supposed to do. We see this both in general as well as in this particular case.

We see it in this particular case from the Gemara we cited at the outset because if we provide sustenance and recover the money after his death we are also doing an action of *geneivas da'as* since he thinks we gave him a present when in fact it was only a loan. We find this in general when a person does not do what he should do from the Gemara (*Yevomos* 106A) that rules that if a person insists on performing yibum when he is supposed to do chalitzo we promise him money to do chalitzo and in the end we don't pay him. Thus, we violated *geneivas da'as* in order to coerce the brother-in-law to act properly. Similarly, you should do something which is *geneivas da'as* in order to coerce your mother to sustain herself properly.

In conclusion: Not only are you allowed to use your mother's money but you should use your mother's money to provide for her medical needs. Just one word of caution is in order. You must always verify with a doctor that this is truly a medical need.

5

Ordered Meat that is Kosher for Pesach and Received Meat that is not Kosher for Pesach

We ordered a carton of meat from a sale on Chanukah. The meat was advertised as kosher for Pesach. We purchased a large amount (250 Shekel) specifically for Pesach, as we do not eat meat except on Yom Tov because we live on a tight budget. When it arrived, we could not find any kosher for Pesach sticker on the carton. Therefore, we opened the carton, hoping to find stickers on the individual packages, but there were none. We contacted the seller, and their representative assured us that it is kosher for Pesach all year round. We requested the number of the Mashgiach to hear this confirmed directly by him. It took us some time to reach him, as he was available only late at night, and at some point we were dealing with Corona in our home. When we finally reached the Mashgiach, we were shocked to hear him say that although it's supposed to be fine for Pesach all the time, in the absence of a kosher for Pesach sticker, we should certainly NOT use it on Pesach. We then contacted the sellers, both to alert them that the Mashgiach does not agree with what their representative had answered us and to discuss the mekach to'us involved. Usually we would not make an issue, but in this case we have no use for the meat. After their representative consulted the ones in charge, they asked if we still had the carton. We did not. They then said that without the carton, all they could do was give us a 50 Shekel

voucher. We thought this was wrong, given that we had spent 250 NIS on what seemed to us a mekach to'us. They insisted that they could do no more for us. They emphasized that since we had not saved the carton, they cannot do anything with just packages of meat. Also, several weeks had passed from the time we picked up the meat until the time we got back to them after having spoken to the Mashgiach. We actually first attempted to contact them only two weeks and one day from when we picked up the meat, but they told us to call back three days later, and with all the back-and-forth, several more days passed until they got back to us with their offer of 50 Shekel.

Answer:

There are a number of sheilos involved in your question but nonetheless most of the details of the incident we will see are not relevant.

The first question is whether this is a *mekach to'us* at all. The basic question is whether receiving non-kosher for Pesach meat on Chanukah in place of kosher for Pesach meat constitutes a *mekach to'us*, even if it was advertised as being kosher for Pesach.

We must stress at the outset that a key element is the fact that the sale took place around Chanukah and not after Purim, for example, since around Chanukah for most people whether the meat is kosher for Pesach or not is not critical.

In order to answer this question it is necessary to consider a section of Gemara in Beitzo (6B) and to carefully analyze a Responsum of the Terumas Hadeshen (322) that is ruled by the Ramo (233, 1) to determine if your situation is comparable and, if it is, what are the halachic results.

The Gemara, as understood by Rashi, discusses the case of a person who announced that he is interested in buying eggs that were laid by

a chicken. Someone who heard his announcement sold him eggs that were not laid but were found in a chicken which was slaughtered. The Gemara rules that it is a *mekach to'us* because we assume that the reason he specifically requested eggs that were laid is because he wanted to raise a chicken and chickens do not hatch from eggs that were not laid.

The Gemara clarifies that if we knew that the customer in fact wanted eggs that were laid because of their better taste then the sale would not be a *mekach to'us* and the seller would only be obligated to reimburse the customer for the price difference between the two types of eggs.

The Terumas Hadeshen derives from this that if a person requested meat from an animal that was castrated, which is more tasty, and received less tasty meat from an animal that was not castrated, he is generally only entitled to the difference in price since most people who want the better tasting meat can also eat the less tasty meat. Only a person of whom it is known that he would never eat the less tasty meat can cancel the sale and require the seller to return his entire payment, since the meat he received was worthless to him.

There are two very notable conclusions we derive from this Responsum that pertain to your situation. First, we see that a person who received a similar but different food from what he requested, even if he made a point of it, cannot cancel the sale on the grounds of *mekach to'us*. Second, this halachah changes for a person who is known to behave in a unique unconventional manner.

We should further note a number of other points. First, the Terumas Hadeshen bases his entire answer on Rashi, but there are many other Rishonim who do not understand the Gemoro as Rashi does. For example, in the text of the Gemara that is recorded in the Rif and Rosh (Beitso (1**,** 9)) the case in the Gemara is different from the way Rashi records and understands it. According to their understanding, there is no source for the ruling of the Terumas Hadeshen. Second, many

Acharonim point out that the Terumas Hadeshen's ruling seems to be contradicted by a Mishna (*Bava Basra* 83B) which rules that if a customer received bad wheat instead of good wheat he can cancel the sale.

Some Acharonim (e.g. Maharshal (Yam Shel Shlomoh Beitso 1, 20) and Bach (233)) therefore, disagree with the ruling of the Rama. However, others (e.g. Sema (233, 5), Sha'ar Mishpot (233), Beis Yehuda (*CM* res. 67)) answer that being less tasty does not fall into the category of being bad like bad wheat in the Mishna. Only if one cannot eat the food is it classified as bad.

Therefore, since the Rama rules the Terumas Hadeshen and others disagree but others defend the Terumas Hadeshen one cannot force an entire return of money that was paid on the grounds of mekach to'us based on agreement or disagreement with the Terumas Hadeshen. Thus, if according to the Terumas Hadeshen your sale does not constitute a mekach to'us you cannot invalidate the entire sale and demand the return of your entire payment.

As we mentioned earlier, the Terumas Hadeshen differentiates between one who never would eat this kind of meat (he describes it as having a foul odor and being of poor quality) for whom "the meat is valueless" and one who would only prefer not eating the meat. Since you eat meat, but just don't usually eat it even on Shabbos because of its expense, you certainly cannot consider the meat to be worthless and cannot void the sale for this reason. However, we must see what the Terumas Hadeshen rules in case the customer cannot void the sale.

In case the sale cannot be voided, the Terumas Hadeshen rules that the seller must return the difference in value between the better quality and poorer quality meat. The Veshov Hacohen (res. 64, also cited by Pischei Teshuvo) explains that even though normally one who overcharges less than a sixth does not need to return the money, here he must refund it. Therefore, if there is a difference in price between meat that is kosher

for Pesach or not, then you would be entitled to a refund of your overpayment even if it was small. However, in fact there is no difference in price in your case so you are not entitled to any refund for this reason.

However, we mentioned that the Terumas Hadeshen rules that we must take into account an individual's known idiosyncrasies. Given this behavior on your part, you are entitled to a refund of some money, if the seller believes you. The amount you are entitled to is the amount you paid that is above the meat's value for you. If you normally eat chicken on Shabbos you must consider how much more you would be willing to spend to eat meat, and that is the amount you have to pay for the meat. Any amount you paid above that, you could ask to be refunded to you.

As a general rule, the Gemoro (*Bava Kama* 20A) rules that a person would pay two thirds of the value but perhaps here it is more. By offering you a fifty shekel discount they are selling you meat for a twenty percent discount on their normally cheap prices. Unless you are certain, and they believe you, that you wouldn't buy the meat for Shabbos if you were offered it at a twenty percent discount, you are not entitled to anything more than their offer.

In conclusion: Since you already paid for the meat you cannot cancel the sale and demand a return of your entire payment. The most you could rightfully claim would be the difference between what you paid and what the meat is actually worth to you.

The seller does not have to believe you that you would only buy kosher for Pesach meat even on Chanukah, but if he does believe you, he should give you a refund of the difference in price between what you paid and the meat's actual value for you. It would seem that probably the twenty percent discount you were offered would suffice unless you are certain that it does not and the seller believes you.

If you wish to read further about *mekach to'us*, we discussed these issues at length in our sefer, Mishpatei Yosher.

6

Collecting Payment from Neighbors for Repairing their Pipe

I occupy the ground floor apartment in a building of five floors. The drainage pipe, which is used by my four upstairs neighbors but not by me, is situated in one of my walls. Recently, the pipe started leaking into my apartment. In order to avoid damages, I promptly called in a plumber who fixed the leak preventing further damage. Since I was the one who called in the plumber I had to pay him. Since the pipe is used by my neighbors exclusively, I asked them to pay the cost of the plumber. Three of my neighbors promptly paid. However, the fourth apartment is not occupied and it is unclear even who is responsible since the owner passed away and no one has been taking care of his apartment. I told my neighbors that they have to pay the entire bill and it is their responsibility to recover their payment from the owner, but they claim that it is my responsibility to collect from the owner. Who is correct?

Answer:

In order to answer your question we have to classify each of the people involved from a Torah perspective and determine who owned the problem at the outset.

It is forbidden for a person to damage another person's property. Thus, the Gemoro (*Bava Metsiyo* 117) rules that if, when the upstairs neighbor washes his hands the water directly falls into the downstairs apartment, it is forbidden for the upstairs neighbor to wash his hands. The reason

is that this type of direct damage is classified as *girei delei*–it as if the upstairs neighbor is shooting an arrow at his downstairs neighbor's property.

Therefore, until the pipe was fixed it was forbidden for all of your upstairs neighbors to use the pipe. Thus, for example, if the water from their showers drained into the damaged pipe, none of them was allowed to take a shower until the pipe was repaired. This is an obvious deduction from the Gemara and is the ruling of contemporary poskim. (See for example page 133 of the Mishkan Shalom.) Therefore each of your upstairs neighbors had an independent problem in using the pipe.

Therefore, while the pipe was broken, each of your neighbor's had a problem. It is not a collective problem but an individual problem for each of them to use the pipe.

There are two reasons why each of the neighbors could have forced the other three to share in the cost of repairing the pipe.

One reason is that whenever a number of individuals jointly share the same problem and when one person rectifies the problem it is rectified for all, each individual has the right to force the others to share in the cost of rectifying the problem. This principle is elucidated by the Nesivos (178, 3) and is the source for many rulings of the Gemara and Shulchan Aruch.

Thus, the Shulchan Aruch (*CM* 272, 15) rules that if a caravan was traveling in the desert, each traveler could force the others to share in the cost of hiring a guide and an armed escort. Similarly, the residents in a town can (*CM* 163) force each other to share in the cost of building a protective wall, a mikva, shul etc. The reason is that all these are joint needs. Another example brought by the Rama (264, 4) is where two people are imprisoned and it is necessary to hire someone to secure their release. The Rama goes a step further and rules that even if one of the prisoners paid in order to secure his own release from jail but

intended at the same time to secure his fellow prisoner's release, he can force his fellow prisoner to share in his costs.

Thus if you had not fixed the pipe you could have prevented all of them from using the pipe and any one of them could have forced he others to share in the cost of the repair. Had one of them repaired the pipe he could have afterwards forced the others to pay their share of the cost of the repair.

The second reason why each of them could have forced the others to share in the cost of repairing the pipe is not because of their need to use the pipe, but because the pipe is jointly owned. The Gemara (*Bava Basra* 42B) writes that if one partner improves the joint property all have to reimburse him for his costs.

Having established the legal classification of your four neighbors we must determine your legal classification. You had an interest in ensuring that the pipe was repaired, but you were not responsible for the pipe's repair. When a person fixes another person's damaged property he is improving the property and he has the legal status of a *yoreid.*

Having established that your four upstairs neighbors were united as partners both in the damaged pipe as well as in the problem at hand, and the fact that you were acting as a *yoreid,* we must determine the extent of liability that is borne by each of the partners to one who improved their joint property or rectified their joint problem. Specifically, the issue is whether each of the four partners is only liable for a quarter of the cost or is actually liable for the entire cost, but since each of the four is totally liable each can eventually collect from the other three, effectively reducing the amount each needs to pay to a quarter of the cost.

The difference between these two approaches is the point of contention between you and your neighbors. If each is liable for the entire cost, you can turn to any one of the four and force him to pay the entire cost

whereas if each is only liable for a quarter, you need to collect from each of the partners.

The Rambam (*Malveh Veloveh* 25, 9) rules that if one partner takes a loan for the benefit of the partnership, each of the partners automatically assumes the status of a cosigner on the loan. The Rama (*responsum* 27, cited by the *Nesivos* (77, 4)) explains that the reason each assumes the status of a cosigner is because he personally, as one of the partners, benefited from the loan. The Rama (*CM* 77, 2) cites an opinion that if it is not known that the loan was taken for the benefit of the partnership then the other partners are not automatically liable. However, that is irrelevant in your case since what you did obviously benefited the partnership.

There is an additional dispute among the Rishonim (*Rosh* and *Ba'al Ha'itur*-see *Tur* siman 77) whether, in the case of a loan, one may force partner A to pay for partner B if partner B is available and able to pay for his share of the loan. However, in your situation, the fourth partner is not available and therefore, according to all opinions, you may turn to the others and force them to jointly cover your entire cost. Therefore, in your situation you can certainly collect the entire amount from the three available partners.

7

Seller Withheld Information

I was offered by a friend to invest in houses that he said were owned by a cousin of his. He told me that the price was temporarily depressed but they would hopefully recover and in the meantime I would earn a substantial profit because the houses were fully rented and in light of the depressed prices the rate of return was unusually high. He explained that his cousin was being forced to liquidate his investment because of cash-flow issues and he wanted to assist his cousin by finding people to invest. He said he himself invested but needed others as well. As far as the friend knew this was all true. However, in truth his cousin lied to him and he did not own the properties. My friend did not believe that his cousin would lie to him, in spite of the fact that he had a well-deserved reputation for being dishonest, and that is why he accepted the lies as facts. However, to his detriment, my friend, at the request of his cousin, withheld from me the identity of his cousin, information which could have helped me investigate further since the cousin had a reputation for being dishonest. Is my friend liable either because he offered me a bad investment or because he withheld key information?

Answer:

We previously discussed a similar but slightly different question. We learned that the Gemora ruled that one is sometimes liable for giving bad advice because he thereby damaged in a causative way in a way that is classified as *garmi*. However, we saw that the consensus opinion

is that the adviser is only liable if the recipient of the advice either informed him that he will rely on his advice or that this was obvious to the adviser because of the circumstances. In your case you did not tell your friend that you were relying on his information. Therefore, the only basis for your claim is that perhaps it was obvious to your friend that you were relying on him.

There are several reasons why it is difficult to rule that your friend is liable. First, you mentioned that your friend really did not believe that his cousin would lie to him. This is obvious from the fact that he himself invested his own money in this venture. As we mentioned, the basis for any liability is *garmi* and the Shach rules (386, 6) that one is not liable for *garmi* if he made a mistake, since the Shach understands that the reason one is liable for *garmi* is that it is a fine which was imposed on people for causing damage. If one did not act maliciously then he does not deserve to be fined.

While even the Shach agrees that one is liable if the advisor was negligent (and that is why the person who said the coin was not counterfeit in the case discussed in the Gemora was liable), it is difficult to call this negligence since your friend is generally cautious but here he was duped – so much so that he himself invested money. This is a judgment call but we will see that there are other factors that serve to exonerate your friend.

Further adding to the difficulty to rule that your friend is liable is the fact that your friend never advised you to invest. Rather he presented you with an offer which he honestly thought was very attractive and might very well interest you, but he did not serve as an advisor. The case that is discussed in the Gemora (*Bava Kama* 99B) is where a person turned to an expert in counterfeit coins to evaluate the coins someone wanted to use to pay him. There, the expert's entire role was to give advice. However, since here your friend did not play this

role he can easily have assumed that he was not being relied upon for advice.

You mentioned that your friend withheld the identity of the one who was selling the houses. If this made it impossible for you to investigate the investment then it means that your friend would have had to realize that you relied on him. This will still leave us with only one judgmental reason to exonerate your friend – that he did not act with intent to damage – but nothing more. However, in your situation you had access to information which enabled you to investigate the property and to determine whether it was actually registered in the land registry with the one you were signing an agreement with and transferring your money to.

The fact that the person you were dealing with was a well-known crook was helpful information and perhaps would have caused you to refrain from investing with him, which is precisely why the crook asked your friend to withhold this information from potential investors. However, this in and of itself does not create liability since you had means of verification available and as far as your friend knew you utilized them before you actually invested. This is the key factor in determining whether your friend is liable: whether he was being relied upon or not, and not for withholding helpful information. At the end of the day the reason both you and your friend lost money is because neither of you did proper due diligence. You relied on your friend (but he did not necessarily realize this) and he relied on his cousin.

We should note that the fact that the one who informed you about the investment was a fellow investor and furthermore that he was trying to assist his cousin is another reason to exonerate your friend, since this makes him less reliable and consequently it is less likely that your friend thought that you relied on him.

This factor is mentioned by several poskim. For example, Rav Yitzchok Elchonon (*Ein Yitzchok Even Hoezer* 1, 68, 21) uses this argument to

explain the halocho (*CM* 232, 20) that one who sold seeds that did not produce a crop is not liable for the expenses incurred by his customers even though he knew that the seeds he sold would not produce a crop. He explains that the seller could have assumed that the customer would not rely upon him since he was interested in selling the seeds. (*Mishpat Hamazik* (1, page 277) points out that today this perhaps would not be the fact since he would end up without a business.) He explains with this why (*ibid* 21) if the customer informed the seller that he intends to take the seeds to a different location, the seller is liable for the customer's transportation costs. The reason is that the fact that the buyer went out of his way to inform the seller of his intentions is tantamount to informing the seller that he is relying upon him that the seeds will produce a crop.

Rav Shlomo Eiger (*Res. CM* 23) also rules that an agent is not liable for incorrect information that he provided one party about the other since each side naturally should suspect that he will provide incorrect information since he only earns money if a deal is closed. He rules that the agent is only liable if he was informed explicitly by the damaged party that he will act based upon his word. This is also the ruling of the Erech Shai (*CM* 129, 20) that an agent who stated that his brother is wealthy when he was not, is not liable for the loss suffered by the seller who sold merchandise to his brother on credit. The reason is that the seller should not have relied upon the agent's statements about his brother since it is expected that anyone will try to help his brother, and this is certainly true for an agent who earns money himself only from the successful conclusion of a deal.

In conclusion: Your friend is not liable since you did not explicitly inform him that you relied upon him and it was not clear to him that he was being relied upon.

8

Must one who Changed his Name Write a new Kesubo?

I became a ba'al teshuvo about twenty-five years ago and Baruch Hashem I raised a large frum family. About fifteen years ago I went to Rav Chaim Kanievsky and he told me to change my name from the modern Israeli name my parents gave me to Meir. I complied and everyone now knows me as Meir and I sign my checks and am called up to the Torah by the name Meir. Recently, I realized that perhaps I need to write a new *kesubo* since my wife's *kesubo* is written in my old name. Must I write a new *kesubo*?

Answer:

In order to answer your question we need to understand what a *kesubo* is, how important it is to have a proper *kesubo* and how important the husband's name is.

There is a dispute among the *Tanoim* and the poskim whether the source for the obligation to pay a *kesubo* is Biblical or Talmudic. However, according to all, anyone who is married is required by Jewish law to give his wife a document that obligates himself or his heirs to pay his wife an amount upon his death or in case he divorces her.

Additionally, the Gemoro (*Kesubo*s 82B) writes that Shimon Ben Shetach (time of second Beis Hamikdash) instituted that the *kesubo* document must be written in a manner that subordinates all of the husband's assets, at the time he marries, to this obligation. This means that if the

husband owned property when he got married and he subsequently sold it, the wife, if necessary, can collect from that property.

The Rabbonon (*Even Ho'ezer* 66, 1) went so far as to prohibit marital relations with a woman who does not have a valid written *kesubo*. Even (*ibid* 66, 3) if a woman waives her right to a *kesubo* or if she loses her *kesubo,* the husband is required to give her a new *kesubo* document. Thus, a *kesubo* is a required legal document that must be written in a manner that obligates the husband to pay money to his wife in case the marriage is terminated by the husband and that subordinates all the husband's assets to this obligation.

This is equivalent to a loan document since the obligations are equivalent. It is just the sources of the obligations that differ. Therefore, we can derive the rules governing the legal document called a *kesubo* from the laws governing loan documents. Loan documents are discussed by the Shulchan Aruch whereas there is no discussion of the *kesubo* document.

The Mishnah (*Bava Basra* 172A) writes that if the name of the borrower that is written in a loan document is shared by two or more people in the city where, according to the loan document, the loan took place, the loan document does not enable the lender to collect from anyone since each person with this name can claim that he was not the borrower. They wrote these documents as we do today in a kesubo, namely the borrower's personal name as the son of his father. The solution that the Mishnah prescribes for dealing with this situation is to include the name of the borrower's grandfather. Some other identifying feature that uniquely identifies the borrower may also be referenced. Thus, in order to be valid, the *kesubo* document must identify the one who is being obligated uniquely.

The Mishnah (*Gittin* 34B) writes that Rabbon Gamliel instituted that in a get (a divorce document) one must include all the names by which a husband and wife are or were ever called since we are concerned that

the divorced wife may eventually move to a different place where she or the husband are known by a different name. Therefore, in a get we are careful to write all the names by which the husband and wife are known. From the fact that this was specifically instituted for *gittin,* the Shulchan Aruch (*Choshen Mishpot* 49, 1 and *Gra* note 1) derive that loan documents do not require any more than that the borrower's name is written in a manner that identifies him uniquely and unequivocally. Since the *kesubo* document is a loan document we have thus learned that your *kesubo* only requires that your name be written in a manner that identifies you uniquely.

Having derived the underlying rules, we will now study the general literature concerning your question before dealing with your particular situation.

Your original name is what is referred to in the literature as a *shem shenishtakea* (literally, a name that sunk into the ground) i.e. a name that is no longer in use. The consensus opinion is that even though we write all names in a get, we do not write a *shem shenishtakea.* The Oholei Shem (from the *Kitsur Shulchan Aruch*, 2, note 23) has a dispute with another *poseik* if a name that was used in the *kesubo* is ever called *nishtakea* and thus may be left out of a get, or perhaps, the mere fact that the name is written in the *kesubo* prevents it from ever becoming *nishtakea* and therefore it must be included in a get. The Oholei Shem is of the opinion that it still can become *nishtakea* and he says that therefore one must rewrite his *kesubo* if the name that was written in the kesubo is no longer in use. Thus, he would seem to rule that you should write a new *kesubo.*

The Minchas Yitzchok (7, 117), while agreeing that it seems that one should rewrite his *kesubo*, notes that it is not customary for people to do so. He says that a possible justification for the custom is that a woman having such a *kesubo* is not the same as a woman who does not have

any *kesubo* because if necessary she can bring witnesses to testify that the name in the *kesubo* is the original name of her husband and she will thereby be able to collect her *kesubo*. However, he (8, 127) agrees that the proper thing to do is to rewrite the *kesubo* using the new name.

There is a very important point that must be taken into consideration when writing a new *kesubo,* namely the proper date for the new *kesubo*. We mentioned earlier that all the possessions that the chosson has at the time he marries become collateral to guarantee payment of the *kesubo*. Therefore, if the husband writes a new *kesubo* with a new date he will thereby remove some of his original possessions from their status as collateral. Therefore, the new *kesubo* must bear the same date as the original. However, one cannot simply write a new *kesubo* on his own with the old date because the date will be wrong and the new *kesubo* will be invalid. One requires (see *CM* 41, 1 and *Res. Mahara Sasson* 66) a beis din to write the new *kesubo* and they can, after seeing the original date on the old *kesubo*, write the original date on the new *kesubo*.

In another teshuvo (10, 132) the Minchas Yitzchok adds three points. One is that even when a name is added to the original name, as people do when they change their name due to illness, it is important to write a new *kesubo* using both names together, and we don't consider the old *kesubo* with one name as sufficient. A second point is that one must be careful to wait at least thirty days after a name is changed before writing a new *kesubo*. The reason is because it takes that much time for a new name to be established from the standpoint of the *halachah* (See *CM* 49, 3-4). The third point is that the text of the replacement *kesubo* should be the one that is used when a *kesubo* is found to be invalid. However where that standard text says that the original was found to be invalid, one should write that the husband's name was changed.

We should add that nowadays the situation in Israel is quite improved from the time of the Oholei Shem. As we mentioned earlier, the

importance of the husband's name is to enable the wife to collect her *kesubo* and the husband must not be able to claim that he is not the one who obligated himself to pay. Today, there are many legal documents that can be used to prove that the husband changed his name. For example, in Israel one must fill out an official form in order to legally change his name. Additionally, when one weds he must file for a marriage certificate and that has the husband's name as he was called at the time he married. Furthermore, the wife's identity card (*te'udat zehut*) has the husband's name. Therefore, a wife should have no problem proving that the husband who is divorcing her now is the same one who gave her the *kesubo* document with his original name when they wed, years earlier. Therefore, certainly there is no prohibition to have relations with a woman who has a *kesubo* with the husband's original name.

The Pischei Choshen (9, *Kuntress Be'inyoney Kesubo*) advises that one should take three people and write under the original *kesubo* that the husband changed his name and now he is called by his new name. Any three people can constitute a beis din for this.

In conclusion: You may continue living with your wife in the meantime. It is advisable to take three people and have them sign on the bottom of your wife's *kesubo* that you changed your name and now your name is Meir.

9

A Wedding Fiasco

Recently one of my friends from Yeshiva got married. He was quite overweight and so we weren't able to pick him up on a chair. One of the friends went to a nearby shul and took one of the succa boards without asking for permission, thinking that since the board was much bigger, more friends could join in picking up the *chosson*. However, in the end the weight was too much for the board and it broke. We are at a loss figuring out who, if anyone, has to pay for the broken board. Some say that no one has to pay for two reasons. One reason is because picking up the *chosson* was part of the wedding festivities, and one is exempt from paying for damages that occur during the course of wedding festivities. Others say no one should have to pay because it broke while being used and it should be considered *meiso machmas melocho*. Others say that the one who brought the board should pay because he took the board from the shul and didn't return it. Others say that all those who picked up the *chosson* should pay because in the end that is when the board broke.

Answer:

Each of the opinions has some truth just some apply to this case and some don't. We will therefore, examine each opinion and discover if it is relevant.

It is true that there is an exemption from damages that result from wedding festivities. However, once we understand the reason for this exemption we will understand why it does not apply to your situation.

The source for this exemption is Tosafos (Succa 45A) who understands that the Mishna writes that it was customary for adults to grab children's lulav and esrog on Hoshana Rabba-when they no longer needed them to fulfill the mitzvah. Tosafos says the reason this act, which seems to be stealing, was allowed is because it was the custom. Therefore, it was as if the children, who brought their lulav and esrog to shul thereby granted permission to the adults to take their lulav and esrog.

Similarly, when the Ramo (Orach Chaim 695, 2) writes that one is not liable for damages that he perpetrated as part of the Purim festivities, the Pri Megadim (695, 7) comments that the reason is because that was the custom. In a similar vein, the Aruch Hashulchan writes (695, 10) that since nowadays it is not customary for people to become so happy on Purim, to the extent that they would damage others, therefore, one who damages in the course of Purim festivities is liable.

Thus, we see that the exemption from payment is limited to the possessions of those who are involved in the *simchah*-like children who come to shul, or the general public that is involved in the Purim celebration. The shul however, was not a participant in this private *chasuna*. Additionally, only customary activities are included. What your group did is not customary.

Thus, since the shul did not make its boards available for this *chasuna* there is no basis for freeing the one who is liable from his liability.

The second reason you mention for exempting your friends from liability is that the board broke as a result of usage known as *meiso machmas melocho* and the rule is that even a borrower is not liable for *meiso machmas melocho*. However, again we will see that this does not apply.

The Rishonim (Bovo Metseyo 96B) offer two reasons why the Torah freed a borrower from liability in case of *meiso machmas melocho*. The classic case of *meiso machmas melocho* is where one lent someone his cow

to plow and the cow died while plowing normally. The Ramban writes that the reason why the borrower is not liable is because the lender is considered to be delinquent since he should have never lent his cow for plowing if it was not physically suited for the task. The Rashbo offers a reason that whenever one lends an object he is aware that the object will suffer somewhat from wear and tear and yet he agrees to lend it out. We say that just like he agreed that his object may suffer some wear and tear so too he agreed that it may be used even it will suffer a lot of wear and tear.

We notice that both of these reasons are contingent upon the owner's granting permission to the borrower to use the object. Therefore, the Presho and Ketsos (308, 3) write that even where the one who used someone else's object had general permission to use the object like an object that is used to perform a mitzvah (where we have a general understanding that people are happy to allow their objects to be used to perform mitzvos), nevertheless he will be liable if the object is damaged from normal usage since the owner did not grant specific permission to use the object. Certainly, in your case where the shul did not grant any permission to use its board you were never freed from liability.

Thus, we have established that someone is liable and we just have to decide who is liable.

One who "borrows" an object without permission is called by the Gemara) BM 41A) a *shoeil shelo mida'as* and is considered a thief even though he intends to return the object in the exact same condition he found it. Therefore, the one who took the board is considered a thief as soon as he took the board (See Nemukei Yosef BM 23A) even before the friends used it. One who steals an object is totally responsible for it even if what happens afterwards is an *oness* because one who steals becomes the owner in a sense and he only relinquishes ownership when he returns the object. If he can't return the object for whatever reason he remains a thief and must pay for the object.

Finally, the friends who participated in picking up the *chosson* are not liable because they didn't tell the one who took the board to do so and even if they would have asked him they wouldn't be liable because *ein schliach lidvar aveiro*-one who does something which is forbidden does not have the status of an agent. Therefore, the only one who is liable for taking the board without permission is the friend who actually took the board.

In conclusion-The one who took the board without permission is the only one who is liable. He must either replace the board or pay for it.

10

Bought *Maftir Yonah* but fell asleep

This past Yom Kippur I, the gabbai of a minyan, sold all the *kibudim* in the morning before *Kriyas Hatorah* including *maftir Yonah*, even though we read it in the afternoon. *Maftir Yonah* was sold to the highest bidder for a thousand dollars. The second highest bidder only offered to pay nine hundred dollars. After Mussaf we had a two hour break. Much to my surprise, the person who had bought *maftir Yonah* did not return for Minchah. I instead called up the next highest bidder without making up with him any price, since it was in the middle of *kriyas haTorah*.

After Yom Kippur I asked the one who had bought the *maftir* to pay, but he claims he doesn't owe anything because he was not called up for the *maftir*. He claims that it wasn't his fault that he didn't return since he didn't wake up from his nap on time. I then turned to the one who did get to read the *maftir* but he likewise refuses to pay claiming that he never bought the *maftir* since his bid was not accepted. Can I force either of them to pay?

Answer:

In order to consider the argument of the one who purchased the *maftir* but failed to show up, we have to understand the nature of the purchase of any mitzvah. If the purchase of a mitzvah is the same as the purchase of any ordinary object, the argument of the purchaser is invalid since, when one acquires an object, the sale is final and is not affected by the customer's use of hiswhat he bought. For example, if

someone bought a car but passed away before having a chance to drive it, the sale remains valid, and if he did not pay before his death his heirs will have to pay.

The reason it is not obvious that buying a mitzvah is similar to any other object is that there is nothing tangible that is acquired when one purchases a mitzvah. It is not even clear what one gets out of being called to the Torah. We will first investigate this latter issue.

The Gemoro (*Chulin* 87A) derives from a *pasuk* that one who is *shochet* is automatically awarded the right to perform the mitzvah of covering the blood of the slaughtered animal. The Gemoro brings a case where someone else covered the blood without first receiving permission from the *shochet*. When the *shochet* complained that the person stole his mitzvah, Rabban Gamliel fined the one who grabbed the mitzvah ten gold coins payable to the *shochet*. The fine is because the *shochet* lost the reward he would have received from Hashem for performing the mitzvah of covering the blood. The Rishonim explain that this fine is levied when someone either took away someone else's mitzvah or took a person's right to say a *brocho*.

Tosafos (*BK* 91B) and the Rosh (*Chulin* 6, 8) cite a ruling of Rabbenu Tam concerning a situation where the gabbai called one person up to the Torah but someone else simply went up in his stead. Rabbenu Tam ruled that the "thief" does not owe anything to the one who had been called up, because the one who had been called up did not lose anything. He explains that he did not lose a mitzvah because one who listens to the Torah reading performs the same mitzvah as the one who is called to the Torah. He says that he didn't even lose the reward for the two *brochos* that were said by the one who read from the Torah in his stead since the Gemara (*Brochos* 51B) states that one who answers amen to someone else's *brocho* receives the same reward as the one who actually recited the *brocho*.

From this we see that one who purchases an *aliya* to the Torah does not gain thereby the opportunity to perform a mitzvah that he could not perform without his purchase. There are mitzvahs where one who purchases the mitzvah does acquire the opportunity to perform a mitzvah that he did not have without his purchase. An example of this is the old custom of paying for the right to be the *sandek* at a *bris*. However, an a*liya* to the Torah does not fall into this category.

In light of the fact that one did not acquire a mitzvah when he purchased an *aliya,* we must consider whether anything transpires when one does purchase an *aliya,* and also how one acquires whatever there is to acquire.

The Maharshal (*Yam Shel Shlomo BK* 8, 60) discusses this issue and derives from the Gemara (*BM* 74A) that since nowadays the custom is to sell *aliyos*, because of this custom one does actually acquire the *aliya* in the same manner that one acquires an object. A practical result that he mentions is that if someone would come to you, the gabbai, after you sold *maftir Yonah* for a thousand dollars and offer you ten thousand dollars, you would not be able to accept his offer.

This contrasts with the earlier period when there was no such custom. In the earlier period even if you agreed to give someone *maftir Yonah* for a thousand dollars, if someone later offered you ten thousand dollars you could legally change your mind. According to many, you would not have even been called a *mechusar amono,* an untrustworthy individual, for doing so.

Thus, we see that when you sold *maftir* Yonah, it was a real sale. Furthermore, it was not an agreement that lacked a formal act of *kinyan*. Rather there was a *kinyan* called *setumpto*. Therefore, the purchaser does not need to actually go up to the Torah in order to acquire the *aliya*.

We find additional proof that the one who bought a mitzvah becomes its full-fledged owner. The Knesses Hagedolo (*Sheyorei OC* 147, *Tur* 3)

rules that if a person who bought the right to perform a mitzvah for a year passed away in the middle of the year, his heirs can sell the right to perform the mitzvah to another person for the remainder of the year. If they cannot sell it for the amount that he bought it for, the heirs have to pay for the difference if the deceased had not yet paid for it, and if they sell it at a profit they are entitled to keep the profit.

The ruling of the Maharshal was preceded by an earlier ruling of the Maharam of Rottenberg (cited by *Mordechai Shabbos* 472-3 and it is brought by the Beis Yosef (*YD* 264) in the case of a *bris* milah. Even though we saw that at the time of the Maharam, who was the rebbe of the Rosh, they did not sell *aliyos* to the Torah, people did buy from the father of a newborn son the right to be a *sandek* or *mohel* at his son's *bris*. The Maharam ruled that the father did not afterwards have the right to award the honor to another individual since the first one already owned the right by virtue of the *kinyan* of *setumpto*.

Therefore, the one who bought *maftir Yonah* acquired the mitzvah and the fact that he did not show up because he fell asleep, even if it would be classified as an *oness*, would not free him from his obligation to pay whatever he agreed to pay. Besides being logical since *oness* does not affect purchases, we can derive this from the ruling of the Knesses Hagedolo because in his case the one who passed away was certainly an *oness* and his heirs were still obligated to pay whatever their father pledged to pay.

The argument of the one who you actually called up is valid, since he never bought the *maftir* and you didn't discuss it with him before calling him up. Furthermore, when you called him up he had no choice but to take the *Maftir* since some (Magen Avrohom 53, 22) maintain that one who refuses to accept an *aliya* is punished by having his life shortened.

Furthermore, it does not make a difference to you since if you had sold it to the second bidder the income would go to the one who bought

the *Maftir* and you would just get the thousand dollars the first one purchased it for. We can derive this from the ruling of the Knesses Hagedolo in the case that the buyer passed away.

An additional source is the Ketsos (316, 1) and Nesivos (316, 2) who rule in the case of one who rented a house to someone who moved out and the owner then rented it out to someone else. They both maintain that the rental income from the second renter goes to the first renter. Their argument is based on the Gemoro's (BM 35B) statement that one cannot earn income from renting out another person's cow even if the owner did not suffer a loss since he had no plans to use or rent out his cow. This applies here as well. You cannot earn income from the mitzvah you already sold to someone else.

In conclusion: The one who bought *maftir Yonah* is obligated to pay a thousand dollars and the person whom you called up owes nothing.

11

Borrowed very Expensive Wine by Mistake

Recently, when I forgot to buy grape juice for Shabbos, I went to my neighbor and asked to borrow a bottle of grape juice. My neighbor replied that he didn't have any grape juice but he could lend me a bottle of wine. I told him that I don't really like wine but, since there was no alternative, I would take the bottle of wine. We made up that I would return to him the same wine after Shabbos. When I went to the store to buy an identical bottle of wine I was shocked to discover that the bottle I borrowed cost two hundred dollars. I would have never borrowed such expensive wine, especially since I really don't like any wine. On Friday night I could have made Kiddush on challah and for the day I could have found another solution. Am I obligated to return such expensive wine?

Answer:

The first step, as always, is to understand what happened from a halachic perspective. Since your agreement was to return the exact type of bottle in place of the bottle you received, what you did was to **borrow** a bottle of wine.

In Hebrew there are two separate words. One (*lovoh*) means to borrow something with the understanding that something equivalent will be returned, but not the original object. This is generally the case when borrowing money. The other (*sho'al*) means to borrow something with

the expectation that the original object will itself be returned, such as when borrowing someone's car or a tool of his.

In this case, you borrowed the wine in the first sense, since the expectation was that you would return an equivalent bottle of wine but not the original one. This would generally be the case when borrowing something consumable such as food. We find in the Gemara that the concept of borrowing is not confined to money but extends to objects as well. For example, the Gemara (*BM* 61A) discusses borrowing food in the context of ribbis.

Thus, what you did were two actions: 1] You borrowed a bottle of wine, and 2] You drank it. Both of these actions were done by mistake since: 1] You would not have borrowed such expensive wine on purpose, and 2] Had you discovered after borrowing it that it was so expensive you would not have drunk it. Therefore, we will study the legal ramifications of each of these actions as performed based on a false impression.

When one purchases something based on a false impression of what it is, we classify the sale as a *mekach to'us* and the sale is invalid. An example that is discussed in the Gemara (*BB* 92A) concerns a person who purchased an ox in order to plow with it, but who received an uncontrollable ox that was only suitable for slaughtering. The Gemara rules that if it was clear at the time of the sale that the customer's intention was to use the ox for plowing, the sale is invalid and the customer is entitled to a full refund of his money. The rationale is that in order for a sale to be valid it is not enough to just perform actions such as an act of *kinyan*, but both parties have to want it to take place. When one acts in error there is a lack of consent or desire for the transaction to take place and this makes the transaction invalid.

For example, in the case of the ox, a *kinyan* was performed on an ox which was only fit for slaughtering. But since the buyer wanted an ox to plow with, he did not really want to acquire the ox upon which he

performed his act of *kinyan*. Since the buyer did not really want the transaction to take place, therefore his *kinyan* was invalid.

Similarly, it would seem that the same should be true when the interaction between two parties is not a sale but a loan of the first kind. Thus if a loan of the first kind took place based on an error, then the loan is not valid and the object which was "borrowed," in reality legally remained in the possession of the lender. The reason is because when one borrows an object in this way, he is legally acquiring this specific object. However, instead of having to pay money for it as in a sale, he has to pay back the same type of object.

In your situation you, the borrower, did not intend to borrow or to drink such expensive wine. Therefore, if the concept of *mekach to'us* extends to loans as well, from a legal point of view the wine remained in the possession of your neighbor and you actually drank his wine.

In fact, we find evidence that the concept of *mekach to'us* does apply to loans as well. The Mishna Lamelech (*Malveh* 8, 1 end, and his contention is supported by the *Machane Efraim Ribbis* 37 and *Chavos Da'as* 161, 5) proves that if a person lent money with interest because the two parties thought that taking interest was allowed, and later the borrower realized that he is not allowed to pay interest and thus will refuse to pay interest, the lender may demand the immediate return of his money since he can argue that he only extended the loan in order to receive interest. When one extends a loan he is normally unable to demand repayment before the end of the term contracted, because he committed himself, at the time the loan was granted, to allow the borrower to use the money until the end of that term. However, since in this case his commitment was made based on incorrect information, the commitment is a *mekach to'us* and thus invalid.

Similarly, since your commitment to repay was based on incorrect information, you never legally borrowed the wine that you received.

Rather, the wine remained the wine of your neighbor and thus in legal terms what happened was that you mistakenly drank your neighbor's wine.

Having established that there was no loan, we have to consider the issue of payment for the wine. As we noted, the legal description of what you did was to drink your neighbor's wine in error. This is exactly the same situation as when a sale was invalid due to a mistake – the classical case of *mekach to'us* – since in both cases something is sitting by a person who mistakenly thinks it is his. The fact that in one case what caused it to come into the hands of the recipient was an invalid sale and in another case it was an invalid loan, has no bearing on the law.

The case where an object came into the hands of the recipient because of a mistaken and invalid sale is discussed in the Shulchan Aruch (*CM* 232, 21). The case is that someone bought seeds to plant and the seeds failed to sprout. Since the seeds were bought to plant and not to eat, the sale was invalid and the customer is entitled to a full refund of the money he paid to acquire the seeds. Even though he does not return the seeds to the seller he is still entitled to a full refund and we don't say that the customer has to pay for the seeds that he damaged by trying to plant them. The reason is because his behavior was normal for one who purchases seeds to plant. (See *Ritvo BB* 92A.)

An application of this is the case of one who purchased a *sefer* and wrote his name and/or notes in the *sefer* and later discovered that the *sefer* was missing a few pages. The Pischei Choshen (*Ono'o* chapter 13, footnote 28) rules that the customer may, nonetheless, return the *sefer* since the sale is a *mekach to'us*. He is still entitled to a full refund even though by writing his name in the *sefer* he prevented the seller from fixing the *sefer* and selling it to another customer at a discount.

Similarly, the Shulchan Aruch (*ibid.*) rules that if someone buys an object and requests delivery of the object to his home and he later discovers

that the object was imperfect and thus the sale is invalid because of *mekach to'us,* the seller must pay the cost of shipping the object back. The reason the seller cannot claim that the added expense is due to the customer's transporting it to his home and thus not his responsibility, is because the customer acted with the seller's permission.

Similarly in your situation, since you had your neighbor's express permission to drink what was actually his wine you are not liable for damaging his wine by consuming it.

We should note that this reasoning is true even if your neighbor was unaware that he lent you very expensive wine. We see in the Gemara (*BM* 42B) that the concept of *mekach to'us* applies even if the seller himself was unaware of the imperfection. The concept of *mekach to'us* has nothing to do with blame. It is simply, as we wrote earlier, a result of lack of desire and consent for the transaction to take place.

Even though you do not have to pay for the damage you did to the wine, you do have to pay for the benefit you had from it. In the case of a very expensive wine, the benefit is much less than the damage. This is similar to what the Gemoro (*BK* 20A) writes in case an ox eats someone else's expensive food that was sitting in the public thoroughfare. Even though the ox's owner does not have to pay for damages his ox caused, he does have to pay for the benefit he had from the food in not having to feed his ox cheap ox food.

Similarly, we find this concept in the case of orphans who, after they slaughtered a cow, which they saw among their inherited possessions, and ate its meat, found out that the cow really belonged to another person. The Gemoro (*Kesubos* 34B) rules that the orphans don't have to pay for the full damages since they were reasonably unaware that it belonged to someone else. However they still must pay for the benefit they derived from eating the meat.

In conclusion: You do not have to return a bottle of the expensive wine that you drank but you do have to pay for the benefit you derived from the wine. In the coming article we will Be"H determine how much money that is in your case.

12

Borrowed very expensive Wine by Mistake-2

Recently, when I forgot to buy grape juice for Shabbos, I went to my neighbor and asked to borrow a bottle of grape juice. My neighbor replied that he didn't have any grape juice but he could lend me a bottle of wine. I told him that I don't really like wine but, since there was no alternative, I would take the bottle of wine. We made up that I would return to him the same wine after Shabbos. When I went to the store to buy an identical bottle of wine I was shocked to discover that the bottle I borrowed cost two hundred dollars. I would have never borrowed such expensive wine, especially since I really don't like any wine. On Friday night I could have made Kiddush on challah and for the day I could have found another solution. Am I obligated to return such expensive wine?

Answer:

In last week's article we learned that you do not have to return wine that costs two hundred dollars. We considered two possible reasons why you could have been responsible to return a two hundred dollar bottle and we ruled out both of these possibilities.

The first reason you could have been responsible is because when one borrows he automatically becomes responsible to return something identical to what he borrowed. If one borrows money he must return the equivalent amount of money, if one borrows food he must return the same type of food. However, in your case since it was obvious that

you did not intend to borrow two hundred dollar wine you did not intend to obligate yourself to return such expensive wine. Even though you did commit yourself to return a similar bottle, that commitment was based on an incorrect assumption and is similar to a sale, which is classified as a *mekach to'us*, where the rule is that even though the customer obligated himself to pay for what he received, nevertheless, that obligation is invalid. Similarly, the obligation you accepted upon yourself, namely, to return the identical bottle is invalid.

The second possible reason that you could have been liable is because since you did not legally acquire his wine effectively you "damaged" his wine by drinking it. We proved that when one mistakenly damages by normal usage another person's object that he thinks is his he is not liable for the damages that result from his error.

Having proven that you do not have to return a two-hundred dollar bottle, we left open the question of what you do have to return. In this article, we will discover that there are two independent sources to create liability for a lesser amount than the full two hundred dollars.

The first source is that you did not totally err. You expected to receive wine and you did receive wine. Your error was only that you did not think that you would receive such expensive wine. Therefore, as much as you could have expected the wine to be worth you are liable for. This is similar to the Gemara (BK 61B) that is ruled by the Shulchan Aruch (418, 13) that if a person set fire to another person's haystack he is not liable for objects that were hidden inside the haystack which are not usually hidden in there. The reason is that the one who set the haystack ablaze never accepted upon himself liability for these hidden objects. However, he is responsible to pay for a haystack filled with hay since for that he did accept responsibility. We should note that the Shulchan Aruch (388, 1) rules like Tosafos (BK 62A) that this rule applies even if a person damaged directly and not by means of fire.

A case which is very similar to yours is ruled by the Mordechai (BK 207). A person lost a sword he had borrowed from another person. After it became lost the borrower discovered that he had borrowed an unusually expensive sword. The Mordechai proves from the Gemara, which we just cited, that the borrower only has to pay the value of a typical sword (The Ketsos (291, 4) only disagrees and maintains that the borrower must pay the full-value of the sword in case the borrower used the sword after he realized that it was expensive, but in a case like yours, where you did not realize that the wine was expensive the Ketsos would agree that you are only liable for what wine typically costs). Thus, we see again that even though the borrower is not liable for the full value of the sword, nonetheless he is liable for what he expected the sword to be worth.

In your case, you had permission to drink the wine that halachically belonged to your neighbor just that your neighbor expected payment in full and you expected to pay much less for his wine (i.e. you did not anticipate that you would need to pay for the difference in value). A similar case was discussed by the Terumas Hadeshen (317) whose decision is ruled by the Rama (246, 17). In his situation, a son-in-law ate by his father-in-law, thinking at the time that he could eat for free but eventually his father-in-law demanded payment. The Terumas Hadeshen ruled that the son-in-law must pay. There is a dispute between the Maharit (Even Ho'ezer 21) who understands that the reason the son-in-law must pay is because he "damaged" his father-in-law's food by consuming it and the Ketsos (246, 2) who argues that since the father-in-law gave the son-in-law permission to eat the food the action of the son-in-law cannot be classified as an act of damage. Rather, the Ketsos maintains that the reason the son-in-law must pay is because he benefitted from the father-in-law's food at his father-in-law's expense. This dispute would pertain to your case as well. According to the Maharit, you are liable because you damaged your neighbor's wine. As

we saw before, as much as you thought you owed for damaging you must pay (Here, where you did not intend to damage your neighbor, even those who disagree with Tosafos, in general, would agree that you do not have to pay more than the amount you thought the wine was worth, as we saw in the previous article.). Therefore, the amount you anticipated the wine could be worth, you must pay. Similarly, if one understands the Terumas Hadeshen like the Ketsos you must pay the amount you anticipated the wine could be worth since you committed yourself to pay that amount, which shows that the wine was worth that much for you and effectively you benefitted that amount from the wine at the expense of your neighbor.

Therefore, we have established that you are liable for the amount that you should have anticipated that perhaps the wine was worth.

In your case, where you told the lender that you do not like wine and do not buy wine for Kiddush you need not pay any more that this amount. However, another person who does enjoy wine would have to pay more because there is a second reason a person has to pay when he eats another person's food.

The reason is that one must pay for the **benefit** he derives from another person's possessions if the owner suffers even a small loss even if the one who benefitted would not have been liable for damages. This is called by the Gemara (many places including BK 20B) *ze nehene veze choseir*.

There are several situations that are discussed by the Gemara and poskim where a person ate someone else's food and was not liable for damages but nevertheless was required to pay the value of the benefit he derived from the food he ate. According to the previous Ketsos, the case of the Terumas Hadeshen is one example of this phenomenon.

A situation that is discussed in the Gemara is where orphans found a cow among their deceased father's possessions and thinking that

it was theirs they slaughtered it and ate the meat. Tosafos (BK 27B) explains that they are not liable for damaging the cow because they were an *oness*-they had no reason to suspect that the animal was not theirs. Nevertheless, the Gemara (Kesubos 34B) rules that they must pay a "cheap price" for the value of the meat and this is ruled by the Shulchan Aruch (341, 4). The reason they must pay this price is because they benefitted from the meat at the expense of the true owner of the cow. However, they were not required to pay the full price because they normally did not buy such expensive meat. The Gemara does not specify what is the meaning of a "cheap price" for the meat.

However, there is another Gemoro that discusses another example of this phenomenon and there an amount is specified.

The Gemara (BB 146B) discusses a groom who brought gifts of food to his fiancée's family and then his fiancée broke up the engagement. The Gemara rules that the fiancée's family must pay for the food they consumed. Even though when they ate the food they did not anticipate that they would have to pay, nevertheless, since in truth they benefitted at the groom's expense (since he would have never given them presents if he would have anticipated that the engagement would be broken by his fiancée) they must pay. Again the assumption was that they would not have eaten such expensive food if they would have anticipated that they would eventually have to pay for it. The Gemara again writes that they must pay a "cheap price" for the food but here the Gemara specifies that a "cheap price" means two thirds of the full-value.

Many Rishonim (Ramban BM 42B, Ritvo: BB 146B, Kesubos 34B etc.) write that this is not an iron-clad price but each case must be judged individually with the underlying principle being that the one who benefitted must pay for the amount of benefit that he derived. This is the explanation of the Sema (341, 10) of what the Shulchan Aruch means when he rules that the orphans must pay two thirds of the full-

price for the meat they consumed. The Sema says Chazal reckoned that even one who normally does not eat meat, because of its cost, would eat meat if he was able to acquire it at two thirds of the usual price.

Thus, we have a rule that we can apply to one who enjoys good wine and borrowed wine that costs much more than he anticipated. We must estimate how much he would have been willing to pay for such good wine. Even if, for example, he never bought wine that cost more than seventy five dollars we have to consider what price he would have been willing to pay for wine that retailed for two hundred dollars. This does not apply to you since you don't enjoy wine and would not have paid anything extra but it applies to one who does enjoy good wine.

In conclusion: You, who don't enjoy good wine, have to pay what you reasonably could have expected the wine you borrowed to be worth. Another person who does enjoy good wine, in your situation, would have to pay the amount we estimate he would have been willing to pay for such good but expensive wine.

13

When is Competition Permitted

You wrote in the previous article that when I copied successful designs from stores and then sold my wares in competition with the stores I might have been guilty of violating the prohibition against taking away another person's livelihood-*yoreid le'umnos chaveiro.* I plan to stop my practice anyway because of what you wrote in the previous article but I am interested to know if I actually violated this prohibition.

Answer:

Before we address your question it is important to clarify the gravity of this issue.

In parshas Ki Sovo, the Torah lists eleven actions for which the perpetrator is cursed by Hashem. One of these actions is known as *hasogas gevul* – moving a boundary. This refers to a person who moves the physical demarcation line that separates his property from the property of his neighbor, thereby effectively stealing some of his neighbor's land.

Many poskim understand the curse to include commercial boundaries as well. These opinions maintain that one who takes away a portion of another person's livelihood in a prohibited manner is included in this curse. Among those who held this opinion are many recent poskim including the Aruch Hashulchan (156, 16), Rav Moshe Feinstein (*CM* 2, 40) and Rav Ovadia Yosef (*Yabea Omer* 9 *YD* 27).

Another reason for extreme concern is that many Poskim, including the Chasam Sofer (*CM* 79) who proves that this is the opinion of the Rama and many others, maintain that this action is also included in the

Torah's prohibition of stealing. Many later poskim, again including Rav Moshe Feinstein (*ibid*), also agreed.

We should note further that the Poskim (*Maharshal* res 37, *Shearis Yosef* 19) write that the fact that many people, perhaps even including people who otherwise act like religious Jews, regularly violate this prohibition does not change the law that makes it prohibited.

We should also preface our discussion by noting that Torah law, in general, is in favor of competition. The Gemara (*Bava Basra* 21B) cites the authoritative opinion of R. Huna son of R. Yehoshua who permits another inhabitant to establish a rival mill even adjacent to the first mill. He also says that even if the proprietor of the second mill is a resident of a different city he may still establish a rival mill in the same courtyard provided that he pays local taxes. On the other hand, if he does not pay local taxes, even if he is a local resident he may not open a rival mill.

Furthermore, the Gemara (*BM* 60A) encourages price cutting since it is advantageous to the consumers. Thus, the Mishna cites the authoritative opinion of the Rabbonon that we laud one who lowers the price if the competition is capable of lowering its price as well. As a result, the Rama (156, 7) rules that local merchants cannot object to competition from merchants from other cities if the latter sell at a price which is lower than what the local merchants charge but could charge, since the customers gain.

However, all the above is true provided the competition is fair. The same Mishna discusses whether a storeowner is allowed to offer children roasted grain or nuts (that was a delicacy for children in the time of the Gemara as we see in Pessachim 108A that one was supposed to make his children happy on Yom Tov by buying them these items) as an incentive to patronize his store. The authoritative opinion is that it is permitted.

It is crucial to note the reason the Gemara gives for allowing this practice. The Gemara says it is permitted because the competition is capable of offering children a different incentive. Many poskim explain that the fact that we only permit offering incentives because the competition can also offer incentives, in no way conflicts with the ruling that one may establish a mill adjacent to an existing mill since the first mill can compete fairly with the second mill, whereas if the competition could not offer incentives it could not remain competitive.

This principle manifests itself in the law governing where one may open a rival store. We mentioned before that one may open a competing store even adjacent to one that already exists. However, the Ra'avyo (cited by the *Mordechai BB* 516) whose ruling is cited by the Ramo (*Darkei Moshe* 156, 4 and res. 10) and serves as the basis for many subsequent decisions, rules that if a store is located inside a courtyard, another proprietor may not open a competing store near the entrance to the courtyard since it will take away many potential customers since they will necessarily pass by the second store before reaching the first store. Since the first store cannot compete we do not permit the second store to open up and if it does, beis din will force it to close. Note that we take into account the location of the first store and don't tell the proprietor that he can remain competitive by relocating.

This principle also manifests itself in the laws governing pricing. We mentioned that the Mishna lauds merchants who lower their prices. However, when the Ramban and Rashba (in their commentaries to *BB* 22A) explain this statement of the Gemara, they write that the reason is because the other stores also can reduce their prices and remain competitive. Thus, a store is not allowed to reduce its prices to a level that other stores cannot reasonably match. Similarly, the Aruch Hashulchan (228, 14) writes that the praise that the Mishna heaped upon one who reduces prices is limited to those who sold grain that

forced hoarders to sell their stock. (See *Rashi BM* 60B who explains the Mishna in this manner.)

In the world at large that does not follow Torah law, rival stores routinely engage in this practice and ruin the livelihood of proprietors of existing stores. Gigantic supermarkets open up in the vicinity of smaller stores and reduce their prices to a level that smaller stores cannot meet, forcing the smaller stores to close. Under Torah law this practice is prohibited and unless the smaller stores have some kind of advantage that will somehow allow them to remain competitive, the gigantic stores may not reduce their prices to a level that smaller stores cannot match.

Thus we have established the basic laws of competition. 1. The halacha permits and even encourages competition especially if it will benefit consumers. 2. Engaging in a practice which the competition cannot match is prohibited.

In your situation, you have much lower costs than your competition since you save on development costs and also you don't pay taxes. If you took advantage of these savings and lowered prices to a level that the competition could not reasonably meet because they paid all these expenses, you violated the rules of fair competition and you are classified as a *yoreid le'umnos chaveiro*. We should note that this is true (and the Chassam Sofer CM 118 writes this explicitly) even if no one was forced to close his store since he had other products to sell. As long as selling the product you copied ceased being worthwhile you violated this prohibition.

Your situation is similar to one which was ruled upon by the Ma'amar Mordechai (res 11). In his case, residents of a town who produced and sold whiskey were charged local taxes. On the other hand, the residents of the surrounding villages were not charged taxes and they could sell their whiskey to the residents of the town at a cheaper price because they saved on taxes. In addition, the taxes that were paid by the whiskey

producers benefitted the local Jewish community and therefore some of the townspeople objected because of the loss in tax revenue. The Ma'amar Mordechai ruled that the town's merchants could force the outside villagers to cease their practice because, as we mentioned earlier, according to Torah law, the residents of the town can prevent others who do not pay local taxes to sell in the town. In his case, he ruled that the town's merchants were even permitted, if necessary, to persuade the non-Jewish owners of the villages to force the Jews to leave the village if they continued their practice.

In the present situation, your competition probably is not very concerned about the loss in tax revenue and therefore, this will not serve as a basis to prevent you from continuing your practice. However, if you undercut prices to an extent that they could not compete, they would have been justified in forcing you to stop as a *yoreid le'umnos chaveiro*.

As we mentioned even if no one was forced to close but someone had to stop selling this item or sold it for very little profit, the Chassam Sofer (*CM* 118) rules that you violated the halacha and as we mentioned at the outset, according to many, you have the status of a thief and also would be included in the Torah's curse for *hasogas gvul*. If you did not pass along your savings to your customers and charged a price that was in line with other merchants, you did not violate this prohibition. However, as we wrote in the previous article, there are other reasons to end your practice.

14

Acquiring a Property by making Renovations

I live immediately under the roof in a condominium in Israel. The roof was jointly owned by all the tenants in the condo. Since I wanted to expand my apartment by adding another floor, I approached the neighbors and asked them for permission to build. They replied that they would give me their rights to the roof in return for my accepting total responsibility for maintaining the roof and bearing all future related expenses. Since that was a small price to pay for the enormous benefit that I expected to reap, I immediately agreed. I began working by making a hole in the roof over my open balcony in order to build an internal staircase that would allow me to gain access to what was going to be the upper floor of my two story apartment. However, at that point I changed my mind and informed the neighbors of my decision because I noticed that the city began a crack-down on illegal construction and I was afraid I would be ordered to demolish my illegal second floor. In the recent rainfall, the roof began leaking in a place that is not related to my construction. The neighbors claim that it is exclusively my responsibility because that was our agreement and I cannot back-out. I understand their claim, but maintain that since I cancelled our agreement I don't have to pay any more than anyone else. Was my cancellation effective?

Answer:

We must analyze your question from the standpoint of the *halacha* in order to determine where your question is discussed.

As you stated in your question, you made a deal to acquire part of your neighbors' property in return for assuming the responsibility to maintain the roof. Therefore, your agreement is a sales agreement. Thus your question is whether you can cancel your agreement by returning what you acquired and in return absolve yourself of the responsibility you assumed as payment for your acquisition.

This is another instance of the basic principle we mentioned in the previous article that in order to validate any agreement an act of *kinyan* must be performed. In the previous article, it was an employment agreement and the issue was whether an act of *kinyan* was performed by the employer since he was the one who "acquired" his employee. In this case, the issue is whether you performed an act of *kinyan* that would validate your acquisition of your neighbors' rights to the roof. If you performed a *kinyan* you acquired the roof and you can't renege on the agreement. However, if you did not perform any act of *kinyan* all you did was to negotiate an agreement but you never formally acquired the roof and thus you could cancel your agreement. Thus, your question comes down to whether you performed an act of *kinyan* by making that hole in the roof.

Since what you were attempting to acquire is a roof – an immovable property – we must study the laws of *kinyan* on immovable (real) property.

The Gemoro (Kiddushin 26A) lists three actions that are considered acts of *kinyan* on immovable property. One is paying the seller for the acquisition, known as *kesef*. The second is giving the purchaser a properly worded and executed contract known as *shtar*. The third is the performance by the customer of an act that exhibits ownership,

known as *chazoko*. Since you did not pay any money and did not receive a formal contract, we must consider whether anything that you did qualifies as an act of *chazoko* and thus you thereby acquired the roof.

The Gemara (*BB* 53A) teaches that an act that improves a property qualifies as an act of *chazoko* on the property. An example given by the Gemoro is when one removes a stone in order to allow water to enter and irrigate a field. Similarly, the Gemara (*BB* 54A) writes that if one fills in holes in a field that he plans to plow, filling in the holes qualifies as an act of *chazoko* since making the field suitable for plowing is an improvement in the field. The Shulchan Aruch (192, 11) adds that similarly if one removes a heap of earth from a field it is an act of *chazoko*. The Nesivos (192, 3) adds that similarly, one who fills in a hole or flattens the ground in a house (built with a dirt floor) thereby acquires the house.

It is important to note that the act must be one that makes the property more suitable for the intended use of the property. Thus the same act can sometimes qualify and at other times be invalid, depending on the intended use of the property. For example, the Rama (192, 11) rules that digging a hole in a field is only valid if the owner intends to plow it afterwards, but if not it is invalid.

The Gemara (*BB* 53A) cites R. Nachman who ruled that if one erects a building on an ownerless piece of land but leaves an opening that allows anyone to enter the incomplete structure, and then a second person erects doors that seal the gap, the second person acquires the land and not the first. The Gemara gives as a reason that what the first person did was merely to "add bricks to an ownerless plot of land." Since the building, as constructed by the first person, was not yet habitable, his construction does not qualify as an improvement of the land that would enable the builder to acquire the land, as he desired.

There is a major dispute among the Rishonim as to how this building was constructed. The Ri Migash understands that the house must have been built without a foundation because if it had a foundation the one who erected the house would have acquired the land when he dug the foundation since he dug a hole in the field in order to improve it by erecting a house thereon. This opinion is cited by many Rishonim in their commentaries including the Rashbo who explicitly concurs.

However, the Ramban and Rosh (*BB* 3, 61) and others (including Tosafos) maintain that even if the house was built with a foundation, the builder still failed to acquire the land because digging a foundation does not acquire the land for the digger. The Ramban explains that digging a foundation does not qualify since that hole is only temporary since the builder intends to fill it in with the foundation. The Rosh says the reason the foundation hole is not an act of *chazoko* is because it was only a step towards the ultimate improvement of the land, namely, erecting a house. It is only when one completes the intended improvement of the land that he performs an act of *chazoko*. (The Ketsos we will cite later maintains that the Rosh means essentially the same thing as the Ramban i.e. that the hole is only temporary.)

We should note that both opinions are cited by the Ramo (275, 21) who does not render a decision.

The Nesivos (printed in the *Shulchan Aruch* at the end of *siman* 192) was asked a question very similar to yours. A person bought a house with the intent to demolish it and replace it with a new house. Like you, he started working before he paid anything or signed a contract. He demolished two walls of the boiler room, cleared away the debris and then decided to cancel his agreement to buy the existing house.

The Nesivos ruled that according to both of the opinions concerning the foundation he can cancel the agreement because none of his actions qualify as an act of *chazoko*. He argues that according to the Rosh and

Ramban the act of demolishing a part of a house cannot qualify as an act of *chazoko* because it only rendered the house less useful as a house. He says further that even the Ri Migash only rules that the act of digging in order to lay down a foundation qualifies as a *kinyan* when the digging is completed. Therefore, since the demolishing was not complete even the Ri Migash agrees that the purchaser did not acquire the house.

The Ketsos (his responsa is printed at the end of the *Avnei Melluim res.* 25 and in *siman* 192 of the Mechon Yerushalaim printing of the *SA*) rebuts the arguments of the Nesivos. He argues that even those (Rosh and Ramban) who maintain that digging a hole for a foundation does not qualify, agree that demolishing a wall qualifies. The reason is that when one digs a hole, the hole is only temporary until it is filled in with the foundation. However, when one demolishes in order to build, the demolishing is permanent. This is especially true in your situation since the hole you made in the roof was to remain and you intended to use the hole by building a stair case that would traverse the hole and allow you access to the upper floor. (The Nesivos (footnote 6) answered that demolishing cannot be better than constructing part of a house. However, he was rebutted by the Ketsos' student the Mahariaz Anzil (footnote 10) who pointed out that when one removes a mound in a field in order to plow the action is a valid *chazoko*.) The Ketsos also disagrees with the argument of the Nesivos that even the Ri Migash agrees that one must complete digging the entire hole in order to qualify as an act of *kinyan*.

The Aruch Hashulchan (292, 13) agrees fully with the Ketsos and argues that renovating a house in order to acquire the house is entirely different from building a house with intent to acquire land. When one wishes to acquire a piece of land he must improve the land, which he did not accomplish by building an incomplete house. However when one wishes to acquire immovable property by reconstructing the house

that sits on the land, he is immediately improving the property when he begins to renovate. This is much more clear in your situation where you were trying to acquire the roof and you began by making it much more usable by removing a section thereof.

In conclusion: The Nesivos maintains that you can back out of your agreement but the Ketsos and Aruch Hashulchan say that you cannot. Since the immediate issue is making you pay the current repair, they cannot force you to pay since you have the backing of the Nesivos and they are trying to make you pay out. However, if they already have your money you could not force them to return it.

15

Customer Discovered a Defect but the Storeowner cannot Return the Defective Item to his Supplier

I bought a shaver and the second time I used it to give my son a haircut the shaver hurt my son because it pulled on his hairs. I promptly returned it to the store and requested a refund. The storeowner replied that he is really just an agent of the supplier and not responsible, but he would try to return it and get me a refund from his supplier. In the end, the supplier refused to return any money to the storeowner. As a result, the storeowner refuses to return my money claiming that he is not a party to the dispute between me and the supplier since he just sells closed boxes and obviously is not at fault. He claims that this is the custom nowadays since stores just sell what they receive from their suppliers and they have no way of determining whether the items are defective. Is he correct?

Answer:

The basis for your right to nullify the sale and return the shaver is because the sale is classified a *mekach to'us*- a sale made by mistake. The Rambam (*Mechiro* 15, 6) explains that, unless stipulated otherwise, an intrinsic condition of every sale is that the product is unblemished. Since the item you bought does not satisfy this condition the sale is void.

In your situation this is not the issue between you and the storeowner and in principle he agrees with you that the sale is void and that the

supplier should refund your money. Your issue is that the storeowner contends that it is not his problem but yours since he had no way of knowing that the shaver was defective and you should go claim against his supplier.

While in the time of the Gemara and the Rishonim stores did not sell items in sealed boxes, nevertheless, we can determine the answer by studying how the Gemara ruled in analogous situations.

One case that is discussed in the Gemara (*Kesubos* 76B) is an animal which, after slaughtering, was found to have inside it a needle that penetrated the wall of its stomach rendering it a *treifo*. It is clear from the Gemara that the butcher has the right to return the animal to the farmer who sold it to him because it is a *mekach to'us* since it was clear that he only wanted to buy kosher animals. This is ruled by the Shulchan Aruch (232, 11). Thus, even though the farmer was justifiably unaware that the animal was blemished, nonetheless, he must refund the butcher's money since it was clear that the butcher only wanted to buy kosher animals.

While this case proves that mistaken sales can be voided even if the seller is blameless, it does not prove this is the case where the seller himself bought the item that he sold from a third party who is blameworthy and liable for the defect. However, we can find proof for this point in a ruling of the Maharam of Rottenberg cited by the Mordechai (*BM* 291). The issue was that someone bought gold jewelry but when he broke it open he discovered that it really was gold-plated tin. The customer claimed that it was a *mekach to'us* but the seller claimed that he just sold what a gentile had sold him as gold jewelry and he was unaware of the true nature of what he sold you. This is very similar to the storeowner's claim in your case. The Maharam ruled that nonetheless the sale was void since, even if the seller was cheated, he may not in turn cheat

his customer. The Maharam's ruling is ruled by the Rama (232, 18), rendering it authoritative.

Another similar case is discussed in the Gemara from which we can not only prove that you are entitled to return your shaver to the store in spite of the fact that the storeowner himself was deceived, but we also can derive an important condition.

The Gemara (*BM* 42B) discusses a case of orphans whose guardian purchased an ox from a cattle dealer on their behalf and he in turn gave the ox to the shepherd who tended all of the orphans' animals. After a few days the ox died of starvation. It was discovered that the reason for its death was that the ox didn't have teeth and therefore, could not consume the food the shepherd was leaving for it to eat. The Gemara says that the dispute was only between the cattle dealer who claimed that he was unaware that the ox lacked teeth and the shepherd, since the cattle dealer had already refunded the orphans' money. The Gemara rules that, if the cattle dealer swears that he was unaware that the ox lacked teeth, the shepherd must pay the cattle dealer because he behaved negligently by failing to notice that the ox wasn't eating because it lacked teeth.

Many commentaries, including the Tur (*CM* 232), understand that if the Gemara writes that the dealer refunded the orphans' money it must be that he was obligated to do so because the sale was a *mekach to'us*. Thus, we see that the deal is classified as a *mekach to'us* in spite of the fact that the dealer swore that he was unaware that the ox lacked teeth, in which he was justified since he was only a dealer who bought and sold without examining the items prior to sale. According to these commentaries, we now have additional proof that your seller is responsible in spite of his being justifiably unaware at the time of the sale that he was selling you a defective shaver. In both your case and the Gemara's case the seller in turn has a claim against the one who sold him the defective item but

that does not free him from returning the money he received from his customer.

Many commentaries, beginning with the Tur, are perplexed by the Rambam's recording of this anecdote. Based on this Gemoro the Rambam writes (*Mechiro* 16, 11) that if a person buys an animal from a dealer and doesn't notice that the animal lacks teeth and the animal dies, the customer loses. He reasons that the customer should have noticed that the animal lacked teeth and returned it to the dealer who could have still returned it to the one who sold him the animal. Since by failing to return the animal to the dealer the customer caused the dealer to forfeit his right to a refund, the customer suffers the loss.

The Tur and others ask that the Rambam's ruling seems to be contradicted by the Gemara since it indicated that the orphans (who were the customer) were always entitled to a refund in spite of the fact that the seller was only a dealer.

The Bach answers that the Rambam does not deviate from the Gemara at all. The Rambam agrees that the customer is entitled to a refund even if the seller's behavior was totally justified. He just is adding another ruling: if the customer's negligence caused a loss to the one who sold him the animal, the customer is liable for the seller's loss. Therefore, even though the customer is initially entitled to a refund of his purchase, his payment is offset by the amount he owes the seller because of the loss he caused him. The reason is because, since the sale was voided, the customer has the status of a *shomeir*-a watchman over the seller's object. He is therefore liable for his negligence like every other *shomeir*. Since many poskim (Shach, Gro, R. Akiva Eiger and others) agree with the Bach, his approach is authoritative.

This has important bearing on many sales that are void because they are classified a *mekach to'us*. Once the customer is aware that the item he purchased is defective he should notify the seller immediately since it

could be that the seller will forfeit his right to return the defective item to his supplier if he does not make a claim immediately. If this happens the customer will lose his right to a refund. In your situation this did not happen since you informed the storeowner promptly and he did not lose anything on account of your behavior but it is an important condition to bear in mind.

While the above is the letter of the law, your seller further claimed that the custom is that storeowners only refund their customer's money if they in turn receive a refund from their suppliers. If his contention is correct he would be justified in refusing to return your money since custom supersedes the pure halacha in monetary issues. However, only a custom that is common knowledge supersedes the law because it serves as an unspoken condition of the sales agreement. Since certainly this custom, if it exists at all, is not common knowledge, the law prevails. Based on the sources we brought, you are entitled to a full refund and the storeowner should deal with his supplier.

16

Wants to Back-out of a Sale because he can Get a Better Price

I made an agreement to sell my house for eight hundred thousand dollars which I thought was a fair price but we haven't yet signed a formal contract. There are a few minor details that we didn't decide yet because we are confident that we can work them out right before the signing of our agreement. Someone heard about the deal and offered to buy the house for thirty thousand dollars more. I then asked around and found out that many people would pay eight hundred thirty thousand and that I made a mistake by settling for eight hundred thousand. I have three questions. May I back out of our agreement and sell to someone else now for a higher price? If not, perhaps I can back out of the agreement and simply take the house off the market and wait another year and then sell it. Furthermore, if I may back out of the agreement, may I sell to the person who offered a better price or must I sell to someone else in order to avoid the issue of *oni hamehapeich becharoro*-selling to someone who intervened in a sale?

Answer:

Since you haven't yet signed an agreement your buyer has not yet acquired the house since he has not performed an act of *kinyan*. Therefore, if you change your mind you would not be stealing anything from him. However, you did give your word that you would sell him the house and he relied on your word. At this stage, the first

issue is whether you would be classified a *mechusar amono,* an unreliable person, or not.

The detail that you provided that there are no significant outstanding issues is very important because if there were, since the customer could not be confident that he would be able to acquire the house, you would not even be at the stage where there would be an issue of *mechusar amono*.

Before deciding whether if you back out of your agreement you will be classified as a *mechusar amono,* it is important to understand the significance of being a *mechusar amono* and why one should avoid acting in a manner that would give him the status of a *mechusar amono*.

When the Gemara (*BM* 48A) discusses the issue of *mechusar amono* it cites a *pasuk* (*Vayikro* 20, 36) as the source for the prohibition to act in such a manner. The source is a *drosho* on the words "*hin tseddek*" which literally means that one must not possess false liquid measures. The Gemoro interprets this *pasuk* as including an additional injunction that one's words of commitment must be immutable, meaning that when one says yes, his yes must remain yes.

Many Rishonim (*Ba'al Hamo'or*, *Ba'al Ha'ittur* and, according to many, *Rashi*) rule that the Gemoro remains with this position and one who violates his commitment and acts in a manner that is considered a *mechusar amono* is violating this Torah prohibition. Other Rishonim maintain that the Torah injunction refers only to one who at the very moment that he pronounces his commitment intends to violate his word, and not to one who later changes his mind. However, these Rishonim also agree that one who changes his mind later still violates a rabbinic prohibition. Thus, one is certainly forbidden to change his mind if it falls into the category of what is considered a *mechusar amono*. While beis din does not impose penalties on one who acts in this forbidden manner, beis din may publicize his misdeed (See *Mishpatei Yosher* page

350) in order to embarrass him and hopefully to cause him to fulfill his original commitment.

Thus, we must consider whether if you back out of your commitment you will be considered a *mechusar amono*. There is a major dispute among the Rishonim if one may back out of a commitment if circumstances change. The reason some are lenient is because the original commitment was only made based on the circumstances that were in place at the time the commitment was made. It is considered as if the commitment was given conditionally.

However, besides the fact that relying on the lenient position is difficult because the majority opinion is to be strict on this issue, your situation does not even fall into this category. The reason (See *Nesivos Socheir* 22, footnote 9) is because, in your situation, circumstances did not change. It is only that you now realize something that you did not realize earlier because you failed to investigate the market more carefully before committing to sell. When one makes a commitment without investigating the market value, his commitment stands and if he goes back on his commitment he is definitely considered a *mechusar amono*. Even if you just take your house off the market you will be considered a *mechusar amono* since you are still violating your commitment to sell to the first customer.

Even though your third question – if you are allowed to change your mind may you sell to the second customer – is irrelevant in your situation, it is relevant in other similar situations and is worthy of discussion. For example, suppose a second customer offered you much more, say a million two hundred thousand dollars for the house because it had special value for him. Since this is a change that was totally unexpected at the time you agreed to sell to the first customer for eight hundred thousand dollars, all opinions agree that you are not classified a *mechusar amono* for backing out of your original agreement since you justifiably

did not take this situation into account when you made your original commitment.

In order to answer this question we must study a different set of *halachos:* the rules of *oni hamehapeich bechararo*. The issue is that the Gemoro (*Kiddushin* 59A) rules that if one person made up with the owner of a property to buy the property another individual may no longer attempt to buy the property. Even though the first customer has not yet signed a formal contract, nevertheless another customer may no longer do anything that interferes with the first person's purchase.

In your case, if you sell to a customer who offers you a substantially higher amount the customer will violate this prohibition. Your question is whether you, the seller, will also be guilty of violating this halachah. The issue is whether, when the rabbonon forbade a person from attempting to purchase an item which the seller already agreed to sell to someone else, did they place the prohibition on both the buyer and the seller or just on the buyer because it is he who is behaving unethically, and not the seller.

While the issue is not discussed by the Gemara or the Shulchan Aruch, there are several poskim (*Nachala Le'yoshua 29*, *Avnei Neizer CM 17*, *Maharshag* (3, 117)) who rule that the prohibition applies only to the buyer. Therefore, in your situation, if you do not have an issue of *mechusar amono* and you back out of your agreement because you found a customer who is willing to pay you a higher price, you would not violate the prohibition of *oni hamehapeich*.

However, if you do sell to the one who made a better offer, even though you would not violate the prohibition of *onei hamehapeich*, nevertheless, you will be enabling the second customer to violate the prohibition of *oni hamehapeich*.

Enabling the second customer to violate this prohibition involves another issue. The issue is *lifnei iveir*. The Torah forbids helping a person

to violate a Torah prohibition. Thus, the Gemara (*Avodo Zoro* 6B) rules that one may not hand a piece of *eiver min hachai,* meat of an animal that was taken when it is still alive, to a gentile since the gentile is not allowed to eat it.

In your case, the violation of *oni hamehapeich* is rabbinic. There is a major dispute among the Rishonim concerning the issue of *lifnei iveir* when the prohibition is rabbinic. Some *rishonim*, including Rabbeinu Tam (*Tosafos Avodo Zoro* 22A, as explained by *Minchas Chinuch* (232, 4)), maintain that the prohibition is from the Torah, namely, even when the violator only transgresses a rabbinic prohibition, nevertheless the one who assists him transgresses a Torah prohibition! Other *rishonim*, including the Ramban (*Commentary to Avodo Zoro* 22A), maintain that there is no prohibition at all. A third opinion is that there is a rabbinic prohibition.

This prohibition applies in your situation since without you, the second customer could not violate the prohibition. Therefore, in your situation, if you sell to the one who offered you the extra thirty thousand dollars you would, according to many, transgress two prohibitions. But if you sell to a customer who did not approach you, you would violate just one prohibition.

In conclusion: You must sell to the first customer and if you sell to the second customer you will violate two prohibitions, one of them perhaps, from the Torah: one is being a *mechusar amono* and the second *lifnei iveir*. If you sell to someone else or even take the house off the market, you will violate one prohibition of being a *mechusar amono.*

17

Paid his neighbor's expense in order to avoid being Damaged

We had an interesting case in beis din recently and we wanted to hear your opinion. Whenever it rained, rainwater would seep into the downstairs neighbor's apartment from the upstairs neighbor's porch. As you wrote (Parashas Mishpatim), the upstairs neighbor was obligated to fix his porch. However, the upstairs neighbor did not want to spend money to repair his porch so he denied the downstairs neighbor access to his porch until he signed an agreement whereby the upstairs neighbor would not have to pay more than three thousand dollars for the repair. (The upstairs neighbor agreed that this is what transpired.) The downstairs neighbor then brought two companies to give estimates. One said he would charge twelve thousand dollars for the repair and the other said he would charge fifteen thousand dollars. The downstairs owner chose the more expensive company because he felt more confident that they would do the job properly. In order to check out prices, beis din brought its own expert who said he would have charged only ten thousand dollars for the job. Our question is how much to charge the upstairs neighbor? Is the limit agreement binding and if not, how much do we charge the upstairs neighbor: the fifteen thousand dollars that was actually spent by the downstairs neighbor, or the ten thousand dollars that the beis din expert said it should have cost, or the twelve thousand dollars that the downstairs neighbor knew he could have the leak repaired for?

Answer:

Since the answer to the question about the validity of the limitation agreement depends on the answer to the question of how much the upstairs neighbor has to pay, we must begin with the latter question.

Before we can decide how much the upstairs neighbor needs to pay we must determine on what grounds he must pay and what he is paying for. In order to decide these issues we must understand the work relationship that was created between these two neighbors.

The downstairs neighbor paid for a company to perform work that the upstairs neighbor was obligated to perform. When one performs work on behalf of someone without having been hired for the job, the status of the work performer is a *yoreid*. He is a worker who did not intend to work for free but wasn't hired by the beneficiary of his work. The fact that the downstairs neighbor paid for a company to do the work is basically the same as if the downstairs neighbor did the work himself. Thus, we have determined that the status of the downstairs neighbor is that he is a *yoreid*.

You will recall that we wrote in a previous article (Parshas Vayero) about a tenant who paid for a snake trapper to catch his neighbor's escaped snake and we wrote that the owner of the snake had to reimburse the one who hired the snake trapper because he paid for someone to fulfill the snake owner's obligation. In that case too, the neighbor who hired the snake trapper was a *yoreid* and the grounds for making the owner of the snake pay is that one must pay a *yoreid*.

In order to decide how much to pay we have to determine what type of *yoreid* the downstairs neighbor is. The Gemara divides *yoreid* into two classes. There are people who are a *yoreid bershus*. They received permission to perform the task that they performed. While the worker wasn't hired, nevertheless he acted with permission. For example, if a landlord permits his tenant to improve the property he is renting, the

renter is a *yoreid bershus*. However, if a squatter improves the property on which he is squatting he is a *yoreid shelo bershus* because the property owner granted him no permission: not to squat on his land nor to improve the land.

In the classic situation of a *yoreid bershus* the worker was given permission by the owner of the property that he improved. However, even if he did not receive permission from the owner but received permission from beis din – or would have received permission from beis din – he is also classified a *yoreid bershus*. For example, the Gemoro (*BM* 39A) explicitly rules that if a person tended the land of his captive relative he has the status of a *yoreid bershus* since beis din would have given him permission to look after his captive relative's property.

We should note that the fact that the downstairs neighbor was only interested in improving the upstairs property in order to avoid being damaged does not detract from his status as a *yoreid* as we see in the case of the captive since in that case too the only reason the relative was interested in improving the property was in order to eventually inherit it. The one who hired the snake trapper also was a *yoreid bershus*.

Having established that the status of the downstairs neighbor is that of a *yoreid bershus* we can determine how much he deserves to be paid.

Whenever someone is a *yoreid bershus* he is entitled to have his expenses reimbursed in full. Expenses include the cost of materials as well as labor costs. If the *yoreid* does the work himself, he only is paid as much as the cheapest common price which in this case would probably be ten thousand dollars. However, when one hires someone else to do the work it is clear from the Rambam (*Geneivo* 10, 10) and the Shulchan Aruch (*CM* 375, 8) that he is entitled to be reimbursed for whatever he paid as long as he acted reasonably.

In fact, the Pa'amonei Zahav (*CM* 375) proves this from a ruling of the Ramo (182, 3) that if someone asked an agent to perform a job on his

behalf he must reimburse the agent for all reasonable expenses. The rationale is that we presume that when one asks another to perform a task that involves an outlay of money, he intends to pay all reasonable expenses. However, if the agent acted in an unusual manner we assume that the one who hired the agent never accepted liability for unusual expenses.

This is also the ruling of the Sha'ar Mishpot (14, 4) in case one caused another an expenditure. He rules that the one who caused the expense must pay all reasonable expenses. Even if there are people who charge less, one does not have to make a survey of all available companies before hiring since that is not usual behavior. For example, if a plaintiff refuses to have his case heard in beis din, causing the claimant to have to go to secular court, the plaintiff must reimburse the claimant for the additional expense of having his case heard in court. However, the plaintiff does not have to reimburse the claimant for extravagant expenses.

Similarly, the Rashba (cited by *Beis Yosef* 333) ruled that if a worker who was obligated to work quit, the employer may hire a replacement at the worker's expense provided the worker charges a reasonable price. The employer does not have to ascertain that he is hiring the cheapest worker that can be hired.

Since the price of twelve thousand dollars seems to be reasonable, the downstairs neighbor is certainly entitled to be reimbursed this amount. However, since normally when a person receives two quotes from reliable companies he hires the cheaper company, we cannot obligate the upstairs neighbor to reimburse the downstairs neighbor for the full fifteen thousand dollars that he actually paid.

Having determined that the downstairs neighbor deserves to be reimbursed twelve thousand dollars, we can consider the validity of his

agreement with the upstairs neighbor that he will only make him pay three thousand dollars.

When a person forces someone to sell him something the sale is valid (See *BB* 48) because we assume that the seller honestly agrees to sell because in the end of the day he receives the value of what he sold. However, if one is forced to give a present, the recipient must return the present because the giver only gave it under duress. Similarly, the Shulchan Aruch (*CM* 205, 4) rules that if one is forced to sell at a cheap price the sale is invalid because a sale at a cheap price is classified as a present.

Since we saw earlier that the downstairs neighbor is entitled to be paid twelve thousand dollars, he was coerced to forego payment of nine thousand dollars. Since it was only done because of your neighbor's threat to prevent him from repairing the leak, it is like being forced to give a present. Therefore, his waiver is invalid and he is still entitled to twelve thousand dollars.

In conclusion: The upstairs neighbor must reimburse the downstairs neighbor the sum of twelve thousand dollars.

18

Yeshiva Benefits from a Better Exchange Rate

I manage a yeshiva. Since our income flow is not steady we often have spare cash that we will need only in another month or two. I have a friend who also manages a Torah institution and he often is short of money to meet his payroll. Since he is very reliable I often lend him money which he pays back by the time I need it. Since my yeshiva's money is in dollars I lend him dollars which he converts into shekels and uses to cover expenses. When he pays back he can return dollars but most often he only has shekels and so he returns shekels at the middle rate on the day he pays back. We never made a formal agreement requiring him to work this way but this is what he does. I should add that my friend isn't trying to pay interest or to do me a favor because I did him a favor and lent him money. It is just that this is a convenient way of calculating the amount of shekels to return. This is beneficial for my yeshiva since if I had held onto the dollars and converted them to shekels when I needed them, I would not have gotten the median rate since the black market takes off an agura for each dollar. For example, if I lend him thirty thousand dollars for two weeks my yeshiva gains three hundred shekels, about ninety dollars. Is there any *ribbis* issue since my yeshiva is benefiting from a loan?

Answer:

The first thing we need to do is to analyze how Torah law classifies your arrangement. Since the exchange rate that you use is the one that is in

effect at the time of repayment, your arrangement has two components. From the time you lent the money until the time of repayment you are lending him dollars with no interest which is perfectly fine. On the day of repayment he may choose to return dollars which again would be fine since you do not gain. Your only issue is in case he repays you in shekels.

When he gives you shekels for your dollars he is effectively selling the dollars he owes you. The reason is that when one repays a loan he must pay back precisely the same money amount that he borrowed (See *Chavos Da'as* (161, 1) who elaborates on this point) and you could require him to pay back dollars. By giving you a, better than the standard, rate he is paying you more money on the sale than you would have gotten had you not lent him money and would have sold the dollars yourself. Your question is whether this benefit is viewed as interest on your loan.

There are a number of reasons to permit your arrangement.

One reason is that the middle exchange rate is a rate that is used often. It is true that you are benefiting because otherwise you would have gone to the black market and your friend, from a certain perspective, lost because he used the black market and only got the black market rate for the dollars you lent him when he got the loan. Therefore, in a sense you gained and your friend lost. However, if you and your friend would have exchanged with a person who needed dollars (e. g. one who was planning a trip to the U. S.) you would have both exchanged at the middle rate since that is the rate that is used when each party wants the other's currency. Therefore, since you used a rate that exists and you both could have used it without any loss or gain there is no interest that is inherent in your loan.

Furthermore, actually you and your friend were in the situation where people use the middle exchange rate since your friend really needed to buy dollars in order to pay back his dollar loan. It is only because you

allowed him to pay you back in shekels that he did not have to do this. Therefore, your friend really did not lose since it would have cost him more money than the median rate if you would have insisted that he pay you back in dollars. Therefore, the median rate is the fair rate to use and you are in a win-win situation which is not *ribbis*.

Second, even if we assume, as you did, that your friend is losing, even if there was an obvious benefit for you, many poskim and perhaps all would permit your arrangement. To understand the problem and its solution it is necessary to introduce two laws of *ribbis*.

The first law (*YD* 160, 6) is that a borrower may give his lender a modest present **after** returning the loan, provided that he does not say that he is giving the present in appreciation for the loan. However, there is a second law (*YD* 160, 4) that a borrower may not include a present to his lender **along with** his repayment of the loan. The reason is because then it seems clear that the present is being given in appreciation for the loan since it is being given along with repayment of the loan.

This second law is the law that would seem to pose a problem with your arrangement because your friend, at the time when he is returning the loan, is giving you more shekels than you may be entitled to. He is giving you a present along with repayment of his loan. If we ignore our first reason, the black market rate is what you are entitled to and the added shekels are his present.

In order to decide if truly there is a problem it is necessary to study this law carefully. The source for this law is a Gemoro (*BM* 73B) that recounts how when Ravino, an *amora*, prepaid for his wine, he received more wine than he should have received according to the market price of wine. The Gemoro says that this behavior does not violate any prohibition of *ribbis* because the sellers meant to give him a present. (Prepaying is similar to a loan on a rabbinic level.) This is the basis for

a ruling of the SA (*YD* 160, 4) that receiving extra goods is permitted in the context of a sale. However, since many commentaries comment that the only reason Ravino's behavior was proper is because he bought wine and did not borrow, the SA rules that if one borrows he may not add anything to his repayment.

The commentaries ask that this seems to contradict another ruling of the Tur (*CM* 232). The basis for the Tur's ruling is a Gemoro (*BM* 63B) that rules how a person should act if he unexpectedly received more money than he was supposed to receive. The Gemoro says that if it is reasonable to assume that there was a mistake, the recipient must assume so and return the money – like one is required to return any lost object. However, if it is unreasonable to believe that it was a mistake the recipient may keep the extra money because he can assume it was given to him intentionally as a present. When the Tur (*CM* 232) records this ruling he writes that this is true even if the money was received in the context of repayment for a loan. The commentaries ask that this contradicts the ruling that one may not give presents together with repayment of a loan.

There are many answers to this question. The Taz (160, 2) and Bach answer that presents received from one's borrower are prohibited only if the borrower first repays the loan and only immediately afterwards pays the extra amount, since then it is clear that he is paying extra. The Prisho answers that it is only prohibited if the one paying mentions explicitly that he is paying more than he is required to pay. The Shach (160, 4) says that if the money was added on to money that is being paid in repayment of a loan it is prohibited but if the money is repayment for a sale it is permitted. The Machane Efraim (*Ribbis* 17) differentiates that the prohibition is limited to cases where the borrower really added money because he was loaned money. However, if he adds money for other reasons there is no prohibition.

The Chavos Da'as answers that there is no contradiction since two different issues are involved. The borrower may never add money when repaying his loan, which is the ruling in YD. CM is discussing the situation of the one who received the money and permits holding onto the extra money that he received. Even though the lender received money which constitutes *ribbis* according to the Rabbonon and the borrower should really not have included it, the lender is not required to return it.

Thus, if we don't wish to rely on the first reason, your case depends on these answers since you are receiving more money at the time when the loan is being repaid. Since all the money is being given to you at one time and there is no mention that you are being given extra and your friend is not giving you extra because you lent him money, according to the Prisho, Bach, Taz and Machane Efraim there certainly is no prohibition. However, according to the Shach and Chavos Da'as it would seem to be prohibited.

However, as we mentioned at the outset, when one does not return the money he borrowed he is not repaying a loan but buying something. If your friend pays back dollars and adds shekels while returning the dollars, you would have a problem according to the Shach and Chavos Da'as. However, since you are only receiving shekels, your deal is classified as a sale and not a loan and giving a little extra is permitted according to all.

This would be our ruling if the money you lent was your personal money. However, since the money you are lending is your yeshiva's and the one who is earning money is a yeshiva, there is an additional reason for leniency.

The basis for this leniency is a ruling of the Gemara (*BM* 70A) that a guardian may invest money that belongs to orphans in a manner that is a rabbinic violation of the laws of interest. The reason (Rashi) is that

since the Rabbonim were interested in preserving the capital of orphans they excluded orphans from their prohibitions of ribbis. Similarly, based on the Yerushalmi, the SA (*YD* 160, 18) rules that a yeshiva may lend its money in a manner that violates rabbinic ordinances since the beneficiary is a yeshiva.

There are a number of reasons that what you are doing certainly does not violate a Torah prohibition. One reason is that in order to constitute a Torah prohibition the payment of *ribbis* must be included in the terms of the loan agreement (known as *ribis ketsutso*). Since you did not make an agreement that required your friend to pay you the median rate you certainly did not violate a Torah prohibition of interest. Furthermore, since your friend pays you shekalim for a dollar loan the entire agreement is classified as a sale and the Torah prohibition of *ribbis* is limited to loans and does not include sales. Since the only potential prohibition is rabbinic, the fact that the beneficiary is a yeshiva is a third reason to permit your arrangement.

In conclusion: You and your friend do not violate any prohibition even if your friend returns shekels to your yeshiva at the median rate. First of all, rabbinic prohibitions of *ribbis* are waived for a yeshiva and Torah violations are certainly not present. However in fact there are also no rabbinical violations and even if the beneficiary is a private individual, for one, the borrower really isn't giving more than he should. Also, even if he would be giving more, it is permitted because your situation is a sale.

19

Selling Slightly defective Merchandise at a discount without informing the customer

I import and sell dry goods in my stores. Recently, I received a shipment of summer blankets. The blankets are perfect except that they have noticeable white spots on them. I would like to sell them as if they are first quality at a ten percent discount to account for the imperfection. The reason I prefer selling them this way is that if I sell them as seconds or label them as imperfect I will have to mark them down by about fifty percent and incur a loss. Is my plan permitted under Torah law?

Answer:

There are three distinct issues that must be considered: *ono'o*-overcharging, *mekach to'us*- a sale that is based on false premises and *geneivas da'as*-misleading someone.

Before deciding whether there is an issue of *ono'o* we should mention a few pertinent rules. One rule (*CM* 227, 2-4) is that if the price that is being charged deviates by a sixth from the fair price the sale is valid but the deviation must be returned to the victim. If the deviation is greater than a sixth the entire sale is canceled and if it is less the sale is valid and stands as is. The Shulchan Aruch (227, 6) cites the Rosh who leaves open the question whether one who overcharges by less than a sixth still violates the prohibition against overcharging. Thus,

the question whether there is a violation of *ono'o* depends on how your price compares to other people's prices.

Thus, it depends on what other stores do. If other stores sell blankets with this type of defect at a fifty percent discount you will be violating the laws of *ono'o*. However, if others would charge a similar price or if there is no fair price since each case is different, you will not violate the prohibition.

Turning to the issue of *mekach to'us* it is important to understand the concept and its rationale. When a sale is classified as a *mekach to'us,* either one of the parties may cancel the sale because the sale was based on incorrect information. The reason is that transactions are only valid if both parties fully desired to effect the transaction. Therefore, transactions that are based on incorrect information may be canceled.

There are two factors that we need to consider in order to determine if your customers will be entitled to undo their purchase on the grounds that the sale constitutes a *mekach to'us*. The first factor is whether the defect is significant enough to render the sale a *mekach to'us*.

The Rambam (*Mechiro* 15, 5) is the source both for the criteria which qualify which defects are significant enough to undo a sale and the rationale for these criteria. He writes that the rationale is that when one purchases something there is a tacit agreement between the seller and the buyer that any issue that was not spelled out explicitly in the sales agreement will be governed by local custom. Therefore, your customers will be entitled to return any blanket that customers customarily return due to defects of this nature. In order to apply this criteria to your situation you will have to determine whether it is customary for stores to accept returns by their customers for defects that are as significant as these spots.

Even if the spots are significant enough there is something that you can do that will prevent sales from being subsequently rendered invalid due

to this defect. The source for many of the rules governing *mekach to'us* is the rules laid down by the Gemara regarding marriage. The reason is that the Torah's perspective is that when a man marries a woman he is effectively acquiring her, in a sense. The Gemara (*Kesubos* 75B) states that we can safely assume that people do not wish to acquire a wife who is blemished. Therefore, if a man discovers a blemish in his wife only after his marriage he may undo his action.

However, the Mishna (*Kesubos* 75A) writes that if the blemish is noticeable, the groom is not able to undo the marriage even if he claims that he was unaware of the blemish. Even if the blemish is in a place that is usually covered by clothing but everyone bathes in a public bathhouse (customary in Roman-Mishnaic times) the husband does not have a right to invalidate the marriage. The Gemara (75B) says that the reason is that since people do not normally get married without first checking whether their bride has blemishes, we assume that if a groom married a girl he checked her out and decided to marry her in spite of her defect.

The Chafetz Chaim writes that in his time a father is not entitled to invalidate his daughter's engagement (and the dowry he committed himself to at the time of the engagement) on the grounds of *mekach to'us* if he was told that the groom is a *talmid chacham* and he subsequently discovered that he is not a *talmid chacham* at all. He writes that the reason is because it was customary (then) for father-in-laws to have a qualified person test their future son-in-law before the engagement. If the father-in-law did not follow this custom he forfeited his right to invalidate the engagement on these grounds.

While we cannot compare every purchase to marriage and postulate that any defect that could have been uncovered, even if it required significant effort, cannot subsequently serve as a reason to invalidate a sale, nevertheless, the Rif (*res* 163, cited by *Beis Yosef CM* 232) derives

an important general principle. The principle is that a defect which people generally notice before purchasing an object cannot serve as the basis for subsequently invalidating a sale. The reason is because we assume that the customer was aware of the defect and decided to make the purchase in spite of the defect. Just like when acquiring a wife people make inquiries before engaging and we always assume that the groom did so, so too we assume that customers make the customary examination before purchasing something.

Turning to your blankets, if you display the blankets for sale so that people can clearly see the spots when they look at the blankets in the store, you will avoid subsequent liability on the grounds that your sale was a *mekach to'us*. The reason is that people normally look at blankets before they buy them since they want to see the color, pattern etc. and one who does so will notice the spots.

This is similar to what the Gemara (*Kesubos* 57B) rules, that a person who buys a slave is not entitled to subsequently invalidate the sale on the basis of an external defect. The reason is that we assume that the customer noticed the defect before he bought the slave and decided that, nevertheless, he wished to purchase the slave. If subsequently he claims that the sale constitutes a *mekach to'us* we assume that it is due to other considerations that the customer changed his mind and he is just using the defect as an excuse to cover up his change of heart.

This is especially true in your case since if a person did not even look at the blanket before buying it he obviously does not care about the blanket's appearance. Since you say that the only defect in these blankets is their external appearance the customer cannot later claim that his purchase was based on false assumptions since either he noticed the spot or in any case did not care about it, for example, if he always places his blankets inside blanket covers.

Coming to our final issue, *geneivas da'as,* this is an independent issue. Even if a sale cannot be canceled on the grounds of it being a *mekach to'us* the seller may still violate the prohibition of *geneivas da'as*. For example, if the seller covers up a defect that people care about but it is not customary to accept returns based on this defect since it is not critical, the seller, nevertheless, is guilty of *geneivas da'as* even though there was no *mekach to'us*. For example (See *Me'iri BM* 60A, *Bach* CM 228, 6) if a seller makes his wares appear as if they are of high quality but only charges the price of low quality without saying that they are of high quality, the customer cannot subsequently cancel the sale on the grounds of *mekach to'us*. However the seller still violated the prohibition of *geneivas da'as*. The reason is that many people prefer buying high quality goods at a high price to inferior goods at a cheap price.

We should mention that if you package the blankets in a way that customers will not notice the defect until they open the package, whether they will be able to return the blankets on the grounds of *mekach to'us* or not you will violate the prohibition of *geneivas da'as*. This is stated by the Rambam on two occasions. In one place he writes (*Mechiro* 18, 1), "It is forbidden to deceive another when engaging in commerce... If one is aware that his wares are defective he must inform his customer." In another place he writes (*Mechiro* 15, 6), "It can be assumed that customers wish to purchase only non-defective goods." However, if you package the blankets in a way that customers will notice the spots before purchasing them there is no issue of *geneivas da'as* because you are not deceiving your customers.

In conclusion: If you package your blankets in a way that the spots will be noticed by customers when they look at the packages and your price is not out of line with accepted prices you may sell the blankets without any special label.

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Signed a contract that did not reflect the Verbal Agreement

I signed a contract to purchase an apartment. The apartment had an extension that had been built illegally. I discussed with the seller my desire to have the extension legalized. In order to do so one has to file plans with the city planning commission and get them approved, which is not a foregone conclusion. Therefore, we agreed that I would deposit thirty thousand dollars in escrow with his lawyer and if the expansion is legalized within two years he would get the money and if not the money will be returned to me. When we wrote the contract he wrote that if the plans that were attached as an appendix to the contract were approved, he would get the thirty thousand dollars. However, the plans that were attached as the appendix were not plans to legalize the extension but rather to build a reinforced room which we never discussed and is worthless to me. He now agrees that this is not what we discussed, but claims that since I signed the contract and he carried out what it says, he is entitled to the thirty thousand dollars. However, I never agreed to such a thing and when I signed the contract I assumed that the plans that were attached were what we discussed and so I never studied them. Who is right?

Answer:

Your question is essentially whether a sales agreement that was signed by someone without reading the agreement is binding on the signer.

It would seem that the contract should not be binding since every transaction requires the agreement of both parties and your seller agrees that you signed to buy something that has no value for you and undoubtedly never intended to pay thirty thousand dollars for it, and you only signed because you didn't check out the contract.

Similar situations are discussed by the Rishonim and brought in the SA in three places and it might seem from them that perhaps the contract is binding anyway, because you willingly signed the contract in spite of the fact that you did not read a key part of the contract. Therefore, we will study the cases that are discussed by the SA and analyze them to see whether any of the rulings of the SA can serve as a source to obligate you to fulfill the terms of the contract that you signed.

One ruling of the Rashbo (*res. Meyuchoses* 77) discusses a document which a Jew signed waiving certain rights that he was entitled to. The document was written in a foreign language and the Jew who signed claimed that he did not understand the foreign language, and therefore the waiver that he signed should be invalidated.

The Rashbo ruled that the waiver is valid for two reasons. The first is that since generally people don't sign documents unless they know what they are signing, we assume that one who signed either knows the language or he had someone read it to him before he signed. Therefore we do not believe that he was unaware of what he signed.

He says that even in case the other party admits, or witnesses testify, that the one who signed the waiver did not know what he was signing, nevertheless, his signature is binding. His argument is that when one signs a document without bothering to read what he is signing, he is stating that he is placing his trust in the scribe that he wrote what was agreed upon. Therefore, if later on there is a disagreement between the scribe and the person who signed on the document whether what is written in the document is what was agreed upon, the scribe is believed.

He derives this from the Gemara (*Gittin* 64A) that rules that if a husband prepares a valid get and gives it to an agent who was empowered by his wife to accept the get on her behalf, and later on the husband claims that he gave it to the agent merely to hold it on his behalf but the agent claims the husband gave it to him to receive as a get on the wife's behalf, the agent is believed since the get was given into his hands. The reason the agent is believed is because the husband's action – handing over the get – shows that he trusted the agent that if he later says it was given as a get he is telling the truth. The Rashba's decision is ruled by the SA (*CM* 45, 3) without any dispute.

Another ruling of the Rashbo (1, 629) concerned a person who divorced his wife. The wife then asked to receive what the husband obligated himself to give in his *kesubo* (which was more than the standard amount-*Beis Shmuel EH* 66, 29). The husband claimed that he is unlearned and was unaware of what was written in the *kesubo*, a claim which was disputed by his wife. The Rashbo rules that we do not accept the husband's claim since if we would accept such a claim every unlearned husband would make this claim, effectively nullifying the enactment that a wife is entitled to a *kesubo*. Therefore, we surmise that witnesses made the husband aware of what was written in the kesubo before the husband had them sign on the *kesubo*. He adds that this is his opinion, but that the Ramah (a Rishon) ruled that we accept the husband's claim.

The opinion of the Rashbo in this responsa is ruled by the SA (*CM* 61, 13). The Sema (note 23) and Shach (note 18) both add that based on the earlier ruling that we cited, even if the husband's claim is true he would be obligated to pay whatever it says in the *kesubo* because he obligated himself to carry out whatever the scribe wrote.

This ruling of the Rashbo is cited by the Beis Yosef in Even Hoezer (end *siman* 66) as well and is ruled by the SA (66, 13). The Ramo and

Beis Shmuel explain that the reason we do not accept the husband's claim is because witnesses affixed their signatures to the *kesubo* and the meaning of their signature is that they testify that the husband properly obligated himself to whatever is written in the *kesubo*. Therefore, if the husband's understanding is necessary they in effect testified that the husband was aware of the content of the *kesubo*.

A third responsa of the Rashbo (1, 1156) concerned a woman in whose *kesubo* it was written that she owned a field which bordered a field that belonged to the community. She later claimed that the neighboring field was hers as well and not the community's. She said that she was unaware at the marriage ceremony that the *kesubo* stated that the neighboring field belonged to the community and not to her and the Rashba ruled that her claim is accepted.

The Knesses Hagedolo (*CM BY* 147, 8) asks that this seems to contradict the other responsa of the Rashba, where the Rashba ruled that we do not accept a claim that a party was unaware of what it says in a document on which he or witnesses signed. He suggests two resolutions. The first is that one cannot claim that he was not aware of the focus of a document since one always pays attention to that. However, mention of the ownership of the neighboring field when delineating the bride's property is a side fact that can be easily overlooked and therefore, the issue of ownership of that field cannot be settled by means of this document. His second solution is that perhaps a bride is uniquely preoccupied at the time of her marriage and doesn't pay attention to every detail. (A woman is different from a man because the man prepares the document whereas the wife first hears what it says when it is read under the chuppah, a time when most women are preoccupied with other thoughts.) If one follows this approach even a side detail can be proven from a document if the obligating party is not a bride.

Having studied the three related responsa of the Rashbo, we can now consider whether any of them can serve as a source to obligate you to pay the thirty thousand dollars. The third responsum obviously is not relevant since if anything it rules that under certain circumstances one's signature does not obligate the one who signed. However, since neither of the conditions of the Knesses Hagedolo applies in your situation, we also cannot derive that you are not obligated.

The second responsa also cannot serve as a source to obligate you to pay since the issue in the second responsa was whether to believe the husband in his claim that he did not understand what he obligated himself to pay. However, there was nothing unusual in what the husband obligated himself to pay and therefore, the husband's claim that he was unaware is not accepted. By contrast, in your situation it is obvious that you did not realize what you were signing since no one pays thirty thousand dollars for something that has no value to him. Furthermore, even your seller admits that this exact amount was negotiated earlier as payment for legalizing the existing extension and not as payment for a fortified room. This is further evidence that you never intended to obligate yourself to pay for the fortified room but rather meant to pay for legalizing the extension.

Finally, we need to consider the first responsum. The first argument does not apply for the reason we just gave, namely that in your situation there is strong evidence that you were unaware what you were signing to pay for. The second argument does not apply as well since the Rashbo only ruled that one who signs without reading what he signs trusts the one who prepared the document that he prepared a document that reflects what was agreed upon. However, in your case the seller agrees that what you signed was never agreed, which means that he violated the trust that placed in him. We should recall that the Rashba based his ruling on the laws of a *sholish* who is granted trust to claim that the get was given to him in order to divorce the get owner's wife. However, he

was never granted power to use the get to divorce the owner's wife if it was not given to him for this purpose. (This is evident from the entire discussion in Gittin 64A and the first two comments of Rashi.)

Since there is no source to create liability on you for something you were fooled into signing, we revert to what we wrote at the outset that you should not be obligated to pay since one is only obligated to fulfill obligations that he willingly accepted upon himself and not those he was obviously fooled into accepting. We will now see three poskim who ruled similarly.

Our ruling is similar to the ruling of the Aruch Hashulchan (45, 5) concerning the first responsum of the Rashbo. He writes that if, when the document was read before the signatory, it was read as saying that the signatory must pay one hundred but in fact it said two hundred, then the signatory is not obligated to pay two hundred because his signature was only intended to obligate himself to fulfill what he was told it says. This is almost exactly like your situation where you were told that the appendix would have plans to legalize the expansion and not an unneeded fortified room.

We should note that the Rashbo's comment serves as strong evidence for the Aruch Hashulchan's ruling since the Rashbo says the reason the signature of one who cannot read a language is binding is because he relied on what was read to him. Obviously, he maintains that if it was read to the signatory incorrectly, what is written does not obligate the signatory.

Similarly, the Mishne Halachos (17, 98) invalidated a *shtar borerus* (arbitration agreement) of a beis din that changed the text of their *shtar borerus* and did not alert the plaintiff who had, in an earlier din Torah, signed on the previous version and assumed (incorrectly) that the text had not changed. Even though the plaintiff could have read what was

written, nevertheless, he was justified in not reading it since he had reason to believe he knew what was written from earlier cases.

This certainly is true in your case since you had even more reason than the plaintiff in the case of the *shtar borerus* to believe that the plans were to legalize the expansion and not for a fortified room. The Mishne Halachos explicitly states that the Rashbo's ruling is limited to one who had no reason to think he knew what was written in the document that he signed, a condition that your agreement does not satisfy.

Another reason to invalidate the obligation to pay for the fortified room is a ruling of the Mahariaz Anzil (res 49), a disciple of the Ketsos. He was asked about the validity of a document that was signed by a blind person, selling his house to his son-in-law. He invalidated the sale since the son-in-law who brought the blind person the document to sign was an interested party since he was the purchaser. The Mahariaz claims that the Rashbo's ruling that one who does not read a document thereby grants trust to the scribe, is limited to cases where the scribe is an uninterested party since people don't trust interested parties. However, in his case the son-in-law was an interested party and thus the Rashbo does not apply. Similarly, in your case, the seller was an interested party and therefore, according to the Mahariaz Anzil the Rashbo does not apply.

In conclusion: Since you were fooled by the seller into signing a document that obligates you to pay thirty thousand dollars for something you never were interested in, and you did not receive what you did agree to pay thirty thousand dollars for, you are not obligated to pay anything and the lawyer is obligated to return the entire thirty thousand dollars to you. We should note that this is the secular law in Israel as well since the actions of the seller constitute *choseir tom lev*-dishonest behavior.

21

Is a Son Required to Pay his Deceased Father's Debts

Our father recently passed away leaving behind many debts and nothing worthwhile to inherit. We should note that he lived a very frugal life, always struggling to make ends meet. The reason he left debts is because he borrowed money to cover medical expenses for himself and for our late mother. The people who lent him the money knew that he was poor so no one was deceived by him and if he could have, he would have paid them back. Are we, his children, required to pay back his creditors or not?

Answer:

We should first make it clear that one who borrows money is required to repay the loan. Besides being crucial for the ensuing discussion it necessary to stress this point since, unfortunately, there are misguided people who try to avoid paying back their debts.

In addition to being very bad middos – being ungrateful toward one's benefactor – it is a Torah violation. The Gemoro (*Kesubos* 86A) writes that there is a mitzvah to repay a loan and beis din forces borrowers to repay, if necessary. Rashi writes that the mitzvah is included in the mitzvah to keep one's word since, when one borrows, it is understood that he is giving his word that he will repay. Moreover, one who borrows and does not repay is called a *rosho* by the *pasuk* (*Tehillim* 37, 21): "One who borrows and fails to repay is a *rosho*."

The Gemoro writes in two places (*Kesubos* 91B, *Bava Basra* 157A) that children have a mitzvah to repay their deceased parent's debts. However, in Kesubos it is apparent that even though the children have a mitzvah, nevertheless we do not force them to repay. In Bava Basra it is clear that we do force the children to repay.

There are two approaches among the Rishonim to resolve this seeming contradiction. Both approaches agree that the key difference between the two cases is what the children inherited. We will only discuss the majority opinion since it is the authoritative approach (*CM* 107, 1) and the second opinion is not even mentioned by the Shulchan Aruch.

Most Rishonim including Tosafos (*Kesubos* 86A), the Rosh (*Kesubos* 9, 14) and the Rambam (*Malveh Veloveh* 11, 4-8) explain that if the children inherited real property (land and immovable objects) we force them to use their inheritance to repay their parent's debts. The reason is that when one borrows he automatically places a lien on his real estate. Therefore, when the heirs inherit this real estate they are inheriting it with the lien on it and the creditors can exercise this lien and force the heirs to repay.

However, when the heirs did not inherit real estate but inherited money or non-real property the Gemara rules that there is a mitzvah on the heirs to repay but beis din does not force them to do so. The rationale of this approach is that the mitzvah that requires the heirs to repay is the fifth of the Ten Commandments, to honor one's parents. The reason we do not force the heirs to repay even though, as we mentioned earlier, beis din generally forces people to fulfill their mitzvos is that the Gemara (*Bava Basra* 8B) says that we do not force people to fulfill mitzvas whose reward is mentioned in the Torah. Since the Torah writes that one who honors his parents is rewarded with a long life, beis din does not force the heirs to show their respect by repaying their parents' loans.

However, the heirs do have a mitzvah to repay. The reason (*Rashbo Res* 4, 152) that children who repay their parents' debts are honoring them is that they are thereby enabling their parents to avoid being called reshaim, which, as we mentioned earlier, is the term applied to one who fails to repay his debts.

We should note that the Gaonim promulgated a *takonoh* whereby when one borrows money a lien is placed on all his property including non-real (movable) property. The reason for this *takonoh* was that in those places in those times many Jews could not own land. Therefore, in order to ensure repayment of loans the Gaonim ruled that an automatic lien is placed even on movable property. This *takonoh* remains in force. As a result, nowadays even heirs who only inherit movable property are required to repay their parents' debts and beis din will even force them to repay their parents' debts.

Where the parent does not leave behind any inheritance, the reason the children are not required to repay their parent's debts is because of the general limitation of the mitzvah to honor one's parents. The Gemara (*Kiddushin* 32A) rules that if it costs money for a child to honor his parents the expense is borne by the parents. For example, if a parent asks for a cup of coffee the child may tell his parent that while he is happy to prepare and bring the coffee, the parent must pay for the coffee.

Thus, if the children inherited something from their parents the children have a mitzvah to use the inheritance to honor their parents and repay their debts, since the children will not need to use any of their own money to repay the debts. However, if there is no inheritance the children are not required to repay since doing so will require them to use their own money.

Thus, we can answer your question: Since you did not inherit anything you are not required to repay your father's debts. However, if you do repay you will honor your father and perhaps spare him being called a *rosho*.

In light of the above, the Aruch Hashulchan (107, 2) says that if the child has the means, it is proper (he calls it a *midas chassidus*) for him to come to terms with the creditors of loans where the parent is not blameless for failing to repay. One example he gives of where the parent is not blameless is when at the time he borrowed he did not have the means to repay. The other is where he had the means to repay for a while but failed to do so when he could have repaid, and later he no longer had the means to repay. The reason is that in these cases the parent has the status of a *rosho*.

In your situation, it is clear that your father does not have the status of a *rosho* for having failed to repay. This can be derived from the Shulchan Aruch (97, 4) who writes that one who take a loan and then squanders the money in a manner that he will be unable to repay is a *rosho*. The Sema (97, 5) writes that one who borrows for an important reason is excluded from this ruling and the Taz (*siman* 97) writes that if the borrower used the money for the avowed purpose he is excluded. (Both the Sema and the Taz are cited by the Chofetz Chaim in the *Ahavas Chesed* at 2, 24 in the footnote.)

Therefore, your father who borrowed for medical expenses, a necessary expense, and also informed the lender of his true intention, definitely is not classified as a *rosho*. Thus, it would seem that even according to the Oruch Hashulchan you do not have to repay the debts even as a *midas chassidus*.

We should note however, that if you do repay the debts you will still be fulfilling a mitzva to honor your father since: 1-the Gemara says there is a mitzvah to honor even a deceased parent, and 2-it is clear that paying any debt of the parent is included in the mitzvah to honor one's parent. The proof is from the fact that when the previously cited Gemara says that there is a mitzvah to repay a parent's debt it is referring to all debts of the parents.

22

Received Checks to Ensure that Money will be Invested-Part 1

I was approached by a friend to invest money along with him in his cousin's project. Initially, he asked for a small sum which I gave him. Since I don't know his cousin, when he asked me to invest an additional amount, I asked him to guarantee that my money will be invested and not used by his cousin for other purposes, by giving me his own personal checks to cover my entire investment i.e. both the money I had given previously and also the money that I was investing now. He complied with my request and gave me a number of signed but undated checks, leaving the payee blank, which covered the entire amount I invested. After two years it became clear that my fears were well-founded since it turned out that his cousin was, much to my friend's dismay, a simple crook. Rather than invest my money, he used my money to pay off personal debts and now when I asked my friend for my money he replied that his cousin doesn't have any money to pay his debts. May I deposit my friend's checks?

Answer:

Since your friend's checks were given with regard to your investment with a third party, his cousin, we have to discuss the rules of guarantors or *areivim* as they are called in the Torah and halachic literature.

In order to understand the answer to your question, we will discuss four issues:1] The halachic basis for the creation of an obligation on

a guarantor to pay someone else's debt; 2] Whether a guarantor is obligated to pay a debt that existed before he obligated himself as a guarantor; 3] What role checks play in establishing one as a guarantor and, 4] Whether there is a difference between guaranteeing a loan and guaranteeing an action such as, in your situation, investing money.

The reason it is necessary to find a source for a guarantor's obligation to pay is that he did not receive any money from the lender. When one receives money as a loan, that creates an obligation to pay it back. However, here we wish to create an obligation to repay money that was given to someone else. The Gemoro (*Bava Basra* 173B) cites one source from the Torah and one from Mishlei. The Torah source is Yehuda's acceptance of responsibility for Binyomin's return. The source from Mishlei are pesukim that indicate that a guarantor is liable to pay what he guaranteed. The poskim discuss whether in the end the Torah source suffices, but in any case a guarantor is liable for what he guaranteed even if he just stated verbally to the lender that he guarantees repayment of a loan.

Having established that a guarantor is liable we have to understand the mechanics that actually create this liability. The reason this needs clarification is that generally one cannot create liability by statements alone. For example, if one says he will give someone a present he has no enforceable obligation to actually give the present. While it is improper behavior to not fulfill one's statements, nevertheless, there is no enforceable liability. If the one who was promised a present takes the one who made the promise to beis din he will not be able to force the one who promised to pay.

To make things worse, a guarantor is generally only creating a conditional obligation, known as *asmachta*, since if the borrower repays (as the guarantor expects) the guarantor will not be liable for the loan. Conditional guarantees are normally not enforceable since the granter

of a conditional guarantee does not have full intention to pay since he expects the borrower himself to repay the debt.

The *meforshim* offer two approaches to explain the mechanics of how a guarantor verbally creates personal liability. One approach Tosafos (*Bava Metsiyo* 71B) as explained by Machane Efraim (*Ribbis* 11)) is that the Torah views the guarantor as an intermediary. Even if the loan money does not physically pass through the guarantor's hands, the Torah looks at what transpired as if the lender gave the money to the guarantor who then lent the money to the borrower. Thus, the obligation is not created verbally but rather by the borrower's receipt of the lender's money from the guarantor.

The second approach (*Ritva Kiddushin* 6B) is that the guarantor's liability is created by the fact that he derives benefit from the lender's granting the loan based upon his guarantee, since this shows that the lender considers him to be reliable.

These two approaches explain clearly why the Mishna (*Bava Basra* 175B) rules that liability cannot be created verbally by a guarantor after the funds were given to the borrower. Since in your situation part of the funds were given prior to your receiving the checks, it would seem that you have that issue with regard to those funds.

However, even though one cannot generally create liability verbally, there are methods to create liability even after the funds were given and we will therefore have to clarify if what you did qualifies as one of those methods.

The Gemara (*Bava Basra* 176A) writes that if the guarantor makes a formal *kinyan* to obligate himself to pay in case the borrower fails to pay, it obligates the guarantor even after the funds were given to the borrower. The *kinyan* that the Gemara refers to is a *kinyan sudar* i.e. the lender gives an object to the guarantor, similar to what we do when

we appoint the rabbi as our agent to sell our *chametz*. The reason it is effective is because a *kinyan* of *sudar* can always create an obligation.

Therefore, since the transfer of money from the lender to the borrower cannot create an obligation if it preceded the obligation of the guarantor one must give over an object to obligate the guarantor to pay if the borrower fails to pay. However, in your case you did not use a *sudar* to obligate your friend to pay in case the funds are not invested. You just received checks.

In order to decide if checks are effective in creating an obligation on a guarantor, we have to first determine whether a *shtar* – a legal document, written and/or signed by the guarantor stating that he is obligating himself to pay if the borrower fails to pay – is effective.

In order to understand the issue it is important to preface that the *halocho* (CM *siman* 40), based on the Rambam, Ramban and others, is that if one wishes to create an obligation on himself by writing this on a piece of paper and giving it to the one he is obligating himself to, it is effective and a debt has been created on the one who wrote the obligation. Therefore, it would seem that this should be valid in order to create an obligation on a guarantor as well and in fact that is the opinion of many *Rishonim*, including the Ra'avad and the Ramban, and it is one of the opinions that is recorded in the Shulchan Aruch (129, 4).

However, the Shulchan Aruch cites other opinions that maintain that this is invalid, i.e. even though it is valid to create a normal obligation, it is invalid to obligate a guarantor. The Shach (129, 11) explains that the reason it is not effective is because, as we mentioned earlier, every guarantor has an issue of *asmachta*. A *kinyan* of *sudar* overcomes the issue of *asmachta* but signing a piece of paper does not. We will continue next week by discussing whether giving a check is better than signing a written obligation or not.

In conclusion: We determined that one can verbally obligate himself to act as a guarantor of a future loan but for a past loan one certainly cannot create an obligation verbally. One certainly can create the obligation if he does a *kinyan sudar*. There is a major dispute if he can create the obligation by means of only a formal legal document. Next week, *Be'ezras Hashem*, we will study whether checks can create this obligation.

23

Received Checks to Ensure that Money will be Invested-Part 2

You received your friend's unfilled-out personal checks as security to ensure that the funds you gave to your friend to invest on your behalf were actually invested and it turned out that they were not invested and you asked if you may cash the checks.

Answer:

We saw in the previous article that the reason there is an issue whether a guarantor can become legally obligated to repay someone else's loan is that the obligation is only conditional. Since the obligation is only conditional the guarantor does not have a full mental commitment to actually pay which normally is necessary in order to create an obligation. This condition is known as *asmachta*.

We saw further that the reason that one who guarantees a loan actually becomes obligated to pay the loan if the borrower fails to pay is because either (the opinion of the Ritva) the guarantor received a recommendation as a reliable person or, because (Tosafos) we view the loan as if the money was transferred to the guarantor and it is he who then lent the money to the borrower. Since neither of these applies if one agrees to guarantee only after the lender transferred the funds to the borrower, we must find an alternative method to overcome the issue of *asmachta* and to obligate the guarantor to pay in case the borrower fails to pay.

We saw further that if he makes a *kinyan* of *suddar* it certainly obligates the guarantor to repay. We also saw that the effectiveness of a *shtar* written by the guarantor is a dispute among the *Rishonim*. We were left with a question of whether the guarantor's giving his personal check suffices to create an obligation on him.

One reason a personal check obligates the guarantor to pay, according to many poskim (*Maharsham* 7, 136: *Tsemach Tzeddek* CM20), is that giving a check creates an unconditional obligation upon the guarantor to repay the loan as if he himself received the funds, since the check does not indicate that the check writer is a guarantor on someone else's loan. This approach is contingent upon the opinion that a check is a *shtar* that creates an halachic obligation upon the signer of the check.

This approach is controversial among modern-day poskim who discuss the halachic status of checks. The reason this is an issue is because the words that are written on the check are: "pay to ____" which literally mean that the signer is directing his bank to pay the amount written on the check to the payee. Rav Nissim Karelitz was of the opinion that a check does not create an obligation since it is just a letter to the bank, and his opinion is still followed by his *beis din*.

However, the vast majority of poskim, including Rav Moshe Feinstein, Rav Eliashev, Rav Shlomo Zalman and the Minchas Yitzchok (all these opinions and many others are cited in *Hacheck Behalocho* 1, footnote 14) maintain that giving a check not only serves as immediate payment but also can serve, if necessary, to create an obligation on the one who wrote the check to pay the funds. For example, if one gives a check to a bar mitzvah boy as a present and the check bounces, the writer of the check owes the amount written on the check to the bar mitzvah boy since he committed himself to pay what he wrote on the check.

These poskim cite various reasons for their ruling. One reason (*Minchas Yitzchok* (5, 119) and Rav Eliashev in *Kovetz Teshuvos* (1, 200)) is that

since the law views a check as creating legal liability we invoke the rule of *dina demalchuso* to create an halachic liability.

Other poskim (Rav Eliashev *ibid*, *Pischei Choshen)* base their reasoning upon custom. The Gemara (*Bava Metsiyo* 71) states that if it is customary for an action to effect a change of ownership then it is valid halachically as well. Since the custom is to view giving a check as a creating liability, it does so according to Jewish law as well.

Since the vast majority of poskim view a check as creating liability, many (See *Hacheck Behalocho* 1, 16) maintain that we don't have to even consider the minority opinion, so that, for example, one can not say *kim li* (I hold) like their opinion.

However, even though one can generally rely upon the opinion that a check creates liability, it is difficult to rely on the opinion that one who obligates himself personally to pay up a debt without writing that he is only committing himself conditionally becomes obligated as a guarantor even after the funds were transferred to the borrower (considering the checks as a *shtar* without considering their unique status as checks). The reason is that many poskim (*Ramo* res 72, *Chavos Yo'ir* 137, *Shevus Ya'acov* 3, 145) maintain that even when one obligates himself to pay without mentioning that he is doing so as a guarantor, it is no better than a *shtar* which says that he is a guarantor and therefore it will only be valid according to those who maintain that a *shtar* obligates a guarantor even after the money was lent. However, as we saw in the previous article, the Rambam maintains that a *shtar* cannot do this and one cannot force someone to pay if this opinion maintains that he is not obligated to do so.

The reason to maintain that in this case you may cash the checks is that checks given by a guarantor are better than a simple piece of paper written by the guarantor (*shtar*) stating that he personally owes the funds that are owed by the borrower. The reason is that checks are

legally valid which creates two reasons to cause the commitment to be effective: custom and law.

Since the guarantor gave you checks you can legally go and cash those checks. The only factor which prevents you from cashing the checks is that perhaps Torah law does not allow you to cash them since the writer of the checks was only a guarantor and perhaps his commitment to pay never took effect because it is an *asmachta* and you are bound by Torah law.

However, there are many poskim who maintain that when one makes a commitment which customarily is considered unconditionally binding, then he has all the commitment that is necessary to create liability even if it was intended as only conditional. The reason is because custom is legally binding under Torah law – an action which is known as *setumta*. This opinion was advanced by the Chasam Sofer (*CM* 66, cited by *Pischei Teshuvo* 201, 2) and was agreed to by many poskim (*Beis Efraim CM34*, *Maharash Engel* (1, 12) and *Aruch Hashulchan* (201, 3) among others.

Furthermore, since the checks are legally valid, there are poskim (*Maharshag* 3, 98) who maintain that since, if this case ever came to secular court you could justify cashing the checks since the writer of the checks had sufficient commitment to pay them, therefore there is no issue of *asmachta*. This is especially true in your situation where the payee was left blank in the checks you received since you could have given them to a gentile who would have no problem cashing them since he need not be concerned with Torah law.

It should be noted that the opinion of the Chasam Sofer was the basis for a ruling by the Chief Rabbinate in a case which was heard by a panel of judges that included the leading poskim, Rav Ezra Hadaya (*Yaskil Avdi* 7, *Hashmotos CM3*) and Rav Eliashev (*Kovetz Teshuvos* 1, 209) and is the practice that is followed by the Rabbinic courts in Israel (See *Hacheck Behalocho* 15, footnote 221)

In conclusion: You may cash all the checks you received from your friend, even those which were given to cover the money you gave over prior to your receipt of the checks, since they were given by the guarantor in case the money was not invested, which in fact was the case.

Damages

24

An Esrog Damaged while it was being Checked Out

I recently went to an esrog dealer. Since I am not an expert in the halachos of esrog I selected a few that seemed very nice and asked permission to take them to a local poseik for his opinion. The poseik advised that I buy a particular esrog. On the way back to the esrog dealer, a kid ran into the box holding the esrogim and knocked one of the esrogim to the ground, bruising the esrog. Baruch Hashem it was not the esrog that I had been advised to purchase. However, am I responsible for the esrog since I was carrying it? I should add that I hadn't seen the kid and was taken totally by surprise.

Answer:

The main question that needs consideration is your relationship with the esrog. Whenever one has an object in his possession he has a certain relationship with it. If he is the owner it is his. If it belongs to someone else he has the status of a shomeir and the Torah recognizes four types of shomerim. Therefore, our focus is on clarifying your relationship with the esrog. Were you the owner or just a shomeir, and if a shomeir which type?

There is a statement of Shmuel in the Gemoro which deals with your situation. Shmuel didn't explain what the relationship is but informed us what the din is. Shmuel said that if one takes an object from a craftsman in order to check it out, he is liable even for damages that were beyond his control and for which he was blameless (an oness).

There are two types of relationships where one is liable for this category of damages. An owner is obviously responsible since it is his. Additionally, the type of shomeir who is a sho'eil, a borrower, is also liable. Thus, there are two distinct possible rationales for Shmuel's ruling. Shmuel might consider one who takes an object from a craftsman in order to check it out to be the owner of the object or to be the borrower of the object. The problem is that both rationales seem to be found in the Gemoro.

The Gemoro in Nedorim (31A) cites Shmuel and limits Shmuel's ruling to a situation where the demand for the object is much greater than the supply. In such a case, the one who is considered to benefit if the sale is consummated is the customer and not the seller, since the seller can easily find many customers but the customer can't find many sellers. This lends support to the view that the customer is a sho'eil and not an owner since if he were the owner it would not seem to make any difference whether demand is high or not.

Shmuel's ruling is also cited in Bava Basra (88A). There the Gemoro makes no distinction about demand for the object, but limits Shmuel's ruling to an object whose price is known. This strongly indicates that Shmuel's reasoning is that the object was sold, since, if one borrows an object there is no need to fix a price, whereas if there is a sale it is crucial to fix a price since without a fixed price a customer does not have the required da'as (presence of mind) to purchase the object. A critical element in a person's decision whether to buy or not is price. Something that is attractive at one price is unattractive at a higher price.

We should note that even if Shmuel considers the object as having been sold, nevertheless the customer has the right to return it to the seller since he only took the object in order to check it out. We are only interpreting Shmuel as saying that while the object is in the possession of the potential customer he is legally considered to be the owner.

We should note that there are quite a few differences between the sale of an object and the loan of the object. Some of the ramifications concern other halachas. For example, in case a gentile takes a Jew's horse to try it out on Shabbos, if we say that the goy is its owner the Jew will not have any problem with the fact that the goy uses the animal to work for him on Shabbos since it's the goy's animal. However, if the goy trying it out is just borrowing the horse, the Jew would not be allowed to let the goy use it on Shabbos since the Jew is the owner.

Another difference, which is very important for us, is that if a sale is taking place, the buyer must make a formal kinyan in order to acquire it.

The Rambam (Mechiro 4, 14) and subsequently the Shulchan Aruch (200, 9) who follows his opinion, write: "One who takes an object from a craftsman's house is liable for damages which were beyond his control …if he picked up the object with intent to acquire the **entire** object." The Sema has difficulty explaining the condition that he must have intent to acquire the entire object.

However, the Gra (200, 34) explains that the Rambam just wishes to exclude one who takes a number of objects with the intent to purchase just one of them. The reason this is excluded is because at the time when the customer picked up each object he did not have intention to acquire it, because he hadn't yet made a final decision about which object he wished to acquire. The Gra writes that the source for this exclusion is a ruling in the Gemoro (Bava Basra 88A) that if one spent a day selecting green vegetables he does not acquire any of them since he did not make a decision to acquire a particular green vegetable.

In fact, the interpretation of the Gra is the way many Rishonim including the Rashbam explain the Gemoro. Therefore, even if this wasn't the intention of the Rambam it is decisive in halacha. Therefore, in your situation you weren't the owner of the esrog at the time it was bruised.

However, as we mentioned earlier, there still is the possibility of your being liable as a sho'eil if the purchase is attractive to you as the customer. The reason is that even if we understand that Shmuel's rationale was that the one who was checking it out is usually a buyer, nevertheless when, due to other factors, it is not a sale, the one who has the object in his possession is still at least a shomeir of some kind. If the sale is very attractive to the potential buyer then he has the status of a sho'eil as the Gemara stated in Nedorim.

In conclusion: Since you selected more than the amount of esrogim that you intended to purchase, you were not even the temporary owner of any of them, and if the sale did not stand to benefit mainly you, the customer, then you were not a sho'eil. Therefore, you are not liable for the bruise since it was damaged in a manner that was beyond your control.

25

Sechach which Broke a Neighbor's Window long after Succos

My neighbor left his succo standing after Succos. The sechach was not tied very securely and one day, about three months after Succos, a strong gust of wind blew his sechach into my window and the sechach broke the glass. We had a question whether he is liable for the damage since this was an unusual wind and one is not liable for unusual winds. However, it was to be expected that eventually an unusual wind would blow since occasionally there are unusually strong winds and the sechach was not tied sufficiently well to withstand a strong wind of this kind. Is he liable?

Answer:

In order to answer the question we have to classify the damage. The first Mishna in Bava Kama states that there are four classes of damage mentioned by the Torah. One of these classes is fire. The Gemara subsequently states that the salient feature of fire is that it damages only with the aid of an external source, namely, the wind. Therefore, the Gemara says that if one places an object on his roof and the wind blows it into an object which is damaged, the owner of the damaging object is liable since what happened is similar to fire damage. Therefore, it would seem that your neighbor is liable just like anyone who makes a fire that eventually damages with the aid of the wind.

However, as you mention in your question, the wind was unusual and the Gemara says that one is only liable for common winds. Thus, we

have to decide whether this wind can be classified as an unusual wind or not since it was to be expected.

It would seem at first that there are strict rules which decide which winds are considered unusual. Tosafos (*Bava Kama* 59B) cites a Yerushalmi that even a wind which does come but only occasionally is called an infrequent wind for which one is not liable. While there is a dispute among the Rishonim whether this applies to all situations or only to coals which require the wind to ignite them, nevertheless, the Chazon Ish (*Bava Kama* 2, 6) rules that since the dispute is undecided we cannot rule that one is liable even for an open fire that spread because of an occasional wind. This would imply that your neighbor is not liable.

However, we find a Tosefta (*Bava Metsiyo* 11, 5) that rules that one is liable for his wall which fell and damaged in a hurricane, if it was not originally built in conformance with construction standards. This is ruled in Choshen Mishpot (*Rama* 416). It seems that the difference between the two sources is that the Yerushalmi is discussing a fire which exists only for a very short period. Therefore, if a wind that could cause the fire to damage blows only occasionally, one does not need to fear that this wind will blow and cause the fire to damage. However, if one builds a wall which is meant to stand for a long period of time, one must build in a manner that meets the standards. The reason is that when one builds according to the standards there is a tacit agreement by all that the owner will not be liable for any damages.

An additional proof was brought (*Beis Aaron ve'Yisroel* 128, 76: Also see *Shut Shoney Ribbis* page 176) from an explanation of the Rif (*Bava Metsiyo* 25B). The Mishna (*Bava Kama* 61A) sets rules governing the amount one must distance his fire from his neighbor's property. The Mishna says that if one distanced his fire in accordance with the rules of the Mishna he is not liable even if his fire broke out from his property and damaged his neighbor. The Rif asks that this seems to

contradict another Mishna (*Bava Basra* 20B) that sets rules on how far one must distance his oven from the ceiling, floor etc. but says that even if one distanced his oven in accordance with the rules he is liable for any damages.

The Rif answers that the Mishna which rules that if one properly distanced his fire he is not liable, is discussing a fire that only burns for a short time. Therefore, if one observed the rules he is not liable. However, the second Mishna is discussing an oven, which is installed on a permanent basis.

Since the Rif restricted the first Gemara to a temporary fire we learn that one must take into account that if he wishes to keep his fire around for a long period of time, he must take precautions that will guarantee that he will not cause any damages that can result from the long-term presence of the fire. Similarly, precautions that are sufficient when one places an object in a precarious position temporarily do not suffice when the object is placed in a precarious position on a permanent basis.

An additional proof (told to me by the author of *Mishnas Hamazik*) can be derived from Rashi's (*Bava Kama* 3B, 28A) explanation that the reason one is not liable for an unusual wind is that he is an *oness* i.e. that the damages were beyond his control. Obviously it is difficult to consider it beyond a person's control to secure an object which is installed permanently.

An additional issue that we consider is whether the fact that no one ordered your neighbor to remove his sechach is a reason to free him from liability.

The reason this is an issue is that the Mishna (*Bava Metsiyo* 117B) rules that only if one was warned is he liable for his wall or tree that fell and damaged. The Gemara (*Bava Kama* 6B) explains that the distinguishing feature is that these were all built in a permitted manner and only became problematic at a later stage. Therefore, perhaps one can argue

that the sechach was also originally placed in a permitted manner and the owner only becomes liable if he was warned.

However, one can differentiate between the Mishna's case and our situation. In the Mishna's case the wall was actually sturdy at the time it was erected and it was only later that the wall became dangerous. Since the wall's sturdiness declined the owner must be warned to heed the change in circumstances.

However, in our situation it is not that the sechach became more insecure. Rather it was originally constructed in manner that was not fit for the long term. Proof for this differentiation can be derived from the Prisho (416, 1) and the Nesivos (307, 1) who state that when it is obvious that the wall can damage, no warning is necessary. Since it was obvious from the outset that the sechach was placed in a manner that was not suited for a long term, no warning was required.

Rav Naftoli Nussbaum agreed with the above but added that one must take into account the location of the succo. Sometimes a succo is situated in a place where even in the long term the sechach is secure, due to sheltering walls or some other circumstance.

In conclusion: If your neighbor's sechach was left for a long period and the type of wind that caused the sechach to damage was to be expected in such a long interval, your neighbor is fully liable for the value of the damaged window (taking into account the current nature of the damaged object which may have declined from use, if it is significant).

26

Invested and Lost, based on Poor Advice

A little over a year ago a friend of mine informed me of an investment that he had recently made in a start-up that was founded by a long-time acquaintance of his. He told me that the founder had a string of successes in his past ventures. After hearing the details, I invested money in the start-up as well. After a year the start-up collapsed and I lost my entire investment. I later learned that the founder never had any success with his previous ventures and had just told my friend stories that were not true. Do I have a monetary claim against my friend since my investment was based on false information that he fed me? I did not know anything about the founder except what he told me and of course had I been given correct information I never would have invested.

Answer:

Your case is similar to a situation discussed by the Rama (129, 2) in the section of Choshen Mishpot that discusses the laws concerning guarantors of loans. The Rama writes, "Not only a guarantor of a loan is liable if the borrower fails to pay back the loan, but even one who advised someone to lend someone money is liable if he caused the lender to lose money because he provided him with false information." This seems to be exactly your situation and would seem to indicate that your friend is liable. However, it is important to investigate further.

The first issue is on what basis is the one who provided false information liable. The fact that the Rama recorded this law in the section that deals with guarantors would indicate that one who gives advice is classified as a guarantor, and if the advice was bad and caused a loss he is liable on that basis.

While there are commentaries who understand the Rama in this manner, the opinion of the major commentators (*Yam Shel Shlomo* (*Bava Kama* 9, 24), *Sema* (129, 7), *Shach* (129, 7), *Nesivos* (129, 2)) is that the liability of the one who gave incorrect information is in the category of causative damages for which one is liable, known as *garmi*. (As a result the Nesivos rules that, according to the Shach who maintains that the heirs of one who is liable for *garmi* are not liable for this debt, if the one who provided the incorrect information passes away, his heirs are not liable.)

The commentaries who classify the damages as *garmi* say that the source of the ruling of the Rama is a Gemara (*Bava Kama* 99B) that discusses an expert in counterfeit coins who rendered an incorrect opinion, which caused a loss to the one who accepted a counterfeit coin based on the mistaken advice. The precise ruling of the Gemara is that an expert is only liable if he was paid to render an opinion, but one who is not an expert is liable even if he gave free advice. The commentaries understand that one who rendered an opinion about a person is similar to one who rendered an opinion about a coin.

When ruling about the liability of one who incorrectly recommended a counterfeit coin, the Shulchan Aruch (*CM* 306, 6) records a major dispute. The Mechabeir, based on the Rif and Rambam, rules that the advisor is liable (if the advice was free-see Nesivos 11) only if the recipient either informed him, or it should have been clear to the advisor, that the recipient will act based solely upon his advice. The Rama mentions the opinion of the Rosh that the advisor is liable even if

he was not informed by the recipient of the advice, but the Rama rules against this opinion and agrees with the Mechabeir. The Shach agrees with the Rama on this point but mentions that the Maharshal rules that the Rosh's opinion is authoritative in the case of the counterfeit coin.

The previous dispute is also cited in the discussion of one who gave a loan based on misinformation. The Maharshal agrees with the Mechabeir that the advisor is only liable if the recipient of the advice informed him that he will rely solely upon his guidance. He says that the reason why, in his opinion, this was not necessary in the case of the counterfeit coin is because there the recipient was required to accept the coin if the expert said it was not counterfeit. However, here in the case of the loan where this was not the case, he agrees that the advisor is only liable if he was properly informed by the recipient of the advice.

The Chavos Yo'eir (res. 64) also rules that where one expressed his opinion about a borrower's ability to pay, all agree that the advisor is only liable if he was informed by the lender that he will rely totally upon his advice. His reason is that the usual practice is for people to ask several individuals about a person's ability to repay because of the difficulty to assess a person's ability to pay.

The Tumim (129, 3) notes the fact that the Rama failed to mention in the case of the loan that the advisor is only liable if the solicitor of the advice informed him that he will act based upon his advice. As a result, he is diametrically opposed to the Maharshal and Chavos Yo'eir and rules that everyone agrees that one who incorrectly assesses a borrower's likelihood to repay a loan is liable even if he was not informed by the lender that he will rely totally upon his advice. He explains that the reason it was necessary for the buyer to inform the advisor in the case of the counterfeit coin is only because otherwise the expert could have thought that he was being asked by the recipient after

he had already accepted the coin and the reason the recipient asked his opinion was because he was interested to know if he was swindled – but there were no monetary consequences that would result from his opinion. Therefore, he maintains that whenever it is clear that one's advice is pertinent for future actions of the solicitor of his advice, the advisor is liable even if he was not informed that the solicitor will rely on his opinion.

However, the opinion of the Tumim was not accepted by later poskim. For example, the Beis Shlomo (*CM* 36) and the Sefer Yehoshua (*siman* 110) rule that even if even if the solicitor of the advice held money which belonged to the advisor, he cannot hold on to it based on the opinion of the Tumim.

The Aruch Hashulchan (129, 3) has an intermediate opinion. He maintains that we must differentiate between one who was merely asked whether the borrower was reliable and replied that he was reliable, and one who initially suggested to the lender to lend the money. He reasons that it is understood that one who initially suggests an investment investigates matters much more carefully than one who is merely asked for his opinion. Therefore, if the one who suggested the investment mentioned that the recipient is reliable, then he is liable if the recipient turns out to be unreliable, even if he was not informed by the investor that he is relying upon him.

However, there are many poskim who argue with the Aruch Hashulchan. For example, the Pischei Choshen (*Halvo'o* 13 footnote 4) says that the rule of the Aruch Hashulchan is not ironclad, since often a person who suggests an investment has no intention of assuming responsibility if the borrower turns out to be crook. Furthermore, the Sefer Yehoshua (res. 110) and the Beis Shlomo (*CM* res. 36) also rule that one who gave unsolicited advice is not liable for his bad advice if he wasn't informed by the lender that he will rely solely on him.

In conclusion: Unless you informed your friend that you were relying on him, or at least it should have been clear to your friend that you were relying totally upon his advice, your friend is not liable for your loss.

27

Rented a Car which He caused to be Impounded by the Police

I own a spare car which I rent out regularly for short terms. Recently, I rented the car to someone (not on Purim) for three days. The renter drove the car while he was under the influence of alcohol. As a result, he got into an accident, which damaged the car, and he also committed traffic violations. (He drove through a "Do not enter" sign.) He was eventually caught by the police and since he tested positive for being under the influence of alcohol, the police impounded the vehicle. It took a week until the police finally released the vehicle. I told him he has to pay for the extra week but he replied that the extra week was not part of the rental period and he did not use the car while it was impounded and therefore, he does not have to pay. Is he correct?

Answer:

We should first note that the fact that the vehicle was not returned on time was a result of the driver's negligence and was not due to circumstances that were beyond the renter's control.

The second point we should note is that there are two possible reasons why the renter may be liable for the additional week. One possibility is that the rental continued until the car was returned physically to you. The second is that perhaps he is liable for having caused you, the owner a loss of income. We will examine each of these possibilities.

The Noda Biyehuda (res. *CM* 2, 56) asks that there seems to be a contradiction between two rulings of the Shulchan Aruch. In one place (307, 6) the Shulchan Aruch discusses a person who rented an animal and, due to the renter's carelessness, the animal suffered a wound which prevented the owner from renting it to others even after the animal was returned. The Shulchan Aruch records a dispute if the renter is liable for the owner's lost income and the Rama rules that he is not liable. In another place (310, 3) the Shulchan Aruch discusses one who rented an animal for two days but due to a rise in the water level of a river, which the animal needed to traverse, it took an extra day. The Shulchan Aruch rules that if the renter should have known that this was a frequent occurrence and the owner was unaware, the renter is liable for the extra day since he should have taken this possibility into account originally.

The Noda Biyehuda answers that the critical difference is that in the case where the animal suffered a wound the animal was returned to its owner at the end of the original rental period. Therefore, the renter was not liable to pay rent for any additional period. While it is true that the owner suffered a loss of income, nonetheless, the rental ceased with the return of the wounded animal. However, in the case where the river became impassable the renter kept the animal for additional days. Since the renter was to blame for the delay he must continue paying rent for the additional days.

The rule that we can derive from the Noda Biyehuda is that the critical factor which determines when the rental period ends, in case the renter is to blame, is the rental's physical return. According to this approach, your renter is liable for the additional week since due to his illegal driving, he did not return the car until it was released by the police.

We should note that many poskim including the Nachalas Tzvi (312, 7) and Aruch Hashulchan (307, 11) cite and totally agree with the Noda Biyehuda.

Let us consider the second possibility, that your renter is liable for your loss of income. We should first note that the damages are causative (*grama*). There are two reasons why your renter would not be liable for these causative damages. The first is that only when the actions of the one who caused the damage can be classified as *garmi* is the one who damaged liable for the damages. In your case the actions of your renter did not directly prevent the car from being used. They only caused the police to impound the car and the actions of the police are what ultimately prevented you from renting the car to others. Therefore, as far as damages are concerned, the renter's action is called *garmi degarmi*-a double *garmi* .There is a dispute among the *Rishonim* whether one is liable for *garmi degarmi*. The Shach (386, 3) decides that one is not liable. Therefore, if we do not rule like the Noda Biyehuda that the rental continues, your client would not be liable for your loss of income.

A second reason why the renter would not be liable for damages based upon your loss of income is that there is a major dispute among the *Rishonim* if one is ever liable, even if he acted directly to prevent someone from using his property in order to earn income. The property that the *Rishonim* dispute is an animal. This matter was first disputed by the Rishonim including the Ba'alei Hatosfos (See *Tosafos Gittin* 42B) who disagreed over this issue. Later poskim also disagree on this matter with, for example, the Ramo (307, 6) ruling that he is not liable but the Maharshal (*Bava Kama* 8, 22) ruling that he is liable.

Furthermore, there is a follow-up dispute among those who maintain that the one who prevented the animal from working is liable, over what the nature of the liability is. Many, including the Maharshal (ibid), Shevus Ya'acov (3, 178) and Chazon Ish (*Bava Kama* 13, 2), maintain that the liability is for the loss in the animal's value due to its incapacity. If one follows this school then in your case, since impounding your car for a week did not lower the car's value, the renter would not be liable for the lost income.

It is only according to those like the Nesivos (340, 3) and Machane Efraim (*Sechirus* 20) who maintain that one is liable for the lost income that one could maintain that your renter is liable. However, even this opinion would agree that in your situation where the damages are, as we mentioned earlier, only *garmi degarmi* your renter is not liable for the damages you suffered from lost income.

Thus we have established that the only reason why your renter is liable is because we consider his rental to have extended beyond the original date of termination.

There is one further issue which affects the amount the renter has to pay you for the extra days. The approach of the Noda Biyehuda is that the extra days are an extension of the original agreement. Thus, even though the original agreement was for three days, in the end the rental was for a week and three days. According to this view he must pay the rate you charge for a week and three days. However, there are others (See Res. of Rav Malkiyo) who, while they agree with the Noda Biyehuda that the extra days are considered as a rental, do not agree that the original rental is extended. The say that there is a new rental for the extra days. They maintain that the reason this period is classified as a rental is because we surmise that this is the true desire of the renter since the alternative is that he would be classified as one who caused damage to you, the owner, which one is not allowed to do, for the days his actions caused the car to be impounded.

In conclusion: Since the car was not returned to you at the end of the rental period, the renter is liable for the entire period until the car was returned to you.

28

Collided with a Car that Ignored Traffic Rules-Part 1

I was recently driving down a one-way street when all of a sudden I was honked by a car which was driving towards me, since he was going the wrong way for the one-way street. Since I was caught totally off guard and my wife panicked, rather than slam on the brakes I, for an instant, stepped on the accelerator. I then caught myself and braked, but I still hit the other car. We both only suffered damages to the body of our cars as a result. My question is who is liable for the damages to each other's car? I should note that when he saw me he stopped, so at the time of the collision he was standing still and I banged into him.

Answer:

You are asking two questions: One is whether you are liable for the damages to his car, and the second is if he is liable for the damages to your car.

Let us first consider the damages to your car. Your last point is very important since by being at a standstill at the time of the collision it seems that the damages done by his car fall into the category of damages known as *bor*. The first Mishna in Bava Kama states that the identifying feature of damages that fall into the category of *bor* is that the damage was brought about by something (a hole in the ground or an object) that was stationary at the time that the damage occurred. If we do view this as *bor* then he is not liable because your car is an object

and a person whose *bor* damaged is liable only for damage to the body of the victim (a human or an animal) and not for damages to objects (even the clothes of the victim). He is also not liable if the human victim dies.

The reason to question whether to classify this as *bor* is that we do find damages that were done in a stationary manner where a person was involved, that are classified as *odom* and not *bor*. The Chazon Ish (*BK* 1, 1) writes that these are not totally *odom* but a cross of *odom* and *bor,* but since the more salient feature is *odom* the governing rules are the rules of *odom*. If this is considered *odom* then he would be liable since *odom* is liable for damages to objects. Thus, it is crucial to determine whether the stationary car is classified a *bor* or *odom*.

There are two cases that are discussed in the Gemara where a person damaged while being stationary and they seem to have contradictory rulings. One case is where a person was walking while carrying a beam and the person following behind carried a jug. The Gemoro rules (*Bava Kama* 32A) that if the beam carrier stopped (in a specific manner) and thereby caused damages to the jug that banged into his beam, the beam carrier is liable. This means that the Gemoro classifies the damages done by the stationary beam that was being carried by a person as *odom* since otherwise he would not be liable for the jug as it is an object.

The other case is where a person tripped and, when he remained lying on the ground, others tripped over him. The understanding of many Rishonim – and that is the ruling of the Shulchan Aruch (413, 1) – is that the Gemoro's conclusion is that the prostrate person is not liable for damages done to objects. This implies that the Gemoro classifies the damages caused by a stationary person as *bor*. Therefore, we have to determine to which of these situations we should compare the car.

The Nimukei Yosef (*BK* 15B), as understood by the Minchas Shlomoh (*BK* 31A), explains that the difference between these two cases is that

in the case of the beam it was only because the carrier was alive that the damage occurred. If he had not been alive the beam would not have been supported and this damage would not have occurred. However, in the case of the person who was lying on the ground even if he had not been alive the same damage would have taken place. Therefore, we classify his body as a *bor*.

We should note that Tosafos Rabbeinu Peretz (*BK* 31B) writes explicitly that the determinant if the damages are classified as *odom* or *bor* is whether this damage would have occurred even if the person who caused the damage had been dead.

Based on this rule, it would seem that in most cases the car is a *bor*. It is true that in order to remain stationary it was necessary for the driver to be alive and keep his foot on the brake. However, if he had not been alive the damages would have occurred anyway and perhaps would have been even greater since the car would have advanced further. Therefore, the fact that the driver was alive was not a cause for the damages. It is only if the car was on a slope and the car would have otherwise rolled backwards that we can say that the fact that the driver was alive caused the damage and the damages done by the stationary car would then be *odom*.

We should note that there are other opinions. Rav Zalman Nechemia Goldberg (*Hayoshor Vehatov* vol 15 Page 4) explains that the reason the beam is considered *odom* is because the beam was controlled by the carrier. As long as it was controlled by the carrier it is considered as an extension of the carrier and any damages that are done by the extension are classified as *odom*. He writes explicitly about your question that the driver is liable as *odom*. He does not explain why the prostrate person is classified as a *bor* since it would seem that since it is certainly the person's body that damaged, according to his interpretation it should be *odom*. Perhaps when he was prostrate he did not exercise any control

over his body whereas one who drives a car when he remains stationary, nevertheless, he is in control of the car. He merely desires that the car remain stationary at this instant.

Support for the latter position can be derived from a Responsa of the Rosh (cited by the *Tur* and *Shulchan Aruch* in *siman* 378). The Rosh was asked about someone who rode a horse and the horse damaged someone else's mule. He ruled that the one who rode the horse is liable as *odom*. The Chazon Ish (*BK* 4, 8) remains with a question why the rider is called *odom* since he only rode on the horse but it was the horse that damaged.

The Ulam Hamishpot (*siman* 378) addresses the Chazon Ish's question and explains that since the man was controlling the horse, the horse was merely like a stick in the rider's hand. This is the same approach as Rav Zalman Nechemia that the determining factor is control and since the fact that the car was temporarily stationary was an expression of the driver's control. Even when the car is stationary the car is *odom hamazik*.

We should note that the Chazon Ish explicitly agrees that if the damages are certain then control suffices to classify the damage as *odom*. He proves this from the Rashbo's explanation of the Gemara (*BK* 56B) that rules that one who causes an animal to position itself atop someone's grain is liable. The Rashbo explains that the one who caused the damage is *odom*. The Chazon Ish says that in this case control suffices to classify the damages as *odom* since the damages were certain. (We will discuss this further in the next part when we discuss the *halacha* if the other car stopped short, and also your second question.)

We should note that everyone agrees that if someone parks a car and then the car causes damage (e.g. it was parked illegally right next to an intersection and someone rounded the corner and hit it because he couldn't see it) that the car is a *bor* because when the car is parked the driver is no longer in control.

In conclusion: In your case where, had you stopped, the damage would not have occurred, many consider the other car as a *bor* and therefore, the driver is not liable for the damages to your car. We will *Be'ezras Hashem* discuss your second question, and also the *halacha* when a driver stops short and thereby causes an accident, in the upcoming article.

29

Collided with a Car that Ignored Traffic Rules-Part 2-Stopped Short

I was recently driving down a one-way street when, all of a sudden, I was honked by a car which was driving towards me, since he was going the wrong way on the one-way street. Since I was caught totally off guard and my wife panicked, rather than slam on the brakes I, for an instant, stepped on the accelerator. I then caught myself and braked, but I still hit the other car. We both only suffered damages to the body of our cars as a result. My question is who is liable for the damages to each other's car? I should note that when he saw me he stopped, so at the time of the collision he was standing still and I banged into him.

Answer:

We learned in the previous article that even if someone caused an accident because he violated traffic rules, nevertheless, if he stopped before the accident occurred he is not liable for the damages he caused to the car which crashed into him. The reason is that many Poskim maintain that the damages which he caused by the manner in which he positioned his stationary car are classified as *bor* and the Torah freed the owner of a *bor* of liability for damages caused to objects.

Even though the following did not happen in your case, we want to discuss whether the stationary car is classified as a *bor* even in case the car only stopped immediately prior to the crash rendering the crash inevitable. This could have happened in your case had you been close to

the other car or driving at a speed that would have made it impossible for you to avoid a collision.

This issue is a factor in many questions concerning traffic accidents. Examples where this is an issue are if a car suddenly stops and the car trailing behind bumps into him because he could not stop in time, or if a person opens a car door right before a passing car which is then damaged by the protruding door.

We should recall from the previous article that there are Poskim who rule that any time one damages due to a temporary stop it is classified as *odom hamazik*. However, where the damage is unavoidable many more poskim agree to classify the one who stopped as *odom hamazik*.

The basis for this is a Gemara (*BK* 56B) that rules that one is liable if he causes an animal to position itself on another person's produce and consequently the animal eats the produce. The Rishonim dispute how to classify this act of damage. Tosafos understands that the result of the fact that the human's action made the animal's damage inevitable is only that the one who caused the damage becomes liable for the animal's action even though he is not the owner of the animal that actually damaged. However, the act of damage remains the animal's and the damage is called *shein* just like if the animal had eaten the crop without human interference.

On the other hand, the Rashba disagrees and rules that the classification of the entire action is changed. Whereas if an animal eats on his own it is classified as an act of *shein,* here where the human created a situation where the animal's eating was inevitable we view the action of the human as being the act of damage and his action is classified as *odom*. The Rashba writes that we view his action as if *he fed* the animal. Even though he didn't actually feed the animal, since he set up the animal in a manner that the animal will almost certainly eat, we view the human as the one who damaged. The Rambam (*Nizkei Momon* 4, 3), Tur and

Shulchan Aruch (*CM* 394, 3) all explicitly follow the approach of the Rashba and therefore, it is the authoritative approach.

We should note that this is not just a theoretical dispute since there are many practical differences between the two opinions. For example, whereas, one is not liable for *shein* if the damage took place in the public domain (*reshus horabim*), if it is classified as *odom*, one is liable even if the damage took place in the public domain.

We can deduce that these opinions likewise maintain that if one stops his car in a manner that will certainly cause damage to an oncoming car, we ascribe the act of damage to the person who set up the damage and it would be classified as *odom* and not *bor*. This is true even in the classic case of *bor*. If one digs a pit in a manner that an animal will unavoidably fall into the *bor* immediately, we view his action as if he threw the victim into the *bor*.

Moreover, there is a Rishon who explicitly rules that when a human sets up an inevitable damage that is caused by a stationary passive object it is classified as *odom* and not *bor*. The Ri'az (*BK* 2, 7, 5) writes about the case discussed in the Gemara (*BK* 27A) where one person hurled another person's breakable object down from a roof to the ground in a place which was covered by a mat that would have prevented all damage, but a third person moved the mat away when the object was already in the air causing the object to break. The Rishonim disagree whether beis din can force the one who removed the mat to pay for the damage because the relation between his action and the damage is only causative.

The Ri'az adds that in case the third person did not remove the mat but placed a rock on the mat then he is certainly liable. He does not explain the reason for his ruling. However, since what was damaged was an object it is obvious that he did not mean to classify the damages as *bor* since otherwise the one who placed the stone would not be liable since

bor is not liable for objects. Thus we see a case where the damages done by a stationary object are not classified as *bor*. Rather, the Ri'az must maintain that the man's actions are considered to be the act of damage and it is classified as *odom hamazik*.

The Steipler (*Chadoshim BK* 24) also writes that if one placed a pole under an object that was headed for the ground he is liable because it is his action that ensured that the damage would take place. Following this view in the case of the car that stopped in a manner that made the damage inevitable, the Ri'az and Steipler would classify the damages as *odom*.

(See Hayoshor Vehatov 9, question 15 for a discussion if Ri'az means that the damages are *odom* or *garmi* since either would explain the ruling of the Ri'az. The Acharonim have this same dispute about the previously cited Rashba. The Chazon Ish (*BK* 1, 7) among others, says it is *odom* similar to one who shoots arrows but others including the Avnei Nezer (*OC* 120, 5) understand that the Rambam, who agrees with the Rashba, views it as *garmi*. We should note that the words of the Rashba support the interpretation that it is *odom*. We should add that in most situations the difference will not be halachically significant.)

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The second issue that remained from last week was the liability of the one who was driving legally and damaged the approaching car because he panicked when he suddenly became aware of the approaching car. Since he was driving legally and the other car was not, it is comparable to the Gemara (*BK* 48A) that discusses one who placed his object in someone else's property without permission. The analogy is based on the rules governing public streets. The rules limit use of public streets to those who obey the rules. Therefore, all those who use the street in the proper manner are the joint owners of the street. However, those who do not are essentially intruders.

The Gemara rules that the owner of the property is not liable for damaging an object that was placed there without his permission if he did not notice the object. Many Rishonim including Rashi and Tosafos (*BK* 32B) understand the Gemara literally, that the determinant is noticing the object. The Rambam (*Chovel Umazik* 1, 16) however, understands that the Gemoro limits the owner's liability to intentional damage. Both opinions are cited, in a sense, by the Shulchan Aruch (378, 6).

The Rambam certainly would rule that you are not liable since the damage was definitely unintentional. The way the Shulchan Aruch understands the other opinion is controversial. According to many, including the Chazon Ish (*BK* 4, 3), and Aruch Hashulchan (378, 16) one is liable only if his actions are considered negligence. Since many people in this situation would react as you did one cannot classify your actions as negligence. Therefore, even the Shulchan Aruch, according to these Acharonim, would free you from liability.

In conclusion: In this part we discussed two issues and determined that when one stops his car in a manner that his car will certainly damage another car he is liable since his act of damage is classified as *odom* and not *bor*. However in your case the other car was stopped so it is certainly *bor* and he is not liable for the damage to your car. Second, in your case, even though you damaged the other car, you are not liable because you did not act negligently. Therefore, you are not liable for the damages to his car.

30

Offering to Buy an Item that is Not For Sale

My son is getting married soon and I would like to buy my neighbor's house for him. My neighbor's house is not for sale but I think that if I offer him a good price he will be happy to sell it since he can use the extra money and for him the house has no special value. Am I allowed to approach him with an offer or will I be violating the prohibition of *lo sachmod* or *lo sis'ave*?

Answer:

In order to answer your question we must study how the Rishonim explain the two prohibitions you cite.

R. Yonah (*Sha'arei Teshuvoh* 3, 43) explains both of the prohibitions you cited, together. He writes that one violates the prohibition of *lo sachmod* even if he pays for his purchase. However, he explicitly limits the prohibition of *lo sachmod* to where the seller, even in the end, does not really want to sell and only does so because he cannot stand up to the pressure. He explicitly writes that the reason one violates *lo sachmod* when he beseeches the seller to sell, is because even when the seller agrees to sell, the sale is really against the seller's true desires, i.e. it is a forced sale.

He adds, in the same vein, that a very important person may not even make an offer to buy since the seller may not be able refuse his offer because of the importance of the customer, and may sell even though

he really does not want to sell. Such a person may make an offer only if he knows that the seller will only agree to sell to him if he really wants to do so.

He writes that we are even enjoined not to make plans to do such a thing. This seems to be what, in his opinion, the Torah added in the prohibition of *lo sisave:* that one may not even think about acting in a manner that violates *lo sachmod.* The difference between *lo sachmod* and *lo sisave* is not in the degree of pressure or the desire by the seller to sell. The difference is only in the buyer's actions. To violate *lo sachmod* one must actually exert pressure whereas one violates *lo sisave* at an earlier stage, when one makes up in his mind to exert pressure in a manner that violates *lo sachmod.* Thus, according to Rabbeinu Yonah, you may make your offer as long as you do not contemplate putting pressure on the seller to accept your offer.

The Ramban apparently understands like R Yonah as he writes (*Devorim* 13, 9) that the difference between *lo sachmod* and *lo sisave* is only that *lo sisave* is purely in the heart, and one violates *lo sachmod* when he "carries out what he thought in his heart." This indicates that if the action does not violate *lo sachmod* the thought does not violate *lo sisave.* Similarly, he writes in another place (*Devorim* 5, 18) that if one wants to steal another person's object and the only thing preventing him from doing so is fear of the police etc. then he violates *lo sisave.* This indicates that in order to violate *lo sisave* one must be so determined to acquire the object that only due to circumstances beyond his control he isn't able to do so. However, if one merely would like to acquire the object and even wants to offer to buy it, he does not violate *lo sisave.* This is also the way the Maggid Mishnah (*Gezeilo* 1, 10) understood the opinion of the Ra'avad as he writes, "The opinion of the Ra'avad is that one violates *lo sisave* when he wants to buy against the owner's true desire."

The Rambam (*Gezeilo* 1, 9), whose words are quoted by the Shulchan Aruch (CM 359), also writes that one violates the prohibition of *lo sachmod* only if he beseeches the seller and sends others to pressure him to sell and eventually the seller gives in and sells to him. When he describes *lo sisave* (1, 10) he says that one violates the prohibition when he contemplates how he can persuade the owner to sell to him. However, he does not say, like R Yonah, that he only violates the prohibition if he thinks how he can get the owner to sell even against his will. Similarly, in the Sefer Hamitzvos (*Lo sa'asei* 265-6) he writes that the prohibition of *lo sisave* is to desire someone else's possessions, because that will lead him to connive to somehow get the owner to sell to him, and that will perhaps lead to actually stealing if he was not successful in persuading the owner to sell. He does not say that his thoughts have to be how to get the owner to sell against his will and it is not clear how much of a desire one has to have in order to violate the prohibition. The Toafos Re'aim (commentary to *Yeraim* 115, 2) understands the Rambam like the above Ramban, that one only violates *lo sisave* when he set his mind to acquire the object in any manner possible, but it is not clear that this is the opinion of the Rambam.

The Chinuch's (*mitzvah* 417) approach to *lo sisave* is similar to the Rambam in the sense that he writes that the reason for the prohibitions of *lo sisave* and *lo sachmod* is that intense desire will lead one to apply pressure on the owner to sell to him and that leads to theft.

In fact, the Chinuch says that since both *lo sachmod* and *lo sisave* are prohibited because Hashem wants to prevent us from stealing, even non-Jews are enjoined since these mitzvos are included in the prohibition on non-Jews to steal. The only difference between Jews and non-Jews is that for Jews these two are considered as separate *mitzvos*, whereas for non-Jews they are both included in the prohibition against stealing.

He also writes that one violates *lo sachmod* if the sale is against the owner's true will but for *lo sisave* he writes that one violates the prohibition when he "sets his mind to desire someone else's possessions." It is not clear what degree of desire is classified as "set his mind." He also says that one violates *lo sachmod* when the sale is against the owner's true desire which agrees with R Yonah but is against the Rambam.

It could very well be that the reason the Rambam and R Yonah differ on the issue of *lo sisave* results from a difference they have concerning the violation of *lo sachmod*. Whereas both agree that one only violates *lo sachmod* if he pressures the seller into selling against his will, nevertheless R. Zalman Nechemia Goldberg (*Beis Aharon Veyisoel* Nissan-Iyar 5759) notes that they differ on what is the actual violation. R Yonah understood that the violation is the actual sale against the owner's true will, as the Ra'avad also maintains in his glosses on the Rambam, but the Maggid Mishnah (commentary to the Rambam) writes that Rambam maintains that the violation is the pressure that leads to this sale and, even if eventually the seller wants to sell, nevertheless, the buyer violated *lo sachmod* because of the pressure that he applied. The Rambam never says that one only violates *lo sachmod* if he eventually bought against the seller's will.

This dispute between the Rambam and Ra'avad manifests itself in a second issue. Rambam says the reason one who violates *lo sachmod* doesn't receive *malkos* is because the violation does not involve an action. However the Ra'avad asks that the sale is an action. The Ra'avad does agree there is no *malkos* but for a different reason: because one can always remove the violation of *lo sachmod* by reversing the sale. Obviously the Ra'avad maintains that the sale is the violation, whereas the Rambam sees the pressure as being the violation and the sale as just a condition. Therefore, in the Rambam's opinion, even if the sale is reversed the violation remains.

In either case we can answer part of your question, namely, that you will not violate *lo sachmod* because even if the sale goes through eventually it will not be a coerced sale which, according to the Ra'avad, Chinuch and R Yonah, is what is required in order to violate *lo sachmod*. You also must not apply pressure, which is needed in order to violate *lo sachmod* according to the Rambam.

The remaining issue is *lo sisave*. It would seem that according to the Ramban and R Yonah you will not violate *lo sisave*. However it is not perfectly clear what the Rambam and Chinuch would rule.

We should note further that there are Rishonim like Rashi in Chumash (*Devorim* 5, 18) and Targum Onkelus, the Yeraim (115) and the Semag (*Lavim* 158) who maintain that there is no additional prohibition of *lo sisave*. They hold that it and *lo sachmod* are one and the same and one only violates if he pressures and also eventually buys against the owner's true desire.

There are several Acharonim who discuss this matter. The Prisho (359, 10) understands that one only violates both prohibitions if the object he wishes to acquire is difficult for the owner to do without. It would seem that in your case where he can buy a different house, there will be no problem. The Oruch Hashulchan (359, 13) writes that one should only buy from a store or from an individual who offered something for sale but one should not approach someone to buy from him in order to avoid *lo sachmod*. This would seem to mean that you may not initiate an offer to buy. However, it seems clear that the Oruch Hashulchan is advising and not forbidding since we showed before that if one does not apply any pressure he certainly does not violate *lo sachmod*. The Betseil Hachochmo (3, 43) discusses the Rambam and understands that he too maintains that even *lo sisave* one only violates if he thinks how to pressure the owner to sell, but to make an offer one or two times will not violate any prohibition.

In conclusion: Certainly by just making an offer you do not violate *lo sachmod* and many Rishonim – and perhaps all – would agree that you also do not violate *lo sisave*. So make your offer but be careful not to apply any pressure on your neighbor to take up your offer.

31

The meaning of *Chayav Bedinei Shomayim*

You wrote last week that under certain circumstances one is liable in the heavenly court-*chayav bedinei shomayim* for causing the damaged car's owner to rent a replacement vehicle. Does that mean that in those circumstances the one who damaged must pay in full for the rental? Suppose the guilty one decides not to pay but the injured party has money of his, can he refuse to return his money?

Answer:

There is a dispute among the Rishonim and Acharonim what is the exact nature of the obligation in *dinei shomayim* for one who damaged in a causative manner. The Meiri (*BK* 56A) cites and agrees with the Sefer Hashlomo that where the Gemara says that one who caused a loss is *chayav bedinei shomayim* it means that he has a full-fledged monetary liability. It merely differs from other liabilities in that with other liabilities beis din is empowered to carry out justice, but here beis din is not empowered to carry out justice. In terms of theoretic liability they are equivalent. Therefore, he says, one who does not pay an obligation *bedinei shomayim* has the status of a thief and no longer qualifies to serve as a witness, just like one who fails to comply with any decision of beis din.

He argues that when the Gemara singles out certain actions and says about them that the one who perpetrated them is *chayav bedinei shomayim,*

it cannot mean that he just deserves punishment from Hashem but nothing more. This is because one is never allowed to cause damage (as is stated by the Gemara in BB 23A) and if he does he will certainly be punished by Hashem like any other violation. By singling out specific actions and saying that for these actions one is *chayav bedinei shomayim,* the Gemara must mean that in these cases there is an additional monetary obligation.

Thus, according to the Meiri there are two distinct classifications: 1] *chayav bedinei shomayim* which means that the guilty one has a monetary obligation, and 2] other prohibitions where the act is forbidden but it does not create a monetary obligation.

There is a dispute whether Tosafos agrees with the Meiri. One of the cases where the Gemara rules that one is *chayav bedinei shomayim* is where one hired witnesses to testify falsely and thereby caused beis din to rule that a person was liable for something that he was not really liable. Tosafos proves that it is only because the person hired these false witnesses that he is *chayav* in *dinei shomayim*. Had he just persuaded witnesses to testify falsely then he would not have been *chayav* in *dinei shomayim* and this is ruled by the Shulchan Aruch (*CM* 32, 2).

The Shach (32, 3) asks that we find in the Gemara (*Kiddushin* 43A) that if one persuades someone to murder someone he is punished by Hashem. From this we can infer that if one persuades someone to testify falsely he will also be punished by Hashem. So how can Tosafos say he is not *chayav bedinei shomayim*?

There are two important answers to the Shach's question. The Gra (32, 2) answers that killing is unique as we see that the Torah singles out death and forbids one to stand idly by and not save a Jew who is in mortal danger, so certainly one will be punished for causing someone to die. This does not apply to loss of money. This is against the Rambam in Sefer Hamitzvos who writes that the reasoning does

apply to loss of money as well. However, many others disagree with this Rambam.

The Ketsos (32, 1) has a different approach. He answers that the Shach confused two concepts, since *chayav bedinei shomayim* is a monetary obligation, whereas punishment at the hands of Hashem is a different concept. The Gemara cited by the Shach never said that one who persuaded someone to kill is *chayav* in *dinei shomayim*. It only said that he will be punished by Hashem. He says that there are many other actions where one causes damage and will be punished for it by Hashem, but the cases mentioned in the Gemara are singled out because they create a monetary obligation.

Thus we have a dispute among the poskim about the approach of Tosafos. According to the Ketsos, Tosafos understood like the Meiri that there is a monetary obligation. But according to the Shach and Gra there is no monetary obligation. We should mention that even though the approach of the Ketsos in Tosafos is similar to the Meiri, it is not certain that he agrees with the Meiri that one who does not pay is disqualified from serving as a witness.

Even though the Shach understands that *chayav bedinei shomayim* does not mean that there is a monetary obligation, nevertheless, the Shach himself (32, 2) rules that in order to avoid punishment at the hands of Hashem the guilty must pay for the damage he caused, unless his victim is willing to forgive his loss.

However, the obligation to pay according to the Shach is not the same as the obligation according to the Ketsos. According to the Shach there is no direct monetary liability but rather a sin which must be gotten rid of. If it requires money to do this then the guilty will need to pay but if the victim is willing to forgive without payment the guilty will not have to pay. According to the Ketsos there is a direct monetary obligation.

Rav Aharon Kotler (*Res. Mishnas Rav Aharon* 1, 21) suggests another approach. We mentioned earlier that the Gemoro writes that it is forbidden even to cause damage. The Gemara (*Avodo Zoro* 30B) states that it is even forbidden to cause temporary damage. The Gemara says that this is the reason one is not allowed to place water that may contain snake venom near someone else's cat. Even though snake venom does not kill cats, it causes them temporary weakness, thereby preventing the owner temporarily from selling his cat.

There is a dispute about the source and nature of the prohibition to cause damage. The Rama (*BB* 2, 107) says that the source is the mitzvah to love our fellow man as ourselves – *ve'ohavto lerei'acho komocho*.

However, the Shulchan Aruch (*CM* 378, 1) writes that it is forbidden to damage another, and the Gra comments that the prohibition includes causing damage. Thus, according to the Gra, the same prohibition which one violates when directly damaging is also violated when only causing damage. Rabbenu Yona (*Pirkei Avos* 1, 1) writes that the source for the prohibition to damage is the pasuk that forbids stealing. If we combine the Gra with R. Yona it comes out that the source of the prohibition to cause damage is the prohibition to steal.

Of course, it is not a full act of stealing and therefore there is no mitzvah of *veheshiv es hagezeilo* – in this case to pay for the damage. But since the way to undo the prohibition against damage is by paying for the damage, one must pay as the means to undo his wrongdoing.

Rav Aharon proves that many other basic Rishonim including the Ramban and Ritvo also follow the approach of R. Yona. Rav Aharon says that according to this approach anyone who causes damage is a thief.

We should note that this is not the approach of the Meiri and Ketsos because they both maintain that there are cases of causative damage where one is not called a thief, whereas according to Rav Aharon one

who damages in any causative manner violates the prohibition to steal. Rav Aharon says his is the approach of the Meiri, but it seems clear that the Meiri does not agree.

We should note further that it is clear from the Gemara that one must pay whenever paying will rectify a Torah prohibition. Besides being logical, one can derive this from a question of the Gemoro. The Gemoro asks that if two witnesses refuse to testify, they must pay for the loss suffered by the one who would have been helped by their testimony since the Torah requires two witnesses to testify. Here we see that even though the Torah did not write that witnesses who fail to testify are liable, the Gemoro still understood that they are liable. The Devar Avrohom (2, 32) explains that the reason it is obvious is because paying will rectify their failure to testify and one must do anything he can to undo his wrongdoing.

Summarizing, we have learned the following: 1. One is not allowed even to cause damage to another. 2. The Gemara writes about some actions that cause damage, that the one who did them is *chayav bedinei shomayim*. 3. There is a dispute among the Rishonim and poskim about the nature of the obligation of one who damages in a manner that the Gemara rules is *chayav bedinei shomayim*. Some rule that he has a monetary liability and some understand that he has sinned and must pay in order to undo his sin but he does not have a direct monetary liability.

Your second question was whether one can withhold money from one who is *chayav* to him *bedinei shomayim*. This would seem to depend on the above dispute between the Meiri and others and the Ketsos and Shach in Tosafos. If we understand like the Meiri and Ketsos that when one is *chayav bedinei shomayim* he has a monetary liability, then it is logical that one could withhold money owed to him. But if one maintains, like the Shach, that he does not have a monetary liability and just has to pay in order to clear away his sin, then one may not withhold payment, because

it is the sinner's personal responsibility to rectify his wrongdoing. In fact, the Shach (28, 2) cites the Maharshal who rules that the victim may not take the law into his own hands. This in fact is the approach of the Sha'arei Yosher (5, 16).

As we explained this makes sense according to the Shach's understanding of the meaning of *chayav bedinei shomayim*. However, this too is the subject of a major dispute with others who disagree with the Maharshal and Shach.

Besides these poskim there are many others who take sides in this dispute. R. Akiva Eiger writes (note on the Shach 28, 2) that it is a dispute among the Rishonim and he remains with a doubt whether the victim can grab money from one who is *chayav* to him *bedinei shomayim*. Here the victim is just withholding money that is already in his possession.

Thus, the answer to your second question is that it is a dispute whether he is allowed to withhold money and therefore, if he withholds the money it will be difficult to make him give it up.

32

Payment for Damaging an *Esrog* Dealer's *Esrog*

Shortly before Succos I was checking through *esrog*im at an *esrog* stand in order to find one that I liked. I picked up a seventy-five dollar *esrog* but I dropped it and it was seriously damaged. I told the *esrog* dealer what happened and wanted to pay him for the damage, thinking that I should pay the full seventy-five dollars. To my pleasant surprise the dealer replied that I should pay him twenty-five dollars since he had asked a rabbi who told him that he should take one third of the sales price for damages. I paid what he asked and left. Was he correct and if not, do I now owe him money since he made a mistake?

Answer:

It seems that the reason he asked for a third is that is about the cost of an *esrog* for an *esrog* dealer. (That is what the questioner in the Mishpat Shlomo (1, 7) wrote.). Therefore, your first question is how much one must pay when he damages an object in a store: Must he pay the amount that the store charges or the amount the store paid for the object?

There are two sections of Gemara that indicate clearly that he must pay the amount the store charges. One section is a discussion (*BM* 99B) that questions how much must one who stole a bunch of fifty dates pay. If the bunch is sold together, it sells for forty-nine *prutos*. However if the owner sells each date separately, as he planned to do (Rambam), he would charge a *pruto* for each. So his loss of potential revenue was fifty *prutos*.

The Gemara (as explained clearly by the Rambam (*Gezeilo* 3, 3) and CM (362, 12)) rules that we are lenient and the thief who stole the entire bunch must pay only forty-nine *prutos*. We do not accept the owner's argument that he planned to sell them individually and earn fifty *prutos*. Even though the Gemara discusses one who stole, it is clear (the source that we are lenient and do not charge on an individual basis is a rule stated concerning damages) and specifically mentioned by the Rambam, that the rule applies to damages as well.

We should note that there is no mention of how much the owner paid for the dates. It is obvious that the owner paid less than forty-nine *prutos* and certainly less than fifty *prutos* for the dates since one operates a store in order to earn a profit. Moreover, the only time the thief only pays forty-nine *prutos* is when he stole the entire group of fifty dates. However, if he steals or damages one or several dates he must pay a full *pruto* per date which is certainly more than the storeowner paid. (This is obvious from the Gemara and written explicitly by the Chazon Yecheskel (*BK* 6, 10).) Thus, it is clear that one who damages must pay the price that the dates are sold for and not the price the storeowner paid.

The other relevant section of the Gemara (*BM* 99B) discusses a porter who broke a storeowner's barrel of wine. The storeowner had two different prices for the wine: a high price on market days when demand was greater and a low price on non-market days when demand was much lower. The issue that is discussed by the Gemara is whether the porter must pay the high price or the low price. However, there is no mention again of how much the storeowner paid for the wine. Therefore, it is clear that what the storeowner paid is irrelevant.

The Gemara adds an important point that is very relevant to your question. The Gemara rules that the porter is not assessed the full price that the store charges because we must reduce the price by

the storeowner's costs that are sale-related and are factored into the price. The costs that are mentioned by the Gemara are the amount that the storeowner pays to the one who installs a spigot, and the cost to transport the wine to the market. The reason for reducing the price by these amounts is because these are expenses that one only has when he sells wine and since the wine wasn't sold the storeowner saved these expenses. Thus, if the *esrog* dealer's price of seventy-five dollars includes, for example, sales tax that he will not have to pay since he didn't sell the *esrog,* we would reduce the price by the amount that reflects sales tax.

The Mishpat Shlomo (1, 7) also rules that the one who damaged must pay the retail price. His argument is that whenever one damages, even when the owner is a private individual, we do not take into consideration how much the owner paid for the damaged object. For example, if someone damaged an object which the owner received as a gift, we do not say he does not have to pay for the damage.

We should note further that R. Mordechai Gross writes (*Teil Talpios* 68, page 74) that he once asked Rav Eliashev this question and Rav Eliashev also ruled that the one who damaged must pay the price the store charges. His reasoning was that besides the cost of the object, the storeowner has other expenses such as store rental and labor costs that are factored into the price. It would seem that this wasn't Rav Eliashev's only reason since part of the price is also the profit that the storeowner earns and if one were to understand that Rav Eliashev's only argument is the storeowner's costs then the price would be reduced by the portion of the price which constitutes the storeowner's profit , which he did not rule. Thus it is obvious that the argument of Rav Eliashev was only secondary.

We should note that Rav Eliashev added that one does not always have to pay the price charged by the storeowner whose object he damaged.

If his price was higher than what is charged by other stores then one does not have to pay his higher price.

The Shumas Nezikin (page 61) rules that we should consider the prices of two other *esrog* stands in the vicinity and the amount one needs to pay is the amount charged by the storeowner who is neither the most expensive nor the cheapest. The rationale is based on the general method used by the *halacha* to assess the value of an object. This issue is pertinent in many situations.

The Shulchan Aruch (*CM* 103, 2) writes about this in the case of a person who borrowed money but only has goods with which to repay his loan. The Sema (103, 5) rules that we follow the opinion of those Rishonim who rule that we ask three experts, and we fix the value of the goods at the valuation of the middle opinion. The rationale for this is that this is the amount that is at least correct according to two of the three opinions. It is as if we consider each valuator as a member of *beis din* and just like in a *beis din* of three we follow the opinion of two out of three, so too with price we determine the price by the amount that is agreed to by two out of the three opinions.

Thus, if one store charges seventy dollars and one charges ninety and your store charges seventy-five dollars you would have to pay seventy-five dollars since two of the three opinions maintain that you owe at least seventy-five dollars and these two outweigh the one who maintains that you only owe seventy dollars. In case the other two stores charge higher prices than your store, you would not need to pay more than seventy-five dollars because it is as if your storeowner waived the additional amount that he was entitled to receive.

In conclusion: The ruling that the storeowner cited that he is only entitled to one third of the amount he charges is wrong. You really owed something in the vicinity of the amount he charged for the *esrog*. To determine the exact amount you would need to ask two other

owners of stands in the vicinity how much they charged for this *esrog* and also determine if the storeowner saved anything because the *esrog* was damaged and not sold.

Next week we will B'ezras Hashem discuss your second question: Do you need to pay the stand owner the money that he waived based on ignorance of the correct *halacha?*

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Payment for Damaging an *Esrog* Dealer's *Esrog* -Part 2

Shortly before Succos I was checking through *esrog*im at an *esrog* stand in order to find one that I liked. I picked up a seventy-five dollar *esrog* but I dropped it and it was seriously damaged. I told the *esrog* dealer what happened and wanted to pay him for the damage, thinking that I should pay the full seventy-five dollars. To my pleasant surprise the dealer replied that I should pay him twenty-five dollars since he had asked a rabbi who told him that he should take one-third of the sales price for damages. I paid what he asked and left. Was he correct and if not, do I now owe him money since he made a mistake?

Answer:

We learned last week that the *esrog* dealer made a halachic mistake since the basis for his accepting twenty-five dollars instead of the seventy-five dollars you offered him is that he thought that the *halacha* only entitled him to that amount, when in fact it entitled him to around the seventy-five dollars you offered. Therefore, we must address your second question which is whether one who waives money that he is entitled to because he made a legal mistake in fact forfeits the money, or do we say that since it was based on a mistake the waiver was meaningless and he is still entitled to the money?

It would seem that this question was decided in the Gemara. The Gemara (*BB* 41B) tells an anecdote that involved an *amora*, Rav Onon. The wall demarcating the boundary between the property of R.

Onon and his neighbor was swept away by a flood. R. Onon and his neighbor together constructed a new wall. They both made a mistake and constructed the wall somewhat into the neighbor's property, effectively granting R. Onon a portion of his neighbor's property. R. Onon was of the impression that since his neighbor participated in the construction of the wall, the neighbor effectively waived his ownership on that portion of his property. However, Rav Nachman corrected him that since it was mistake nothing transpired legally and R. Onon had to move the wall to the original place. Thus we see that when one mistakenly waives a right, it does not have any legal validity (*mechilo beto'us lo havei mechilo*). The rationale is that one must intend to waive a right in order for the waiver to be effective, as one must for any other transfer of ownership.

However, there is another Gemara that seems to contradict this conclusion. The Gemara (*BM* 66B) discusses one who sold the fruit of a tree before the fruit started growing. Since one cannot legally sell fruit before it starts growing (*dovor shelo bo lo'olam*) the sale is invalid. Nonetheless, the Gemara states that if the purchaser took the fruit after it grew because the seller mistakenly thought that the sale was valid, he may keep it since the seller waived his right to prevent him from taking the fruit. Here we see that even though the seller only waived his right to the fruit because he erred, nevertheless the waiver is effective. This seems to contradict the previously cited Gemara.

This question is raised by Tosafos and many other Rishonim. Tosafos answers that we assume that the seller would waive his rights to invalidate the sale even if he found out that the sale was ineffective since by doing so he creates a feeling of mutual trust. Therefore, one cannot compare this situation with the case of the neighbor who mistakenly agreed to move the boundary, who has no such reason to allow his error to remain.

The Rivash (*res* 335) cites Rabbeinu Tam as offering a different resolution. He says that the difference is that in the case of the boundary the neighbor never intended to waive anything. He just mistakenly thought he was building the wall in the proper place when in fact he wasn't. Thus his entire action was a mistake. However, in the case of the fruit, the seller fully intended to sell the fruit to the purchaser. His mistake was because the cause of his agreement was a legal error. However, the action itself was not an error. The Ketsos (17, 3) claims that this is the approach of the Rosh (*BM* 5, 32) as well.

In another case involving a mistake the Rama (*CM* 17, 12) rules that if a *dayan* notices that a plaintiff actually is entitled to more than what he is claiming in his din Torah, the *dayan* is not allowed to correct the plaintiff. Moreover, should the *dayan* award the plaintiff the amount he really is entitled to, the ruling is null and void. One of the sources cited by the Rama is another responsum of the Rivash (227). The commentaries on the Rama find his ruling very difficult since people generally want everything they are entitled to and presumably the only reason the plaintiff failed to ask for the larger amount is because he wasn't aware of what he was entitled and, as we saw earlier, when one waives a right in error it is ineffective.

The Ketsos (17, 3) answers that the Rivash (227) on which the Rama based his ruling is in accordance with his approach (335) that we studied before: when the cause of a person's mistake is lack of legal knowledge his action is nonetheless binding. Therefore, when the plaintiff did not claim something he was entitled to, he effectively waived his claim and he was no longer entitled to it. Therefore, if the *dayan* awards him a claim he did not make, the *dayan* would be mistaken because the plaintiff was in fact no longer entitled to that claim.

The Nesivos (17, 1) disagrees both with the answer of the Ketsos and with his interpretation of the Rama's ruling. He asks that the Gemara (*BM*

66B) states that the reason the Torah requires a seller who overcharged to return the overcharge (if the discrepancy is great enough) is because the customer only overpaid because he was unaware of the fair price and therefore, the seller is not entitled to keep the overcharge. The Nesivos argues that there is no basis to differentiate between a mistake based on lack of factual knowledge and a mistake based on lack of legal knowledge, since the determining factor of whether an action is valid is if the person acted on the basis of a mistake or not. He says that the Rama agrees that in case a plaintiff is entitled to more money than he is claiming the *dayan* is obligated to correct his mistake. He claims that the Rama only rules that a *dayan* may not interfere if the plaintiff will not forfeit any money as a result of his ignorance.

The Yeshu'as Yisro'ail (17, 3) sides with the Nesivos. He argues that when the Rivash and subsequently the Rama ruled that a decision based on legal ignorance remains valid, they only referred to cases that are similar to the sale of fruit that was cited previously. In the case of the fruit the owner really wanted to sell the fruit to the customer. He merely erred in not acting in a legally effective manner. Since he desired to sell the fruit, we rule that his failure to take advantage of a legal option because of his ignorance does not invalidate the sale. However, if from the very beginning his action was based on a mistake and he never really desired to waive anything, his waiver is not valid.

We should note further that the Shach (17, 15) also is certain that there is no legal validity to a waiver that is based on legal ignorance. He claims that even the Rama never intended such a ruling. The basis for this interpretation is the wording of the Rama in a different section (241, 2), "Any waiver that was made in error is invalid." Furthermore, there are commentaries who understand that even the Ketsos only intended to explain the Rivash in this manner, but he himself really agrees that a waiver of a right that is due to ignorance of the law is invalid.

Thus, your question whether the seller's waiver was effective is at best the subject of a dispute, since in your case the seller never desired to accept anything less than what he was entitled to. It was only due to a legal mistake that he agreed to accept twenty-five dollars and not the seventy-five dollars he was entitled to. According to the Ketsos' understanding of the Rivash you do not owe him any money but according to the Shach, Nesivos and Yeshu'as Yisro'ail and perhaps even the Ketsos himself, you owe him around fifty dollars. (We explained the way to compute the exact amount in the first section of this article.)

We asked Rav Naftoli Nussbaum and he also ruled that you may not keep the difference based on this Ketsos since his rationale is very strained and is disputed by most poskim.

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Who has to Pay for Trapping my Neighbor's Escaped Snake

Recently, I came into my kitchen and was horrified to discover a snake on the floor. I quickly ran out, closed the door and called a snake trapper. He came, caught the snake and charged me a hundred dollars for his services. When I told the story to some of my neighbors, one of them informed me that there is a neighbor who keeps snakes in his apartment and he was away for the last few days. Apparently, in his absence one of his snakes escaped and made his way into my apartment. My question is can I force my neighbor to reimburse me for the hundred dollars I spent? My neighbor admitted that it was his snake, but he says he asked someone who told him that beis din cannot make him pay since he just caused me an expense. He said maybe in the din of *Shomaim* he is liable since there one is liable for causative damages but not in beis din. Is he correct?

Answer:

The first issue is: who was responsible for catching the snake, you or its owner? Catching snakes is not discussed in the Gemara but the case of a fallen wall is discussed. The Mishna (*BM* 117B) rules that if a person's wall fell onto his neighbor's property he cannot free himself from the expense of removing the stones by telling his neighbor that he may keep the stones.

The Rishonim ask why the owner of the stones cannot free himself from responsibility by declaring them ownerless since the Mishna is discussing a situation where it was not his fault that the wall fell (*mafkir nezokov le'achar nefeelas oness*). Tosafos answers that he is responsible because he did not declare them ownerless. The Rosh disagrees and maintains that even if he were to declare them ownerless now, he would not be free of responsibility since the fallen stones already damaged his neighbor before its owner declared them ownerless The damage was that the fallen stones prevented his neighbor from tilling the area of his property that was occupied by the stones.

All these reasons apply to your situation as well since, first, your neighbor never declared his snake ownerless. Second, even if he declared it ownerless now, the snake already caused you damage since you could not use part of your property. Third, this situation is far worse since the snake's escape cannot be classified as an oness since one must keep snakes in a cage, whereas the fallen wall was an oness because there was no prior indication that the wall was in danger of falling. Therefore, responsibility for removing the snake certainly rested with your neighbor, its owner.

The next issue is whether beis din can force one who is derelict in fulfilling his obligation, to reimburse a person who spent money in order to carry out his obligation. This issue is discussed in a number of places in the Gemara. One situation is where a person went on a trip and left his wife without funds to cover her expenses and someone else voluntarily paid her food bill. The Mishna (*Kesubos* 107B) records a dispute whether the one who paid is entitled to reimbursement by the derelict husband. We rule (*CM* 128, 1) like the opinion that he is not entitled to reimbursement.

Tosafos and many others ask that we find many other cases where the Gemara rules that one who spent money to pay another person's

expenses is entitled to reimbursement. For example, the Gemara (*BM* 31B) rules that if a person spent money in order to save someone else's lost object he is entitled to reimbursement.

Tosafos (*BK* 58A) answers that the critical factor is how certain the loss was. For example, the Yerushalmi says that the reason the one who paid the wife's food bill is not entitled to reimbursement is because the husband can argue that others, e.g. her parents, would have paid her food bill had the volunteer not paid, and they would not have asked for reimbursement. However, in the case of the lost object the expense was inevitable.

In your situation as well, people don't trap snakes for free and since the owner was obligated to catch the snake right away the expense was unavoidable. Therefore you, who spent the money that your neighbor was obliged to pay, are entitled to reimbursement.

There are other situations where this comes up. For example, a neighbor may go away and a pipe of his bursts and water leaks down to his neighbor. If the downstairs neighbor brings a plumber to fix the pipe he is entitled to full reimbursement (if the plumber's price was reasonable). Another situation that comes up sometimes is where a store's burglar alarm goes off in the middle of the night disturbing the neighbors' sleep. If the neighbors cannot contact the storeowner or they called him and he refused to come and they call someone to pick the lock and shut the alarm they are entitled to reimbursement from the storeowner. The reason is because as the *Chashukei Chemed* (*BK* 55B) writes that the store owner is obligated to come even in the middle of the night. Since he was obligated to come and he refused to do so and it costs money he must reimburse the one who paid money to enable him to fulfill his obligation.

Even when a person is obligated to spend money for his own good or because he has a personal obligation but he neglects or refuses to do so

and someone else spends money on his behalf, the person who spent the money is entitled to reimbursement. Proof for this contention can be brought from a ruling of the Maharam of Rottenberg (*Res. Kremona* 32, ruled by Rama in *Yoreh Deoh* 252, 12) that if someone who was taken captive by gentiles refuses to spend his own money to be released and someone else spends the money on his behalf, the captive is obligated to reimburse him since a captive is obligated to spend his money to free himself from captivity by gentiles. The Maharam proves his ruling from several examples in the Gemoro.

One could ask that perhaps your situation is different because in your situation you did not intend to pay your neighbor's debt or to fulfill his obligation. Rather, you brought the snake trapper in order to free yourself from your unwanted company. Essentially, we could say that you spent money on yourself and your neighbor merely benefited from the money you spent for yourself. This would seem to be a situation which should be classified as *ze nehene veze lo choseir* (A benefits from B's action but B did not lose anything) where the one who derived benefit (A) does not have to pay anything to his benefactor (B) since his benefactor needed to spend the money anyway for himself.

However, this is not the correct analysis of your situation. Even though you intended to protect yourself, this cannot be called money that you anyway spent for yourself since the one who needed to pay was only your neighbor and not yourself. Therefore, it is not money that you needed to spend anyway. Had you been aware of the true situation you would have known that you were spending the money only for your neighbor and not for yourself at all. Whenever one makes a decision based on lack of correct information it is a mistake and does not affect the ruling. This is similar to *mekach to'us* where a person bought something based upon incorrect information where the sale is invalid since his decision to buy was done in error. Since the reality is that

you spent the money only for your neighbor, he is still obligated to reimburse you.

Proof for this contention can be derived from the case of a person who planted and worked on his wife's field, as he was obligated to do, but before he could harvest the crop the couple got divorced. The Gemoro (*Kesubos* 80A) rules that the wife, who receives her field after the divorce, must reimburse her former husband for his expenses even though he incurred them for himself. Another case is where a person bought a field from a gentile only to subsequently discover that the gentile who sold it to him stole it from a Jew. While the purchaser must return the field to its rightful owner he is entitled to complete reimbursement from the owner (*CM* 236, 8) since the owner benefitted from the one who bought it from the gentile and we don't rule that the buyer is not entitled to reimbursement since he bought the field for himself. Rather, the determinant is who really benefitted from the purchase.

In conclusion: If you paid the snake trapper a normal price you are entitled to full reimbursement from your neighbor.

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Obtaining Cash from a Customer in a Store

Recently, I needed three thousand shekels in cash. To obtain the cash, I went near the cashiers in a nearby supermarket and spotted a customer with many items and asked him if he intended to pay with cash. When he replied affirmatively, I asked him if I could pay his bill with my credit card and he will give me his cash. He accepted my offer, and I paid and left the store with the cash that I needed. Later, I started thinking that perhaps I acted improperly since I caused the store to pay a credit card fee which they would have avoided if the customer had paid with cash. Did I indeed act improperly?

Answer:

Today there are many stores that prefer that their customers pay with a credit card. In those stores there is no question since obviously the storekeeper approves of your action. Our discussion only concerns those stores that prefer that their customers pay with cash in order to save on credit card fees. In those stores we have to examine whether you acted improperly when you caused the storeowner an expense that otherwise he would have avoided.

This is related to our previous article. In that article we cited the decisive opinion of R. Huna son of R. Yehoshua that generally one may open a rival store even adjacent to an existent store. However, previously the Gemoro (*BB* 21B) cited the opinion of R. Huna that

one may not open a competing store in the entire courtyard where the first store is located.

The Gemoro attempted to prove that R. Huna is correct by citing a ruling that a fisherman must distance his trap a large distance from bait that had previously been set down by another fisherman. However, the Gemoro rebutted the proof by saying that for a certain reason fishing is different. Since we do not rule like R. Huna, the Gemoro's rebuttal of the proof is authoritative and this is the ruling of the Chasam Sofer (*res. CM* 79 *c.v. veyesh ka'an*) and many others.

There are various opinions among the Rishonim about the reason for the fishing difference that the Gemara is referring to. Rashi's opinion is that when one sets out bait he can be certain that all the fish in the vicinity will be caught by him. The second fisherman is prohibited from spreading his net in the vicinity since if he does so he will catch what otherwise would certainly have been caught by the first fisherman. This contrasts with an ordinary store where the loss is not certain.

Tosafos (*BB* 21B) asks that we find in other places in the Gemara that one may grab an object that otherwise someone else would have certainly gotten. For example, one may snatch away an ownerless object from someone else who was lying upon it (and thus had not made a *kinyan* on it) in order to acquire the object. Tosafos suggests two differences for fishing. One is that the prohibition is limited to where the fisherman is earning his living, since there is a special prohibition to take away a person's livelihood known as *yoreid le'umnos chaveiro,* as we discussed in the previous article. Since the first person is fishing for a living, when the second person spreads out his net he is being *yoreid le'umnos chaveiro*. The second difference is that in the case of fishing, the second fisherman can find another place to fish whereas the person who snatches away an ownerless object cannot be told to grab a different object because there is no general supply of ownerless objects.

Tosafos (*Kiddushin* 59A) in another place asks the same question and answers by citing the explanation of the father of Rabbeinu Tam, which is similar to Rashi's explanation in the sense that the prohibition is because the second fisherman's bait will attract fish that would have been caught by the first fisherman. However, the reason why this is prohibited according to Tosafos is not merely because he is taking fish that otherwise would have certainly been caught by the first fisherman but because he utilized the first fisherman's work for his own benefit at the expense of the first fisherman. This is because the only reason the fish were in the vicinity in the first place is because the first fisherman's bait attracted them. Thus the second fisherman must leave because otherwise he would be guilty of utilizing another person's work in order to compete with him.

In the article from Parshas Miketz we cited the Noda Biyehuda and Divrei Malkiel who ruled that this constitutes *ze nehene veze choseir* i.e. B is benefitting from A in a manner that harms A. In this case not only is B's action wrong, but B must even compensate A by reimbursing him for all of his gain. The Chashukei Chemed (*BB* 21B) applies this to an employee who, while working for A, discovered the identity of A's customers and then opened a rival business and convinced A's customers to buy from him. He is in violation of this prohibition because he utilized the customer base that A had established in order to take away his customers.

Many Rishonim, including the Ramban, Rashba and Ran, cite the Oruch who explains the Gemara differently. The Oruch explains that the reason a second fisherman may not spread out his net in the vicinity of the first fisherman's net is that he may attract fish that had already entered the first fisherman's net, which constitutes theft. The Chassam Sofer (*res CM* 118) explains that since the second person only caused the fish to leave but didn't actually take the fish from the first one's net, he is only similar to a thief but not an actual thief.

We note that the fact that these Rishonim understand the Gemoro in a different manner does not necessarily mean that they disagree with the laws that result from the explanations of Rashi and the father of R. Tam. We will see that many later poskim based their rulings on the explanations of Rashi and R. Tam's father.

One ruling is given by Tosafos themselves. After recording the explanation of R. Tam's father, Tosafos says that we can derive from it that a private tutor may not offer his services to a person who already employs a live-in private tutor to teach his children. The Maharit (*Commentary to the Rif*) explains that the rationale for this is that if a second tutor replaces a previous tutor he benefits from the efforts of the first tutor since it is due to the work of the first tutor that the second tutor finds it easier to teach the children. In this sense the first tutor is like the one who placed the first fish bait, since in both cases the second person is benefitting from the first person's efforts and thereby he is preventing the first person from enjoying the fruits of his labor. This ruling of Tosafos concerning a second tutor is ruled by the Shulchan Aruch (237, 2) without any dissenting opinion, rendering it authoritative. According to the Maharit's explanation this in turn implies that the opinion of R. Tam's father is authoritative. Other poskim who relied on the explanation of the father of Rabbeinu Tam are the Maharshdam (*CM* 259) and the Maharsham (2, 202).

There is another instance where the Gemara rules that a person may not benefit from another person's efforts and thereby prevent the first one from enjoying the fruits of his labor. The Mishna (*Gitin* 59B) records various actions which the Rabbonon forbade since they considered them a type of theft. One of those actions is where one individual banged on an olive tree in order to knock down olives and then to gather the fallen olives from the ground. The Mishna rules that if another person precedes him and gathers the

fallen olives he is a rabbinic thief since he benefitted from the first person's efforts in a manner that prevented the first person from benefitting from the olives that he had made available by knocking them off the tree, even though knocking down olives does not give one any ownership of the fallen olives. Tosafos (*Gittin* 60B) says that this prohibition applies even when the first person is not engaged in earning his livelihood.

Thus we have established that there are two prohibitions. One is to take away certain profit from someone else where it damages the victim's livelihood. The second is where a person utilizes another person's efforts for his own gain in a manner that prevents the first person from reaping the fruits of his efforts. This second prohibition applies even when the first person is not engaged in earning his livelihood when he suffers the loss. Additionally, the second person will have to pay the first one for the value of the benefit he derived.

In your situation, you acted on a one time basis and you could not be called a *yoreid le'umnos chaveiro*. Therefore, the first explanation of Tosafos would not apply. However, you used the fact that the supermarket brought the customer to the store, in a manner that was detrimental to the store. While it is true that you did not take away the customer since he did buy from the store, nevertheless the store incurred an expense that it would have otherwise avoided and therefore, your action was forbidden. You do not owe anything to the store if you didn't earn any money thereby and just needed cash.

An interesting similar question was very relevant in Israel. Taxi drivers would drive up to a bus stop and offer rides to those waiting at the bus stop. The Pischei Choshen (*Geneivo* 9, *footnote* 7) is uncertain whether the practice is forbidden, because a bus stop is not the same as a store. The bus companies didn't set up the bus stops. Rather the city did so in order that people should know where they can catch a bus and that

traffic should flow smoothly etc. Therefore, he is inclined to rule that the taxi drivers were permitted to continue their practice since they did not benefit from the efforts of the bus company but rather from the city's actions.

Renting Immovable objects

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Rented an Apartment as a Dormitory and all of the Students Departed

I manage a yeshiva for American bochurim who learn in Eretz Yisroel. I rented a furnished apartment for one year beginning in Cheshvan 5780 in a residential building in order to house six of the bochurim. Previously, the apartment was rented to a family. We were not limited in our use of the apartment. We could use it as a residence or as a dormitory. Even though we did not specify this in the contract, it was clear to the owner of the apartment that our sole purpose in renting the apartment was to house bochurim, which he specifically allowed us to do. Around Purim all of the bochurim departed due to the covid virus and stopped paying tuition to the yeshiva. I immediately informed the owner. At first he couldn't find anyone to rent. When he did find someone, he was forced to reduce the rent by two hundred dollars. Am I responsible to cover the owner's loss?

Answer:

We have discussed in previous articles that in contrast to secular legal systems, the Torah's legal system takes into account whose "fault" a situation is, and the one who is at fault has the responsibility. Furthermore, we learned that when a problem befalls the general public, we do not consider either party at fault. Therefore, we must determine whether or not, in this situation, we can attribute the problem to the renter.

The reason why it is an issue is that even though anyone who rented an apartment for students from chutz lo'oretz had the same problem,

which would indicate that it is a general problem, nevertheless the property did not have to be used by students from chutz lo'oretz. It could be used by an Israeli for residential purposes and according to the rental agreement the renter could live there himself or sublet to someone else.

This question is the subject of a dispute amongst the Poskim. The Maharshach (2, 198) was asked about a store in a market which was rented and in the middle of the rental period the government decided that all those who sold what was sold by this store, could no longer operate in this market. The Maharshach ruled that since the ruling did not relate particularly to this renter, it was called a makas medino and the renter was entitled to cancel the rental agreement.

However, many poskim (*Ra'anach* (1, 38), *Shai Lamora* (5), *Machane Efraim* (*Sechurus* siman 7) disagree with the Maharshach and rule that this is not considered a makas medino since the property was usable. Furthermore, in your situation it could be that the Maharshach would even agree that this is a makas medino, since the Maharshach argued that the renter was blameless since one could not expect him to use the store to sell something else which the government still allowed, since people who have one line of business cannot be expected to switch lines in the middle of their career. This argument would not apply here since the renter could certainly use it himself or sublet the apartment to someone else without any problem.

Even though we have determined that the renter cannot argue that this is a makas medino, it is true that the new situation was unforeseen at the time of the original rental agreement. There is a major dispute among the Rishonim if a renter can cancel a rental agreement in case of an unforeseen event during the rental period which prevents the renter from using the rental property.

There are Rishonim like the Rashbo (*Response* 2, 228) who rule that the renter must carry out the rental agreement as if nothing occurred. Their argument is that property rental is considered by Chazal as a temporary sale. The property is viewed as having been sold to the renter for the duration of the rental period. They argue that just like any other sale it is final. Just like one is not entitled to undo a sale because of unexpected events that transpired after the sale was consummated, so too one cannot undo a rental after the rental was in force.

However, many Rishonim agree with the opinion of the Maharam of Rottenberg who compared a property rental not to a sale, but to a rental of a worker i.e. an employment agreement. The Gemoro (*Bava Metsiyo* 77A) gives a number of examples of unforeseen events which prevented a worker from carrying out the terms of his employment agreement and the Gemoro rules that the employee is not entitled to payment if he was prevented from performing his job due to unforeseen circumstances. For example, the Gemoro writes that if one hired workers to irrigate a field in the morning and there was an unexpected downpour at night, the employer is not obligated to pay the employees.

The Maharam (cited by *Mordechai Bava Metsiyo* 345) deduces from this that if one rented a property and the renter passed away and his heirs do not want to continue the rental, they are entitled to cancel the rental agreement since the death of their parent was unforeseen. However if the rental was prepaid the heirs are not entitled to a refund, but if there was no prepayment they are free to cancel the rental agreement.

The Ramo (334, 1) cites both opinions and rules that if the rent was prepaid the heirs are not entitled to a refund but if it was not prepaid the heirs are not liable for future rental payments.

Thus, we have established that in case it is clear at the time of a rental that it is being rented for a specific purpose and that purpose is no longer necessary, the renter cannot be forced to make future payments.

In this particular case it was not stated explicitly that the rental was being done on behalf of your yeshiva and under the terms of the rental agreement you, the manager, could have used the apartment for yourself or you could have sublet the apartment. Therefore, we must consider whether the unforeseen events that prevented the yeshiva from continuing suffice to categorize the cancellation as having resulted from unforeseen circumstances.

You mentioned in your question that it was clear at the time of the rental that the purpose of the rental was to house bochurim of the yeshiva. We find in other cases that poskim rule that when one's intentions are clear he does not need to spell them out explicitly. For example, the halacha (*Choshen Mishpot* 232, 21) is that if a customer told the seller that he intends to take what he purchased to a different city, he need not return the purchased object in case the purchase is voided due to it being a *mekach to'us*.

The Nesivos (232, 10) proves that if it was clear that the customer intended to take the purchase to a different city the halacha is the same even though this fact was not stated explicitly. The rationale is that a clear *umdeno* is equivalent to explicit speech.

Therefore, since it was clear that the purpose of the rental was to house students of the yeshiva, you, the manager, are not liable for any unpaid rental fees for the period following the departure of the students. However, you are not entitled to a refund of any money that you paid for this period since this was not a makas medino. If you prepaid the rental, the landlord will also not have to refund the difference between what you paid and what the new tenant is paying him, but if you did not prepay you will not have to pay the difference to the landlord.

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Rent from an Apartment Built on another Person's Property

Our building complex has much land which is unused. One of the neighbors, who is a sofer, decided to build a small apartment on some of the unused land where he would write. No one raised any objection because the property was anyway not in use and we were happy to help our neighbor earn a parnosso. After quite a few years, the neighbor moved away and no longer used the apartment to write. He began renting the property to an individual who used it as an apartment. The neighbors felt that now that the sofer is using the apartment to earn money, they should share in the income. The sofer understood their position but said that he paid all the construction costs and they should pay him back, which they agreed to do. How much of the rent money are the neighbors entitled to?

Answer:

The basis to answer this question is a Gemara in Bovo Kama (21A). In order to understand the discussion it is necessary to introduce two related dinim.

The Gemara has a discussion and concludes that if a person derives benefit from another person's possessions, the one who derives benefit is not obligated to pay for the benefit if the owner of the property did not suffer any loss. This is the psak in Choshen Mishpot (363, 6). This principle is known as *ze nehene veze lo chosar, potur*.

However, according to most Rishonim (ruled in *C.M.* 363, 7) if the owner suffers a loss – even a minor one – the one who derives benefit must pay for the entire value of the benefit he received. For example, if a person squatted in a vacant house which was not up for rent, he is not required to pay the owner any rent. However, if he sullied the walls he has to pay rent, according to most Rishonim.

The Gemara records an anecdote of someone who built a palace on a vacant lot owned by orphans. The Gemara writes that Rav Nachman made the builder pay rent for use of the palace since previously there were others who used the vacant lot and they paid a small amount to the orphans. The Rosh (2, 6) and Rabbeinu Yerucham (*Meishorim* 31, 2) explain that Rav Nachman made the builder pay for the benefit he derived from the land on which the palace was built, but he did not have to pay for the benefit from the palace because the orphans did not have a house and their loss was just the use of the land. Similarly, the Talmidei Horashbo Vehorosh writes that the orphans acquire the palace building only from when they pay for it.

However, the opinion of the Rashbo is that when the orphans pay for the property, they acquire the palace not from the time they paid for the palace but rather retroactively, from the time the palace was first built. The logic of the Rashbo is that when one builds on another person's property he immediately gives the building to the property owner, on condition that the property owner pays him. Therefore, when the owner pays him he is merely fulfilling that condition and therefore his ownership began right when the house was built. The Ketsos (363, 5) also maintains that the land owner's ownership of the building starts from when the building was built.

However, the difficulty with this explanation is: Why did the Gemoro say that the reason the builder had to pay anything is because the lot had been rented previously? If the house already belonged to the

landowner, even retroactively, the Gemoro didn't need the fact that the property was previously rented in order to require the builder to pay for use of the house. The Gemoro could have said that the reason the builder has to pay is that he used the orphan's house and dirtied the walls during his use of their building.

The Rashbo does not offer any real answer to the question. However the Ketsos says that the orphans were minors, and minors are an exception since, due to a technical factor, they can only acquire the house when they actually pay for it.

Thus we have established that there is a major dispute among the Rishonim and Acharonim about when the property owner acquires a building that was built on his property. According to the Rosh, Rabbeinu Yerucham and the Talmidei Horosh Vehorashbo the property owner acquires the building when he pays for it and owns it only from then on. According to the Rashbo and the Ketsos, when he pays for it he acquires the building retroactively, from the time it was built.

Besides the Rishonim there are several Acharonim who rule that the building is only acquired from when it is paid for. Among these is the Ra'anach (1, 58 and 2, 3) and the Avnei Shayish (2, 82) and the Mishpatim Yeshorim (2, 187).

The Ramo (375, 7) writes, "If the builder rented the building to others we reduce the amount that the property owner must pay for the building. If he lived there himself he needs to pay the property owner, if the property owner had even a minor loss."

The source of the second ruling is the previously cited Rabbeinu Yerucham and clearly indicates that according to the Ramo the property owner only acquires the building from when he pays for it, because if he acquires it from the time it was built he would not need to cause the owner a loss since his living in the house itself causes a loss to the property owner, as was noted by the meforshim of the Gemoro.

Based on this, it would seem difficult to understand the first ruling of the Ramo, namely, why does the builder have to reduce the amount which the property owner has to pay for the building as a result of his renting out the building, since the building is his until it is paid for?

However, R. Akiva Eiger (Notes on the Margin) writes (in the name of the *Ra'anach*) that the Rama does not mean that the amount the property owner needs to pay is reduced by the entire rent which the builder received. Rather, his intention is that the price is reduced by the amount of rent that can be attributed to the land on which the house was built. Whenever one rents a house there are two elements in the rental: there is the rental of the land and there is the rental of the building. The amount of rent which is attributable to the land is the amount which needs to be reduced from the price of the cost of the building since the land was not owned by the builder. This approach is in accordance with the interpretation of the Rosh and those who agree with him.

Returning to your question: You have to pay the sofer for his expenses in building. However, the amount you pay is reduced by the portion of the rent which he received which is attributable to the land. After the neighbors pay for the construction costs they are entitled to the entire rent. According to what you stated in your question, the neighbors allowed the builder to use it without paying rent for the land while he used it himself.

38

Paying for an Apartment Built on our Land Using the Rent

Recently you answered a question concerning someone (who was a sofer) who built a small apartment on the common area which belongs to his entire building and the neighbors allowed him to use the apartment for free. Furthermore, you said that if the neighbors later want the apartment they have to pay the sofer for the building. We have a similar situation but we don't want to allow the builder to use the apartment for free. Can we tell the builder that we want to buy the apartment but we will pay for it by reducing the amount that is due him for the building by the amount that it costs to rent a similar apartment in our neighborhood? In this manner, each month we will reduce the amount we owe him instead of paying in advance.

Answer:

Your question is similar to a question which was asked to the Maharach Ohr Zorua (son of the Ohr Zorua, res. 257). In his situation, one of two partners in a house improved the house by adding extra rooms onto the existing house that was commonly owned. The one who improved the property then demanded that his partner, who did not raise an objection when he saw him adding rooms, pay his portion of the expense. The partner replied that his silence was only acquiescing for him to build, but he never agreed to pay for the improvements. The Maharach sided with the defendant, and further ruled that he had the

right to tell his partner that he can use the added rooms as payment for his share of the building costs.

Thus, it would seem that we have a clear answer in this precedent to our question. However, it is important to analyze the basis for his decision. He cites as proof a situation which is discussed in the Mishna (*Bava Metseyo* 117A).

In the Mishna's situation, a two story building collapsed and the owner of the second story apartment wanted to rebuild but the owner of the ground floor apartment refused, thereby preventing the owner of the second floor from rebuilding. The authoritative opinion of the Chachomim is that the owner of the second story has the right to rebuild the ground floor apartment and live there until the owner of the first floor pays his expenses. The Maharach understood that the Mishna means that the amount the owner of the ground floor owes is reduced by the rent the owner of the second floor would have had to pay otherwise.

However, this approach is very difficult because the Gemara (*Bava Kama* 20B) clearly indicates that the owner of the second floor does not have to pay anything for living in the ground floor apartment and in fact this is the unequivocal ruling of the Shulchan Aruch (164, 5). Thus, the proof of the Maharach does not stand up halachically.

It is very important to note that this does not prove that the opposite is true, since the Gemara (*Bava Kama* 20B) says there is a special reason why the second floor owner may live for free in the ground floor apartment in the interim. The reason the Gemara gives is that one of the obligations of the ground floor owner is to enable the second floor owner to live in the building. Thus, if he prevents the second floor owner from rebuilding his own apartment because he doesn't build his first floor, he must allow the second floor owner to rebuild the first floor for his own use. Since this is a special obligation, we cannot prove

that in your case you cannot repay the builder by reducing your debt to him by the cost of renting the apartment he built.

The Nesivos (375, 3) discusses a similar case to yours, where a person built on another person's property and the owner of the property either indicated by his actions or common sense dictated that he approved of the building. The question of the Nesivos was exactly yours: whether the owners can pay for their share in the building by allowing the builder to live there without charge, or if they needed to pay the entire cost right away. The Nesivos wanted to rule that the owners must pay immediately one lump sum for the entire amount that they owed. His argument was that since they owed the cost of building there is no reason to allow them to delay and also for allowing them to repay in installments since people prefer to be paid in one lump sum. According to the Nesivos' approach, you could not do what you asked.

The Nesivos backed away from part of his ruling since it is clear from the Rosh (*Bava Metsiyo* 8, 23) that one cannot force the owner to pay for the improvements that he made on his own initiative, not immediately and not in installments. In fact, in two places (the above and in a responsa cited by the Tur in siman 375) the Rosh rules that what the one who improved the property can do is just to use the property until he is paid. The Nesivos writes that this is the way to pressure the owner to pay for the improvements. Obviously, the Nesivos understood the Rosh as intending that the one who made the improvements may live there without reducing the amount owed to him at all, since if the amount owed is reduced, living there will not pressure the property owner to pay. This is exactly like in the Gemoro where the owner of the second floor lives there for free.

There are two ways that one can explain why the one who improved the property may use it free of charge. One explanation is that it is his until the owner pays him. The Rosh clearly (*Bava Kama* 2, 6) indicates that

this is his opinion. Another approach is that even though the property owner immediately acquires the improvements, still the builder may use them for free until he is paid as a means of pressuring the owner to pay.

The Chazon Ish (*Bava Basra* 2, 6 *bezman*) also understands that the one who improved the property may live there for free. He writes that the same reasoning which the Gemara gave to justify Chazal's allowance of the second floor owner's living for free, explains why the one who improved can use the additions he made for free, namely, because the property is subordinated to the one who improved it until he is paid in full.

We should point out that in general one who purchases anything cannot force the seller to accept credit if it wasn't agreed to initially, since the seller doesn't have to be the banker of his customer. Thus, in the case of an ordinary sale the Nesivos (190, 7) rules that if the customer pushes off the seller, the seller has the right to cancel the sale.

In conclusion: If you wish to acquire full ownership of the apartment you will have to pay the builder, and you cannot reduce the price by the amount of rent that the builder saved by living in the apartment that he built. The builder can use the apartment he built without paying rent until you pay him in full for building it.

39

The Rights of a Renter who Continues after the Lease Expired

A year and three months ago I signed a lease to rent an apartment for one year. When the year ended, we didn't discuss or sign anything and I continued living in the apartment and paid the same rent as in the first year. Last week the landlord informed me that his nephew needs an apartment and I must vacate the apartment in two months' time. It causes me problems because my two year old daughter attends kindergarten and my wife works nearby so it would be very difficult for me to move out of the neighborhood. While it is true that there are other available apartments in the neighborhood, nonetheless it will be difficult for me because the prices are generally higher and I am living on a tight budget. Must I vacate in two months' time or am I entitled to an entire year since we continued living in accordance with the terms of the contract and the original contract was for an entire year?

Answer:

First, let us clarify the amount of time that one must grant to a renter before requiring him to vacate a rental. The Mishno (*Bava Metsiyo* 101B) gives guidelines based on the difficulty of finding an alternative property to rent. Thus, one cannot require the renter of a house to move during the winter whereas in the summer it suffices to give thirty days' notice. The Gemara explains that the reason for the difference is that there was a shortage of apartments available for rent in the winter.

The Mishna states that for stores one must grant an entire year since stores give credit to their customers and a year is required in order to ensure that all of the customers pay up their entire bill.

It is important to mention that all the rules apply to both the renter and the owner. Thus, just like the landlord must give thirty days' notice to his tenant in the summer, so too the tenant must inform the landlord thirty days before he vacates.

The difficulty of applying these rules to your situation is that the Rishonim including the Rif (*B.M.* 59A) and the Rosh (*B.M.* 8, 24-25) cite the Yerushalmi that limits the applicability of the Mishna to a rental agreement that only stipulated the amount the renter was required to pay each month but did not stipulate the length of the rental period. If the contract stipulated the length of the rental period, the agreement automatically ends at the end of the rental period. The reason is because the contract itself serves as notice that at the end of the rental period the rental will cease. Thus, in your situation had you vacated the apartment at the end of the year the landlord could not force you to remain for another month because you had effectively informed him by means of the contract that you would vacate at the end of the year.

We now have to consider your situation, where you continued living after the rental period was up. This situation is discussed by the Rishonim beginning with Rav Hai Gaon (cited by the *Ba'al Haitur*) who rule that the fact that you continued living in the apartment after your lease ended does not constitute a renewal of the lease. As the Radvaz (*Responsa* 2060) argues: "Is the landlord required to evict his tenant immediately upon the end of the lease? While it is true that he had the right to evict the tenant, nonetheless, the landlord does not forfeit this right by failing to exercise this right immediately."

Many poskim cite a response of the Rosh (1, 7) who dealt with the flip side of your question. In his situation, two months after the tenant's lease ended the tenant informed the landlord that he wished to vacate. The landlord argued that the tenant's request should not be honored because in the area where the rental was located there was just one time in the year when people rented apartments. Therefore, if the tenant would vacate immediately he would cause the landlord a loss of ten months' rent since no one will rent in the interim. The Rosh sided with the landlord and explained that in this situation it was incumbent upon the tenant to have informed the landlord at the time the lease terminated that he only intended to continue for another two months. Since the tenant failed to do so he effectively renewed the lease by staying on after the lease ended.

The poskim derive from this response that, in general, living past the termination of a lease does not constitute renewal of the lease. Furthermore, one can derive that if there is a special situation that prevents the landlord from finding a new tenant the old lease continues.

There is a dispute how to view the relationship between the tenant and landlord after the lease expires. Many poskim, including the previously cited Radvaz, as well as the Mahari Ben Lev (4, 28), maintain that the tenant is living on a day-to-day basis. Thus, the Mahari Ben Lev writes that both the tenant and the landlord need not give any advance notice of their desire to terminate their relationship. The Aruch Hashulchan (312, 24) disagrees. He agrees that there is no rental period. However, he maintains that the rules which the Gemara gives for one who does not rent for a specific period but merely agrees how much the tenant must pay per period (e.g. a month or a year) apply. Thus, since the Gemara rules that in the summer one must give thirty days' notice so too here one must give thirty days' notice.

Rav Shlomo Kluger (*Chochmas Shlomo* in his notes in the margin of *CM* 312, 1) discusses a situation that occurred in his town, Brody. A tenant rented an apartment on 21 of Iyar 1840 for a year for a fixed yearly payment. Subsequently, for the next seventeen years, no contract was made between the landlord and his tenant. On Rosh Chodesh Iyar 1859 there was a fire which destroyed the landlord's house. The landlord wanted to evict the tenant immediately since he had no alternative living facilities.

Rav Shlomo Kluger ruled that not only did the landlord have no right to evict his tenant immediately but he must allow him to remain until 21 Iyar 1860! He argued two points. First, since for the seventeen years following the first year the tenant continued living in the apartment and paid the same yearly rent without ever discussing the next year, it is as if they agreed each year to renew for another year. Therefore, until 21 Iyar 1859 the landlord certainly may not evict his tenant. He argued further that since the landlord did not give the tenant thirty days' notice before his year was up it is as if he agreed to continue for another year. The Maharash Engel (4, 20) agrees with the first point but disagrees with the second.

Even though it might seem that these poskim disagree with the previous poskim that is not necessarily the case. The difference is that Rav Shlomo Kluger is discussing someone who has experience of many years where each year he continued for an entire rental period without discussing renewal. On the other hand, the earlier poskim were discussing someone who was in the first year after the contract expired. They had no track record of continuing the rental for an entire rental period without a contract.

Therefore, since you are only in the first year past the contract, the landlord can evict you at any time. As we mentioned, according to some he could ask you to leave tomorrow but according to the Aruch

Hashulchan he must give you a month's notice. Since he is giving you two months he is certainly within his rights. We should note that if you decide to leave after a month you may do so since you are also not bound by the previous contract.

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Rented a Store and has nothing to Sell

I bought a company that sold pizza. Before purchasing the business I gave an accountant the records of the business to see if it was a worthwhile investment. The accountant checked over the books and reported that indeed it was quite profitable. Based on this, I purchased the business and rented a store to make and sell the pizza. I told the storeowner that the reason I wanted to rent is because I had bought someone's pizza business. However, shortly thereafter it became clear that the sellers had altered the records and the business was not a worthwhile investment. We therefore canceled the purchase on the grounds that it was a *mekach to'us*. However, when we tried to cancel our lease for the store, the owner did not want to release us from our contract. Can we cancel the agreement or are we bound by our original agreement?

Answer:

We find in the Torah and Gemara that there are specific rules when one has the right to cancel an agreement. In the Torah we find that Moshe Rabbeinu made his grant of the east side of the Jordan River to the tribes of Reuven and Gad contingent upon their participation in the battle to conquer the west side of the Jordan River. From this the Gemara derives that one can insert conditions in an agreement and if one of the parties fails to adhere to the conditions, the agreement is invalid.

The Gemara (*Kiddushin* 49B) states that if one sold a parcel of land because he intended to emigrate to Eretz Yisroail the sale remains valid even if he is unable to emigrate due to unforeseen conditions. The reason is because the seller failed to stipulate the condition, namely that the sale is formally contingent upon his emigration. The fact that he failed to stipulate a condition renders his thoughts nothing more than *devorim shebeleiv* which have no validity. In order for a condition to be valid it must be stated explicitly as a condition.

However, the Gemara limits its ruling that the sale is final to a case where the seller did not even mention at the time of the sale that he intended to move to Eretz Yisroel. The implication is that if the seller did mention that he was selling because he intended to move then if he was forced to change his plans he could cancel the sale even though the sale was not stated explicitly as being contingent upon the seller's moving to Eretz Yisroel. Thus, a mere mention of the seller's intention suffices to make the sale contingent upon the seller's ability to implement his plans and one does not have to make his plans a formal condition in the sales agreement. Your situation would seem to be similar, since you mentioned your purchase of the business at the time of the rental and therefore, according to this you are justified in canceling your agreement.

However, the Rosh (*Kiddushin* 2, 15) deduces an important principle from the fact that Rashi made a point of mentioning that this rule was stated in reference to an immovable object (real property). He explains that there was a very clear distinction in the time of the Gemara between one who sold his land and one who sold movable objects. People did not sell their land unless they intended to move, because their land was their source of livelihood. In contrast, people at times sold their movable objects even if they did not intend to move. Thus, the Rosh argues that stating one's plans suffices only when it is supported by an *umdeno (a logical argument)* that the sale is contingent.

The principle of the Rosh is ruled by the Tur and the Ramo (207, 3) and is authoritative. Therefore, we must examine your situation in light of the Rosh's principle.

There are other situations that are discussed by the Tur and Shulchan Aruch which shed light on the Rosh's principle. The Tur (230, 9) records a dispute between Rabbeinu Yonah and Rabbeinu Chananel concerning a person who bought a large amount of wine and mentioned, at the time of purchase, that his intention was to sell it in a place where wine was expensive. Rabbeinu Chananel, whose opinion is ruled by the Tur and is authoritative, says that the customer has the right to cancel his purchase in case the price fell in the place where he intended to sell the wine. This seems to contradict what the Tur himself wrote concerning the sale of movable objects. The Pischei Teshuvo (207, 6) cites a number of poskim, including the Chasam Sofer (*CM* 70), who differentiate that when it comes to buying movable objects (as opposed to selling them) people don't buy them unless they have a reason and, therefore, it suffices if the customer mentioned his intention when he purchased the wine.

A third instance where this concept is discussed concerns rentals. The Ramo (312, 9) discusses the case of a person who rented out his house and mentioned at the time of the rental that he was renting it because the renter was his friend. The Ramo rules that if during the course of the rental period they became enemies the owner may cancel the rental. Thus we see another situation where a mere statement of fact suffices to insert a condition in an agreement.

The Ketsos (319) disagrees with the Ramo's ruling. He notes that people try to rent out any property of theirs that is vacant and therefore this should be similar to what the Rosh wrote about the sale of movable objects where it is necessary to stipulate one's conditions explicitly, according to the rules for conditional agreements.

The Nesivos (312, 7) addresses the objection of the Ketsos. He says the ruling of the Ramo applies only to a house which in the past was not rented out by its owner. In that case, the statement of the owner that he is renting to this customer because he is his friend suffices to allow the owner to cancel the rental when relations sour. It stands to reason that the Nesevos only applies if the renter is aware that the house was not rented out in the past since we want to use this fact to create a condition in an agreement between the owner and the renter.

We should note that the Nesivos is stating an important chiddush, which the Ketsos may disagree with. Until now in all our examples the rules were general and did not concern a particular situation. People in general do not sell immovable objects. People do not buy movable objects that aren't necessary for their day-to-day living, and so on. Here the Nesivos says that even if a person made an exception to his personal practice – which was not the general practice – it is enough.

The Maharsham (*Mishpat Sholom* 207, 14) gives a very important principle which is in accordance with the Nesivos. His rule is that if there is an *umdeno,* if it stands to reason that the statement which was made at the time of the agreement was critical, then the statement is binding even though it was never stated as a formal condition. Many later poskim (see *Pischei Choshen* (*Sechirus* 5, footnote 15)) accepted the principle of the Maharsham.

According to this principle, in your situation if you don't usually rent stores and the owner was aware of this then you can cancel the rental. However, if you have other stores or even if the owner is not aware that you only rented because of your purchase of the pizza business it would be difficult to allow you to cancel the rental. Furthermore, if you already paid a portion of the rent it will be difficult to recover the money since there may be poskim who do not agree with the Nesevos.

In conclusion: Your right to cancel the rental depends on what you do otherwise. In the future, it is always best to spell out all your conditions when you make a formal agreement. That way you will avoid sheilos and unnecessary dinei Torah.

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Rented Offices that became Unusable due to the Epidemic

I rented offices for a year beginning in August 2019. In March of 2020 the government ordered all offices closed for almost two months. Since the epidemic adversely affected my income in a very serious manner, I informed the landlord of my unequivocal desire to vacate and requested that he find someone else to take over my lease. However, since he did not bring in a new tenant, I resumed using the property when the government lifted its ban on using offices. However, my use of the rental was curtailed because large gatherings were still banned and part of the rental is a conference room which was unusable both because of the ban on large gatherings plus no one wanted to endanger their health. For the two months when the total ban was in effect I did not pay rent, but I did pay rent in full for the following months when I enjoyed only partial use of the facilities. Do I owe any money for the two months that I couldn't use the property at all? Or perhaps the landlord owes me some money for the months I had only limited use of the property?

Answer:

Since this question keeps coming up in various forms and the issue is very complicated, it is important to discuss the basics and explain the various positions and their rationale in a clear manner.

In this article we will deal with the first period when you had no use of the property. The fact that you could not use the property was

unforeseen at the time of the rental and was not due to your choice. Therefore, your inability to use the property is classified as resulting from an *oness*. However, this *oness* was not a private *oness,* like when one rents a property and then becomes ill preventing him from using the property. The circumstance which prevented you from using the property was a general *oness* which prevented everyone from using their office for anything more than their personal use. Furthermore, it is important to note that the *oness* affected both renters as well as owners of offices. This type of *oness* is called by the Gemara a *makas medino*-a national calamity. The laws concerning payment under these circumstances are not fully discussed in the Gemara, leaving a major dispute.

The one case of a *makas medino* which is discussed in the Gemara, concerns a person who rented a field where the rent was for a fixed amount of the crop (unlike a sharecropper who pays the owner a percentage of the crop). Due to unforeseen infestation, much of the crop was destroyed. The Mishna (*Bava Metsiyo* 105B) rules that in spite of the original agreement for a fixed amount, the renter is entitled to a reduction in his rent commensurate with the reduced crop but he cannot cancel the agreement.

The Maharam of Padua was asked to rule concerning the amount of rent which must be paid by renters of stores (in Italy in the sixteenth century) that were licensed to lend money to gentiles for interest. At the time the rental agreement was signed, the renters were allowed to freely lend to gentiles and charge interest. In the middle of the multi-year rental period, the local ruler issued an edict forbidding Jews to charge interest on loans which were not secured by collateral. This curtailed the profits of the renters of these stores and they claimed they were entitled to pay reduced rent based on this Mishna.

The Maharam replied that there is another Mishna (*Bava Metsiyo* 78A) that deals with this issue as well and seems to contradict the first Mishna

that we cited. This Mishna rules that if one rented a donkey that died during the course of the rental, the renter is only required to pay rent until the animal died and he is not required to pay even a reduced rent for the time following the animal's death, essentially canceling the agreement.

In order to resolve this apparent contradiction, the Maharam postulates that we must differentiate between two types of rentals: rentals where the one who rented invested in the property and those where he did not. In the first Mishna, the one who rented invested heavily in the field since he plowed, planted etc. If this renter were to discontinue the rental at that point he would forfeit his entire investment. Therefore, the Mishna rules that he is entitled to reduced rent. However, in the case of the donkey the renter loses nothing by canceling the rental when the donkey died.

Therefore, the renters of the stores in the case of the Maharam, who did not invest in the stores and actually continued to use them after the edict, could have discontinued the rental at the time of the edict, but if they did not do so they are not entitled to a reduction in rent. He explains that reducing rent is not an ideal solution since, while it takes the renter into consideration, it does not take the owner into consideration since he might be able to rent the property to someone else who will pay in full.

The Maharam explains the basis for the renter's right to cancel the agreement and why it is critical that he do so. He says that the basis is that every rental is an ongoing sale. In general when one buys an object and then discovers a blemish he is entitled to undo the sale because he never intended to purchase damaged merchandise. It is important to note that if the buyer continues using the object after discovering the damage, he forfeits his right to void the sale since his actions show that he accepts the purchase as it is.

The Maharam argues that when one rents, he is constantly purchasing the rental property on a temporary basis. Therefore, since at the outset the rental was unblemished, if it later suffered a blemish the renter is entitled to terminate the rental at that point. If the renter failed to terminate the agreement at that point he is still entitled to terminate the rental later whenever he wants. However he cannot terminate the agreement retroactively from the time of the appearance of the blemish, as the tenants were asking in the case of the Maharam. This is in contrast to a regular sale where the acceptance of the blemish means the buyer can never cancel the sale.

In your case you asked to terminate the rental but stayed on since the owner did not bring a new renter. Therefore, we have to consider whether your staying on served to cancel your notice that you desired to terminate the rental. Since the Maharam considers the rental to be a *mekach to'us* we can resolve this question by studying the laws of *mekach to'us*.

In our sefer the Mishpatei Yosher (page 448) we cite three opinions on this matter, with the majority maintaining that you did not forfeit your claim of *mekach to'us*. The reason is because the only reason one forfeits this claim when he uses the damaged object which he purchased following discovery of the blemish, is because by using the damaged object the customer shows that he intends to keep the damaged object in spite of the blemish. However, when the customer first informs the seller that he wants to return the damaged object the customer serves notice that his use of the damaged object should not be interpreted as intent to keep the damaged object. Therefore, in your case as well, the fact that you used the offices after having asked to leave does not cause you to forfeit your claim of *mekach to'us*.

Thus, we established that according to the Maharam of Padua you voided your rental agreement when you informed the owner that you

wanted to cancel your original agreement. You are still required to pay for the later use of the property even though you terminated your rental. However, for the two months you did not use the rental the Maharam would rule that you do not have to pay.

The approach of the Maharam was disputed by his cousin, the Ramo. The Ramo says that the proper approach to resolve the contradiction is by differentiating between a personal *oness* and a general *oness*. The case of the donkey is a personal *oness*. Therefore, the renter may cancel the agreement in unforeseen circumstances. However, the infested crop was a general *oness* and in a general *oness* the renter does not have the right to cancel the rental. His only recourse is to have his rent reduced.

Later poskim took sides in this dispute. For example, the Sema and Chassam Sofer and apparently the Shach and Gra side with the Maharam Padua, but the Taz, Nesivos, and Orach Hashulchan do not agree with the Maharam. Since this matter is a dispute and you did not pay for these two months you do not have to pay for them now since the rule is that *hamotsi mechaveiro olov horayo* – the one who wishes to extract money must prove his position, which the owner cannot do in your situation.

Therefore, we have successfully resolved the first issue: you are not required to pay anything for the time you did not use the offices and did not pay for them. We will discuss the second period which you paid for but are asking for a return of your money in the next article, Be'ezras Hashem.

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Rented Offices that became Unusable due to the Epidemic-Part 2

I rented offices for a year beginning in August 2019. In March of 2020 the government ordered all offices closed for almost two months. Since the epidemic adversely affected my income in a very serious manner, I informed the landlord of my unequivocal desire to vacate and requested that he find someone else to take over my lease. However, since he did not bring in a new tenant, I resumed using the property when the government lifted its ban on using offices. However, my use of the rental was curtailed because large gatherings were still banned and part of the rental is a conference room which was unusable both because of the ban on large gatherings plus no one wanted to endanger their health. For the two months when the total ban was in effect I did not pay rent, but I did pay rent in full for the following months when I enjoyed only partial use of the facilities. Do I owe any money for the two months that I couldn't use the property at all? Or perhaps the landlord owes me some money for the months I had only limited use of the property?

Answer:

Last week we dealt with the first period when the property was unusable. This article will discuss the months when you returned, paid full rent but only enjoyed partial use of the property. Your question is whether you are entitled to a refund for part of the rent that you paid for that period.

In halochoh, possession of a disputed sum (known as *muchzak*) carries great weight. In your case you are not in possession of the sum at issue. Your landlord is in possession.

Let us first discuss what you would have had to pay if you had not already paid, i.e. if you had returned to the premises as soon as they became available, but had not paid any rent, and now the landlord asks you to pay for the time you used the premises. In this case you are in possession of the disputed sum.

In the previous article, we mentioned that since Covid affected the entire nation, the situation is classified as a *makas medino* - a national catastrophe. We introduced two approaches to rentals that were adversely affected by a *makas medino*, one of the Maharam Padua and one of the Ramo. We will first discuss what each opinion rules in the hypothetical situation in which you are in possession of the disputed sum.

We recall that in the previous article we wrote that the reason you did not have to pay for the two months that you did not use the facilities is because you informed the landlord that you wanted to terminate your contract and vacate the premises. Your action was effective according to the Maharam Padua and those who follow his opinion. Thus, from a halachic standpoint your contract ended at that point. Carrying that further to the period when you returned, it means that you returned to the property knowing the landlord's price without discussing prices.

Even if you had no previous agreement, i.e. if you discussed with the landlord how much to pay and he told you his price and you told him the amount you were willing to pay and then you moved in with no further discussion, you would be required to pay the landlord's price.

The source for this ruling is a Tosefta (*Kiddushin* 2, 11) that discusses a case of two people who were negotiating a sale and the seller asked for two hundred and the buyer offered just one hundred. Since they could

not reach an agreement they then parted company. The Tosefta rules that if subsequently the customer approached the seller and asked for the item and they did not discuss prices any further, the customer is required to pay the price the seller asked for during the negotiations. The reason is that when the customer broke the stalemate and approached the seller, he thereby indicated his agreement to the seller's price.

In your case the situation is more conclusive, since you never even mentioned a different price. All you did was to move into an office whose price you knew without requesting a reduction in price. Therefore, by moving back you indicated you accepted the landlord's terms.

Thus, if one follows the opinion of the Maharam Padua you are required to pay the full price for the time you resumed your use of the offices. Moreover, in the case at hand you even paid the seller's original price and are no longer in possession of the disputed sum. Therefore, this opinion would certainly maintain that you are not entitled to a refund.

We wrote last week that the opinion of the Maharam Padua is disputed by the Ramo and others who follow his approach. This school of thought maintains that since the situation was a *makas medino,* often one may not legally terminate a rental agreement. Therefore, when you resumed using the offices you were using them within the framework of your original agreement. The reason you may be entitled to a reduction in rent is because at the time you originally rented, you had full use of the offices and when you resumed using the offices you no longer had full use. Furthermore, your resumption of use is not indicative of acquiescence since you had no choice since you were just continuing the original contract.

We saw in the previous article that even though there are a number of Acharonim who side with the Ramo that one cannot always terminate the lease, they do not all agree on the question of when you may not

terminate the lease and how much you have to pay if you may not terminate the lease.

One of these opinions is the Taz (*siman* 321). However, in your situation the Taz would side with the Maharam Padua that your cancellation was effective because in the first period the offices were required to be completely closed. Therefore, what we wrote according to the Maharam Padua is true according to the Taz as well.

Another opinion that sides with the Ramo is the Aruch Hashulchan (321, 9-12). He maintains that we must differentiate based on the intended use of the rental. If the rental was in order to earn the renter a profit, cancellation is not possible. However, if no profit was intended cancellation is effective. Since you are a chessed organization he too would agree that your cancellation was valid.

A third opinion that disagrees with the Maharam Padua is the Nesivos (321, 1). He maintains that the cancellation was invalid and the original contract was still in effect. However, he would maintain that you were not entitled to a reduction in your rent because the property was usable *per se*. It was only that you could not make full use of the rental because the particular use you intended was not possible during part of the rental period. Therefore, he too would require you to pay the full price.

Thus, we have established that everyone agrees that you were required to pay the full price when you resumed use of the property and they just disagree over whether you were required to continue the rental or not.

We should note that all the above is true even if you would have not already paid the full price and were thus still in possession of the disputed sum. However having paid the full-price makes your case for having your rent reduced even weaker, because the opinion of the Machane Efraim (*Sechirus* 7) is that even when one is entitled to a reduction in price based on a *makas medino* he forfeits that right by

paying. The reason is that paying shows agreement to pay the full price in spite of the altered state of affairs. The basis of this argument is Tosafos (*Bava Metsiyo* 79B). While others disagree with the Machane Efraim it will not affect the outcome since the consensus in any case is that you were required to pay the full-price.

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Landlord Neglects a Leak Causing a Loss to the Renter

I live in rental apartment. In our contract it states that I have to pay the water bill and need to register my rental with the municipality so that they should bill me directly for the water, which I did. Recently, a water pipe began leaking and I promptly informed the landlord that he should fix the leak. However, it took the landlord almost a month until he brought in a plumber and as a result I got a much larger water bill than usual because of all the extra water that went to waste. May I charge the landlord for the extra water, since it is his fault?

Answer:

Before discussing the question we should clarify that a rental agreement, like all agreements, creates responsibilities and grants rights. In the following discussion we will clarify several of these responsibilities and rights.

In order to answer your *sheilo* we need to clarify a number of issues. The first issue is: who is responsible to fix leaking pipes in a rented apartment according to Torah law.

The Gemoro (*Bava Metsiyo* 101B) states that the general rule is that any repair which is commonly done by a skilled workman is the responsibility of the owner. There is a difference of opinion among the *Rishonim* whether this applies to problems that develop during the rental period or only applies to repairs that were needed at the time of

the rental. Most *Rishonim* (e.g. *Rosh res* 35, 6) are of the opinion that this applies even to damages that develop during the course of the rental, namely, that the landlord is responsible for repairing the damages if generally they are repaired by landlords. He is not obligated to make minor repairs which landlords typically do not repair. That is the ruling of the Shulchan Aruch (312, 17).

The minority opinion (e.g. *Ritva* on *Bava Metsiyo* 101B)) maintains that the landlord is not obligated to repair these damages. However, many (*Ramban* cited by the *Ritva* who concurs) maintain that while the renter cannot force the landlord to repair, nevertheless, the owner will not be able to charge the full rental payment because the apartment is in a state of disrepair. Thus, if the owner wants to charge full rent he must repair damages that require the services of a skilled repairman.

Furthermore, since it is customary that the landlord is responsible for the repairs, that is automatically a condition of the rental agreement (*Ramo* 314, 2). Therefore your landlord was certainly obligated to repair the pipe, according to Torah law.

It is important to point out that there is a cap on the cost of the repairs that the landlord is obligated to pay. The Nesivos (312, 11) and others explain that the landlord is only obligated to use the rental money to repair the rental, but he has no obligation to use his savings in order to enable the renter to fully utilize the rental. If the cost of the repair exceeds the landlord's income from the present rental, the landlord can refuse to repair the property. Of course, he cannot force the renter to remain. It is just that the renter cannot force the owner to repair.

The second issue to consider is whether you could have repaired the pipe yourself and what would have been the monetary consequences of your doing so.

As we mentioned above, the Nesivos explains the Shulchan Aruch (312, 17) that the landlord is not obligated to dip into his savings in order to

provide his renter with a usable apartment. The Nesivos deduces that, therefore, if the renter prepaid for time that he hasn't yet occupied, the landlord must utilize the extra funds he already received to perform the necessary repairs. He says that if the renter did not prepay, since the funds that the owner is obligated to use are still in the renter's possession, the renter can use these funds himself to hire someone to perform the repairs.

Thus we see that a renter can himself fund and arrange for the repairs to be done if he still has outstanding rent, even for future months. This is also the opinion of the Kesef Hakodoshim (314, 1) and the Ra'anach (res. 38). The Kesef HaKodshim advises showing the problem to the local *beis din* and working under their guidance so as to avoid future issues concerning whether the repair was really necessary and whether the renter overpaid. Often that is difficult but one should at least get written estimates from three repairmen, since that is common prudent practice and the practice of *beis din*.

Thus, we have established two very important principles. One is that the owner was obligated to repair the leak, and two if he is derelict in performing his duties the tenant has the right to repair the leak at the landlord's expense. However, in your case neither of these occurred. Neither the landlord nor the tenant repaired the burst pipe and the water went to waste at the tenant's expense. Therefore, we have to decide if the landlord must reimburse the tenant for the additional amount he was charged by the water supplier.

It is clear that the grounds for charging the landlord for the additional amount the tenant was forced to pay is that he damaged the tenant. Since he didn't physically damage the tenant's property these are causative damages. We know that there are two classes of causative damages: *garmi* for which one is liable and *gromo* for which one is not liable.

Since the damages resulted from the inaction of the landlord there is a dispute among the *Rishonim* if one can classify the damages as *garmi*. The source for this dispute is the *beraiso* (*Bovo Basra* 2A) that discusses the case of one neighbor who has a vineyard and the other who grows grain and the fence separating them develops a hole. The ruling is that the owner of the vineyard must repair the fence and, if he is warned to repair the hole and neglects to do so resulting in his neighbor's loss of his grain crop, due to the prohibition of deriving benefit from *kilayei hakerem* (growing grain in a vineyard), he is liable.

The Gemoro (*Bava Kama* 100A) explains that the basis for the vineyard owner's liability is that what he did is classified as *garmi*. The *Rishonim* dispute why this is classified as *garmi*. The Ramban (*Kuntress Garmi*) writes that the vines are like the ox of the vineyard owner and they damaged the neighbor.

The Ramah (*Bava Basra* 17-18 and cited by *Tur siman* 157) however, maintains that the reason is that the vineyard owner was derelict in fulfilling his duty to repair the fence. He deduces from this that if one neglects to construct a fence separating his property from his neighbor's and as a result his neighbor was burglarized, he is liable. He specifically writes that the reason is that one is liable for his inaction.

Thus we have a major dispute whether inaction can be classified as *garmi* or not with the Ramah and Riaz (*Shiltei Gibborim Bava Kama*) and others ruling that it is possible and many *Rishonim* including the Rosh (*res* 101, 10) and Meiri (*Bava Kama* 56A) ruling that it is not possible for it to be *garmi*. It is important to note that the opinion of the Ramah is cited by the Tur (*siman* 157) and the Ramo (155, 44).

Since it is a major dispute, *beis din* will not force one who causes damages by inaction to pay, but if he holds money of the one who damaged him he will not be forced to return the money because he can say *kim li* like the Ramah.

We should note that this *braiso* also is a source that even though the damaged party could have prevented the damage, the one who damaged as a *garmi* is still liable. The proof is that in the case of the vineyard, the grain owner could have repaired the fence himself and later sought compensation from his neighbor. This is particularly important in your situation since, as we mentioned earlier, you had the right to repair the leak at the expense of your landlord.

We should note further that even those who maintain that inaction cannot be classified as *garmi*, hold that it can certainly be classified as *gromo* because *gromo* does not require action as we can derive from the Gemoro (*Bava Kama* 56A) that states that one who refuses to testify is called a *gromo* and he is not liable in *beis din* but is liable in the heavenly court.

There is a major dispute if a person can grab money from one who owes him money, only in the heavenly court. While the Shach (28, 2) agrees with the Maharshal that one cannot, there are others (See *Pischei Teshuvo* (28, 6) and Rabbi Akiva Eiger who cite others and in fact this is the opinion of *Rishonim* like the Meiri (*Bava Kama* 56A) and Ohr Zorua (see *Maharach Ohr Zorua* 229)) who maintain that one can grab. Rabbi Akiva Eiger is undecided if a person can say *kim li* like those who say that grabbing is allowed.

Moreover, in your situation you have the additional support of the Ramah and others who maintain that even *beis din* could force the landlord to pay because it is called *garmi*. Therefore, if you didn't yet pay all your rent you can withhold from the rent the amount you needed to pay extra because of your landlord's negligence. However, it is wise to wait until the last month since otherwise your landlord can try to evict you due to failure to pay rent. Additionally, if he has a security check from you he may be able to cash the check for the missing rent but that requires another discussion.

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Canceled a Verbal Rental Agreement at the Last Moment-Part 1

My father who lives in Yerushalaim became ill recently. In order to visit on Shabbos, I agreed to rent an apartment in a nearby neighborhood but there was only an oral agreement. On Wednesday my father's condition worsened and he had to be hospitalized and they also diagnosed him with Covid. Since we could no longer visit him on Shabbos, we decided to rent a larger apartment in a different neighborhood to enable us to be together with many more family members. When we called to cancel, the owner told me he had turned down a number of offers because he had rented to us. In the end, he didn't find another renter. Must I pay him since I had originally agreed to rent the apartment and caused him a loss?

Answer:

As usual, we must first consider the halachic interpretation of your question.

The Gemoro says (*Bava Kama* 79A) that one legally acquires an immovable object, such as an apartment, as a rental (not a purchase), by performing one of the following three actions: giving *kesef* (paying), *shtar* (signing a contract) or *chazoko* (moving in). You did none of these. Therefore, at first glance it would seem that you can cancel your agreement. This would be the end of the story from a monetary point of view if the owner did not suffer any loss. However, since you believe

him that he did suffer a loss, we have to determine whether you have any responsibility for his loss.

There is no Gemoro that deals directly with your question. Even the Rishonim and Shulchan Aruch only discuss this essential issue in the context of employment agreements but not of rental agreements. However, we have seen that in many ways these two kinds of agreements are very similar since when one employs a worker he is essentially renting him to perform a job. It is just that an employee provides a different type of service than a rented facility. We will therefore study what has been written about employment agreements and we will at the same time carefully consider whether one can apply those findings to property rentals.

We will also need to investigate if even today the situation remains as in the time of the Gemoro and Shulchan Aruch, that verbal agreements do not have the status of a *kinyan*. Finally, since the ruling depends also on the reason for canceling the agreement we will also discuss how to classify the reason for your cancellation. In this part of the article we will only deal with the first issue.

The Gemoro (*Bava Metsiyo* 76B) writes that only if the worker actually began working, is the employer liable to pay the worker whose employment was canceled by the employer. The reason beginning to work is so crucial is that beginning to work constitutes an act that carries the weight of a *kinyan*, a legal action that binds both parties to their agreement. It obligates both the employee to work and the employer to pay his employee. However, if the employer canceled the employment agreement before the employee began working or performed any other formal act to obligate the employer to engage his services, the employer may cancel their agreement without incurring any liability. We will now study three approaches among the Rishonim concerning the question of whether the employer really bears no

liability. Note that this is exactly your question translated to the context of employment agreements.

Tosafos (*ibid*) and the Rosh (*BM* 6, 2) ask that even though the employer isn't liable to pay the employee any wages if he fired him at this stage, nevertheless, he should be liable for damages since he caused the employee to pass up other employment opportunities, a causative damage that falls into the category of *garmi*? They answer that the premise of the question is essentially correct. The employer would be liable as one is liable for any *garmi* just that the Gemoro was discussing a situation where there were no causative damages. We should note that if the employer is liable for the loss he caused to his employee because it is classified as *garmi* then the damage you caused the owner would also be considered *garmi* and you would be liable because in both cases cancellation by the purchaser of the services caused the provider of services a loss of income.

However, both the Ketsos (note 2) and Nesivos (note 3) claim to have proof that this damage does not fall into the category of *garmi* since the employee did not suffer an actual loss but only a loss of potential income. The Ketsos goes so far as to rule against the Shulchan Aruchm to say that the employer is not liable. However, the consensus of poskim is against the Ketsos. (So ruled the Tehillo Ledovid siman 333 and that is the consensus of contemporary poskim and thus one cannot even claim *kim li* like the Ketsos.) However, many agree with the Ketsos to the extent that *garmi* applies only if one caused a loss and not just a loss of income. They disagree with him in practice in the case at hand because they find other reasons to require the employer to pay.

However, there are others such as the Ohel Moshe (*res*. 2, 52) and Nefesh Chayo (*BM* 76B) who disagree with the Ketsos and Nesivos and maintain that the understanding of Tosafos and the Rosh that the employer's action constitutes *garmi* is correct since the income was

certain. They maintain that even being a cause of a loss of income is included in *garmi* if the income is certain. According to them, one who canceled a rental agreement is liable if there was another renter, as in your situation, since the loss was certain.

The Nemukei Yosef (*BM* 46A) and Rashbo (*BM* 76B) have a second approach. They agree that the employer is liable if he canceled in the manner described above, just that rather than attribute the liability to the general class of damages known as *garmi*, they say that the reason is that employers and employees have mutual liability for *dovor ho'oveid*-a monetary loss that one may cause the other. It is not clear from these Rishonim what is the source for and the nature of this mutual liability for *dovor ho'oveid*.

While the Tur (*siman* 333) writes that the reason the employer is liable is due to *garmi*, the Shulchan Aruch (333, 2) brings the reason of the Nemukei Yosef that the reason for the employer's liability is because it is a *dovor ho'oveid*. However, the Sema (note 8) explains that the Shulchan Aruch means *garmi*. Thus, the Sema seems to have understood that this mutual liability falls into the general category of *garmi* and the Nemukei Yosef and Tosafos are actually the same opinion. However, many commentaries (R. Akiva Eiger 333, 2), Ketsos, Nesivos, Gra) comment that this is quite strained since if the Rishonim and Shulchan Aruch mean *garmi* there is no need to connect the employee's loss of income with the employer's loss in case the worker quits. Thus, we have to understand the new concept of mutual liability for *dovor ho'oveid* and see if it applies equally to property rentals.

The Nesivos understands that the mutual liability is a Rabbinic institution governing employer-employee contracts. He explains that since normal principles do not suffice to create liability, a special Rabbinic edict was required. He even claims that when Tosafos and the Rosh called the damages *garmi* they meant that it was a special edict and there is no real

disagreement between Tosafos and the Nemukei Yosef and no one really means ordinary *garmi*. However, this is quite difficult and it seems far more plausible (and this is implied by R Akiva Eiger and the Gra) that these are two distinct approaches.

The Ritva (73B and 75B) understands that when an employer and employee enter into an employment agreement, since the basis for the agreement is mutual trust, therefore to bolster each one's confidence that the agreement will be carried out, they obligate their assets as if they were cosigners (*areivim)* on their mutual obligations. The Chazon Ish (*Bava Kama* 23, 36) and Kehillas Yakov (*BM* 38) understand that this is a full-fledged Biblical liability like any other monetary obligation and this is the source for the liability that the Nemukei Yosef and Rashbo speak about. It should be noted that even though the approach of the Chazon Ish and Kehillas Yakov may very well be correct in their interpretation of the Nemukei Yosef, since the Nemukei Yosef often follows the approach of the Ritva, it is problematic halachically since most poskim (See *Ramo* (333, 6) and the Nesivos thereon (333, 14))) disagree with at least part of the Ritva and maintain that the employee has no monetary liability if he does not fulfill his commitment.

However, the Ketsos (333,3) says that we can understand this mutual liability even if we do not maintain that the employee has monetary liability. He explains that the mutual relationship is that each accepts a penalty that is related to his role in their agreement. For the employer it is a monetary liability since his role in an employment agreement is to pay the employee. But for the employee it is a penalty that will coerce him into working since that is his responsibility as a result of the employment agreement.

The Erech Shai (312, 14) also understands that the Ritva serves as the basis for the mutual employer-employee liability in case either causes the other a loss. He specifically states that this agreement applies to

property rentals as well. He also understands that this is the intention of the Nesivos. The Mishpat Shalom (176, 14) also agrees that based on the Ritva a renter who causes a loss to the property owner is liable for the owner's loss.

Thus, many maintain that those who follow the second approach maintain that one who backs out of a property rental is liable monetarily even though there was no *kinyan*.

There is a third approach that is taken by the Mordechai (*Bava Kama* 115). He explains that when one obligates himself to pay for a good or service he not only obligates himself to pay if he receives what he paid for, but also in case he changed his mind and caused the other party to lose. He specifically applies this to rentals and says that when one agrees to rent something he is agreeing to pay both if he uses the rental or does not use the rental but the owner was not able to rent to another person. This approach is ruled by the Erech Shai (333, 1), the Ulam Hamishpot (310, 3) and the Malbushei Yom Tov (*res.* CM 7). Therefore, following this approach as well, you are liable after canceling your rental.

We should mention that there is a fourth approach that was suggested by the Ketsos and the Chazon Ish (*Bava Kama* 22, 1) and applies only to employees but not to property rental. This approach maintains that the employer is liable because the Torah made anyone liable if he damages a worker so that he cannot work (*sheves*). Similarly if one hires someone and then cancels in a manner that prevented the worker from working, he is liable since in essence he is like anyone who prevents someone from working. (The Ketsos only maintains that the Shulchan Aruch does not agree that one is liable even in case of employees and therefore he argues on the ruling of the Shulchan Aruch that one is liable to his employees.)

In conclusion: We have seen that very many poskim maintain that even if we hold that a verbal agreement does not constitute a formal act of *kinyan*, nevertheless, one who agrees even only verbally is liable for the damages he causes the owner. Thus you are liable for the losses of the landlord.

It is true that there are opinions that rule that you are not liable. However, there are two important points to consider. First, even if one is not liable in this world for damages that are only *gromo* (and not *garmi*), one is generally liable for such causative damages in the *shomayim*-the world to come. One certainly should pay in this world for these damages since otherwise he will be punished after death. Many, including Rav Zalman Nechemia Goldberg, maintain that beis din, nowadays, can force someone to pay for damages for which he is liable in the *shomayim* in the context of the *shtar borerus*.

Second, in the next part we will see that many maintain that today even a verbal commitment constitutes a *kinyan*. If this is correct then you are certainly liable to pay as a renter and not just for damages.

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Cancelled a Verbal Rental Agreement at the Last Moment-Part 2

My father who lives in Yerushalaim became ill recently. In order to visit on Shabbos, I agreed to rent an apartment in a nearby neighborhood but there was only an oral agreement. On Wednesday my father's condition worsened and he had to be hospitalized and they also diagnosed him with Covid. Since we could no longer visit him on Shabbos, we decided to rent a larger apartment in a different neighborhood to enable us to be together with many more family members. When we called to cancel, the owner told me he had turned down a number of offers because he had rented to us. In the end, he didn't find another renter. Must I pay him since I had originally agreed to rent the apartment and caused him a loss?

Answer:

Last week we discussed the question from the viewpoint of the Gemara and Shulchan Aruch that you did not make a formal *kinyan* and therefore, your halachic status was that of one who reserved the apartment, but you never formally acquired the rental property. The reason you did not acquire the apartment is because you never performed an action that qualifies as a *kinyan*. We saw that according to many opinions you are nonetheless liable. However, it is important to note that your liability is for damages and not for rental payment.

In this article we will consider that perhaps nowadays what you did qualifies as an act of *kinyan* even in Jewish law and you actually owe rent.

Of course, if you pay rent there were no damages. However, we saw in the previous article that some poskim maintain that you do not need to pay damages. Therefore, the discussion here is important because even those who maintain that you don't pay damages may agree that you need to pay rent. Also if you need to pay rent, we do not have to determine if there were damages or not.

The reason the situation changed from the time of the Gemara and the Shulchan Aruch is based on the fact that nowadays, under secular law, if the owner of an apartment and a prospective tenant agree – even on the phone – to rent an apartment, the rental agreement is legally in effect.

There are two reasons the secular law can create a *kinyan* in Jewish religious law. The first reason is that secular law may create a custom and there is a halachic *kinyan* called *setumpto*-custom. Custom does not have to be based on secular law and often secular law does not create a custom. Stated precisely: any act that is customarily accepted as a means for changing ownership is considered as an act of *kinyan* under Jewish law. For example, in many places a handshake is accepted as effecting change of ownership. Sometimes the secular law recognized this and sometimes it did not. However, in any place it was the established custom among Jews it is halachically valid. For example, in many times and places if one Jew sold a cow to another Jew and they shook hands, ownership of the cow changed hands according to Jewish law.

There is a dispute about the status of this *kinyan*. The Nesivos (201, 1) writes that it is an institution of the Rabbonon that custom affects a *kinyan*.

However, the Chasam Sofer (*Yoreh Deoh* 314, *nimtso*) reasons that it is effective from the Torah. He argues that in other cases when the Rabbonon enacted a *kinyan* their decision was to grant legal status to an action. However, *setumpto*-custom does not stem from a decision

of the Rabbis. Rather people decided on their own to view an action as a means for transferring ownership. Since it is people's decision, it is viewed as if it were a condition stipulated in the agreement of the parties, that they can transfer ownership by means of that customary act. Just like any other condition in a monetary agreement is effective under Torah law so too this condition is effective.

This is an important issue when one wishes to transfer ownership in order to affect Torah Law. For example, the Chasam Sofer was discussing one who sold his cow to a gentile by means of a handshake in order to prevent the first-born calf from being a *bechor*. If one follows the approach of the Chasam Sofer, there is no problem. However, if one follows the approach of the Nesivos it could be that the calf is a *bechor* since from the standpoint of the Torah, ownership of the mother was never transferred to a gentile. This is also an issue in selling *chametz*. Since *chametz* is a Torah prohibition we must sell *chametz* to a gentile in a manner that is valid under Torah law and does not only have the status of a Rabbinic enactment.

As far as your question is concerned, it does not make a difference if the *kinyan* has the status of Torah law or Rabbinic.

However, there is an issue if speech suffices to affect a *kinyan* of *setumpto* or must one perform a physical action.

A source that speech suffices is the Maharam of Rottenberg (cited by *Mordechai Shabbos* 472 and *Beis Yosef Yoreh Deah* 264) who ruled that one who tells a *moheil* that he can perform a bris on his son has committed himself by means of *setumpto* to that *moheil*. The one who disagrees is the Rosh (res. 12, 3) who comments on this Maharam that even if there is a custom to rely on speech to affect a transfer of ownership it is not a proper custom. (He says it is a *minhag gorua*.) Thus it cannot qualify to affect the *kinyan* of *setumpto*. He adds that perhaps it was not the custom either to commit oneself verbally.

There are poskim (e.g. the *Maharshal* in *Yam Shel Shlomo BK* 8, 60) who understand that the main reason of the Rosh was his second reason, and even he agrees that where there is a well-established custom to rely on speech alone to obligate the one who spoke, speech does affect a *kinyan*. Based on this, he rules that if the *gabbai* calls someone to the Torah and another person takes his place, he is liable to pay the one who was honored by the *gabbai*. Similarly, Rav Moshe Sternbuch (*Teshuvos Vehanhogos* 1, 803) rules that the custom of diamond dealers to transfer ownership of diamonds by saying the words "*mazal ubrocho*" is a valid *kinyan* and one may not back out of his commitment afterwards. He bases himself on the fact that this is a prevalent custom. Furthermore, he reasons that it is a good custom because it saves diamond dealers from having to walk around with their diamonds.

Based on the above, many poskim therefore maintain that you actually rented the apartment and you owe rent even if you would have been a true *onus* (which you weren't). The case for ruling that a verbal agreement has halachic effect may be even stronger, especially when one rents from a hotel, since conversations are generally recorded. Maybe even the Rosh would agree that a recorded conversation is not just speech because it does not have the drawback that mere speech has, namely that one can deny what he said. Therefore, it may very well be that if the owner recorded your conversation everyone would agree that you actually rented the apartment. Certainly if you and the owner exchanged e–mails or WhatsApp's stating that you are taking the apartment you would be a renter.

The second reason that you may be considered a full-fledged renter is based on the concept of *dina demalchusa dina* i.e. it is a halacha that one must abide by the laws of the land. We should understand the significance of this rule. Whereas one who is not a religious Jew decides whether he will abide by a law based on considerations such as what are the consequences if he does not abide by the law (e.g. what are the chances

he will be caught, what are the penalties for not abiding) a religious Jew must keep the law even if there are no negative consequences for doing so, simply because the law assumes the status of a halacha. We must keep the halacha because Hashem or the Rabbonon said so even if nothing bad will result from not keeping a halacha.

This is a lengthy topic, which we won't treat now but just consider this rule as it pertains to your situation. The Chasam Sofer that was cited earlier says that even the Nesivos who maintains that ordinary *setumpto* is only rabbinic agrees that where the custom is actually the law of the land the *kinyan* is Biblical since we have the support of the principle that *dina demalchusa dina*. The Nesivos (201, 1) (and the Noda Biyehuda (*Orach Chaim Tinyono* 59)) himself raises the possibility that a custom that is also the law is effective even where custom alone would not be effective. Since the law is that verbal contracts are binding, by virtue of *dina demalchusa* combined with *setumpto* we have even more reason to maintain that you actually made a *kinyan* and you actually rented the property. If you rented the property then we don't need all of the previous article in order for you to be liable.

Finally, a word about whether you can claim that your cancellation was a result of an *oness* since your father's health situation changed between the time you rented and Shabbos when you actually needed the apartment. One cannot classify this as an *oness* since what happened did not affect your ability to use the apartment. You just chose another apartment that was more suitable for your needs since you anyway couldn't visit your father. Whenever one cancels because he wants to improve his situation, we do not classify the cancellation as an *oness*. One source for this principle is the Ketsos (316, 1) who rules that if a person rented a house and then inherited another house making the rental unnecessary, nevertheless he may not cancel his rental since he can still use the house.

In conclusion: Besides the reasons mentioned in last week's article why you are liable for causing a loss to the owner, you are almost certainly liable as a renter. Additionally, you cannot claim that your cancellation is a result of an *oness*.

46

Landlord wants to raise Rent in the middle of the year

Two and a half years ago, when I began renting the apartment in which I live, I signed a one year contract with the owner. At the end of the first year, I said that I want to continue for another year and the owner said fine and we didn't discuss anything else. I just continued paying the same rent. After the second year I didn't say anything, assuming that since he didn't say anything either that I can continue for a third year and I kept on paying the same rent. Now, in the middle of the third year, the landlord called me up and said that he heard that rental rates have increased and he is raising my rent by twenty percent. I replied that I don't think he has the right to raise my rent since we are in the middle of the year and by accepting my rental payments until now he agreed to renew my lease for a third year. Is my argument correct?

Answer:

Your question really is whether you have a contract to live in your apartment for the original price or not. You are arguing that since you and your landlord have conducted yourselves in accordance with your original contract and the original contract was for a year for a certain price, you have the right to pay that price for the remainder of the current year. The owner is, in effect, arguing that you don't have a contract and even if you do, he is not bound by the original price and, therefore, he is free to raise your rent.

Your situation is not discussed in the Gemara explicitly. One situation that is discussed briefly (*Kesubos* 90A) and bears on your question is a father who married off his son who was a minor and he wrote a *kesuba* obligating his son to pay more than the minimum amount that one must pay when he divorces his wife. The Gemoro rules that if the son becomes bar mitzvah and remains married he is not obligated to pay more than the minimum amount that every married man must pay if he divorces his wife. We see in this case that where the couple continued living together without discussing the issue of the amount of his *kesuba,* the *kesuba* does not remain as it was under their original agreement.

The reason we consider becoming bar mitzvah as a new period is because when the son was a minor he was not legally married since a minor man cannot wed legally. But when he becomes bar mitzvah and continues living with his wife, the boy effectively marries his wife because he is now able to wed. By continuing to live with his wife after his bar mitzvah he marries her anew starting then, but since he did not renew his obligation to pay the larger amount he is no longer obligated to keep the terms of the original agreement.

The Rivash (res. 475) was asked to decide a dispute between a community that hired a chazzan for a year and freed him from paying community taxes. After the year the chazzan continued working. When he was asked to pay taxes then, he claimed that since under the original contract he was freed from paying taxes he retained that right. The community argued that the waiver was only for the life of the original contract, which was for one year, and therefore, now in the second year, he does not have a tax waiver. The Rivash ruled that since the community agreed that the chazzan should continue working for another year, even though there was no mention of continuing the tax waiver, the waiver applies to the next year as well and therefore, it is different from the Gemoro in Kesubos.

There is a major dispute how to interpret the differentiation that the Rivash makes between his situation and the Gemara's case of the marriage of the underage boy. The Rama (CM 333, 8 and *Darkei Moshe* 333, 6) understands that the difference is that in the Rivash's case the community agreed that the chazzan should work for another year, whereas in the case of the Gemara the marriage just continued without any discussion between husband and wife that they would continue. Even though in the Rivash's case there was no mention that the waiver would continue, still, since they spoke that the chazzan would continue, that implied that they would continue with the same terms as previously. Thus, according to the Rama, if nothing at all is said about continuing, the terms of the original agreement do not apply.

The Shach disagrees with the Ramo's interpretation. He understands that the Rivash's differentiation was that in the case of the Gemara even though the father wrote a large *kesuba* for his daughter-in-law, nonetheless, it was not valid because a minor cannot wed. Since it was never valid in the first case, therefore, when they did wed it did not obligate the boy to its terms. However, in the case of the Rivash, since the original agreement with the chazzan was valid at the time it was made, it automatically continues even if nothing at all was said about the chazzan continuing to work for another year.

We should first note that even though the Taz (333, 8) agrees with the Shach, many later poskim (*Machane Efraim* (*Sechirus 12*), *Divrei Mishpot* (312, 2) and others) side with the Ramo.

Second, the Aruch Hashulchan (333, 30), while he agrees with the Shach in his dispute with the Ramo, places a major limitation on the Shach's ruling. He claims that the Shach only argues on the Ramo concerning issues of the past but not issues concerning the future.

A similar situation to yours where the Aruch Hashulchan would maintain that there is a dispute between the Ramo and Shach is if you

had lived in the apartment in the third year and had not paid your rent for that year, and then the landlord asked you to pay a higher price for those past months claiming that rates have risen and your old price is out-of-line. According to the Shach, he would not be able to force you to pay a higher price since you have a contract which says you only have to pay the original price. But according to the Ramo he could force you to pay the customary price since you were living in the apartment without a contract and the rule is that one who lives without a contract must pay the customary price. The Aruch Hashulchan would rule like the Shach that the owner could not force you to pay the higher price since that is an issue concerning the past.

However, in your situation that is not the issue, since the owner accepted your payments at the lower rate. Your dispute concerns the future only and the Aruch Hashulchan says that in this case even the Shach agrees that the owner can ask you to pay a higher rate.

The rationale of the Aruch Hashulchan is that according to all opinions the original contract does not continue as a yearly contract. Rather, according to the Aruch Hashulchan, according to both the Ramo and the Shach, it continues as a contract to pay a certain price per month (with all the other original conditions) without fixing a rental period. Therefore, the landlord can tell you to leave at the end of any month since he never agreed to allow you to stay for another year. Consequentially, he can tell you that if you wish to stay you have to pay a higher price and if not you must leave. (He proves this in 312, 24 from a responum of the Rosh.)

It should be noted that based on this approach (See *CM* 312, 5) if your landlord demands that you leave immediately he has to give you a month notice. However, (See *CM* 312, 9) during that month you would have to pay whatever is customary and not just your original rent. Since, in your situation the landlord is not asking you to vacate but asking for

an increase up to the customary price, this issue is not germane and according to the Aruch Hashulchan even the Shach agrees that you have to pay what is customary.

We should note further that many other poskim (See *Eimek Hamishpot* 5, 20 for a lengthy discussion), based on the same source as the Aruch Hashulchan, disagree with the Aruch Hashulchan and maintain that your landlord could even ask you to vacate immediately and not give you a month notice since you have no contract at all. In your situation, this difference is irrelevant since even according to the Aruch Hashulchan he can ask for an immediate raise up to the customary price.

We should note two important points that further illustrate the delicate nature of these rules. The first point is that what we have written only applies to the third year since neither you nor your landlord said anything at all. In the second year, since you and the owner agreed that you would stay for a second year, even the Ramo agrees that by doing so you renewed your original contract for another year and the landlord would not have been able to raise your rent until the end of the year.

The second point is an interesting ruling of Rav Shlomo Kluger (*Chochmas Shlomo*-printed in the margin of *CM* 312) concerning a tenant who rented a house with a one–year contract in 1840. In 1859 there was a fire in town which burned down the landlord's own house. Since the landlord needed a place to live he forced his tenant to vacate in the middle of the year. Rav Shlomo Kluger ruled that the landlord's behavior was wrong. He does not disagree with anything we wrote previously. However, he rules that since for the last 18 years the tenant lived without a contract and yet the landlord and tenant behaved as if the original contract was still in place, therefore, it is has become their custom to act in this manner and they are bound by their custom.

Thus, had your question been asked after the fifth year (probably three years of such behavior suffices) the answer to your question would change and the landlord could not raise your rent.

In conclusion: Your landlord can raise your rent since you are not protected by any contract that prevents him from doing so. In the future, if you want protection at least get the landlord to agree to continue for another year. Of course, this would also obligate you to remain for the entire year unless you find a suitable replacement.

47

Tenant Damaged some Floor Tiles

We have been living in a rented apartment for the past few years. Over the course of the rental we cracked a few tiles in the living room. It didn't bother us so we never repaired them. Now that we are getting ready to vacate the apartment I tried to purchase the same tile so that I could replace the broken tiles. However, I checked into a few places and was told that they no longer manufacture exactly that pattern but I could buy something similar. I told this to the landlord and he told me that since it says in our contract that I must return the apartment in the same condition as it was at the time I began renting I must change the tiling in the entire room. If this were my house I would not replace the entire tiling of the room since this is a major expense and the room won't look so terrible with the replacement tiles. I would like to know if I am required to do as he says.

Answer:

Before answering your question it is important to understand on what grounds you are required to repair the flooring. Depending on how the tiles broke there are two possibilities.

If you yourself broke the tiles, for example if you banged on a tile with a hammer or carelessly dropped a heavy object on the tiles, then you are liable as a *mazik*. If however, one of your children or a stranger broke the tiles, then the reason you are required to repair the floor is

only because you agreed to return the apartment in the same condition as you received it.

This point was brought out by Rav Eliashev in response (*Kovetz Teshuvos* 1, 216) to a question posed by a renter in Antwerp whose minor son played with matches creating a fire which caused major damage to the rental. Rav Eliashev said that the father is not liable since a house is classified as an immovable object. This is a dispute between the Shach (*CM* 95, 8) and the Magen Avrohom (*OC* 637, 7) but the consensus is like the Shach, that a house is classified in halachah as an immovable object even though it was built from movable materials. The Torah excluded immovable objects from the liability of a watchman like a renter. However, Rav Eliashev added that it is customary in Israel to add a clause, as your landlord did, that the renter must return the apartment in the same condition as he received it, and if that clause is present in the questioner's contract he would be fully liable even though it was only the actions of his minor son that caused the damages.

We can derive two important rules from this responsa: One, as we said, that there is a difference between if it was you or your minor son who caused the damages, and the second is that the clause that you must return the apartment in the same condition as you received it is valid and that it creates liability in situations that one would otherwise be free of liability.

This second point is made by the Kesef Kodshim in his commentary to Shulchan Aruch (*CM* 316). He also states that this condition creates liability even if the renter would not be otherwise liable under the Torah's rules. He adds further that since it is customary to add this clause to contracts, even if it was not written in a specific contract it would still be binding since custom suffices to create liability. Thus, he would rule that in Israel, where this condition is customary, even if it

was not written in your rental agreement you would be liable for the broken tiles.

Having established that there are two possible sources for your liability for the broken tiles, we have to determine whether based on each source it suffices if you simply replace the broken tiles or, since the new tiles do not match the original tiles, you are obligated to change all the tiles.

The issue concerning the liability that was created by the clause that you must return the rental in the same condition that you received it is how we understand people's expressions when they affect others. Your landlord's position is that you would not fulfill the condition of your contract if you do not replace all the tiles since the apartment will not look the same as it did when you received it. When you received it all the tiles looked the same and now they won't.

The Rivash (*res.* 341) was asked to rule in a dispute that arose concerning A's commitment under oath that he would give B a certain amount of money as a present. When it came time to fulfill his promise, A said he would fulfill his pledge by giving B the amount he promised with the condition that B returns the money to him. The Rivash ruled that even though in many cases of Torah law (see *Kiddushin* 6A) we view a conditional present as a present, nevertheless, when we are considering a present that was promised to someone else, we do not view a present given with this condition attached as a fulfillment of A's vow.

This decision is ruled by the Ramo (*CM* 241, 6). The Sema (note 17) explains that it is only because A made a vow to B that we don't consider a conditional present as fulfillment of his vow. Had he simply sworn to give a certain amount of money he could fulfill his commitment by giving a conditional present. The Rivash explained his reasoning that expressions that are used in interpersonal commitments and agreements are interpreted in the way that people usually understand them and not by their literal or legal meaning. Even though giving a

conditional present is legally classified as a present, nevertheless since people don't understand statements as including this way of giving, one cannot fulfill a commitment made to someone else in this manner.

The Rambam also writes (*Mechiro* 26, 8) that the basic rule that governs expressions that are used in agreements is that they are interpreted in the manner that they are customarily used by people in the place and at the time when and where the agreement was made. This is also the ruling of the Shulchan Aruch (*CM* 61, 16) who states, "Conditions in contracts are governed by intent and not by literal interpretation." Thus, the previously cited Kesef Hakodoshim states that even though rental agreements require return of rentals in the same condition as they were received, nonetheless, tenants are not required to pay for concealed damages. Thus, your clause cannot be taken one hundred percent literally but only as much as custom dictates. Therefore, the answer to your question depends on how different the new tiles are, the location where they will be installed and the general condition of the apartment. For example, if the apartment is old and otherwise does not look perfect, you would have more leeway than you would have if you were renting a recently-renovated luxury apartment. Similarly, if they are in a corner you would have more leeway.

The second possible basis for your obligation, as we said, is if you broke the tiles yourself. If so, even if there is no clause requiring you to return the apartment in the same condition as you received it, you are required to pay since you were a *mazik*. Therefore, we have to consider whether the rules of *mazik* require you to replace all of the tiles.

In order to arrive at a decision we have to recall the basis for requiring one who damaged an apartment to pay for his damages. We wrote previously (See *Money Matters* page 8-9) that the Chafetz Chaim and Rav Chaim Brisker maintained that one does not have to pay anything if he broke a window (or a tile) in someone else's apartment because

the value of the apartment is not changed if it has a broken window, especially if it already had one broken window. However, as we wrote, *batei dinim* nowadays follow the ruling of the Chazon Ish (*BK* 6, 3) that in spite of the fact that the price of the apartment is not affected, the one who broke the window must pay because the owner of the house will need to replace the window.

Since, even according to the Chazon Ish, if you are the one who damaged the tiles you are required only to cover the landlord's replacement costs, you could put in different new tiles if owners in general would not spend the money to replace the entire floor tiling in this situation.

Even though the criteria for determining whether you need to change all the tiles are technically different if the source of liability is an act of damage or if it is a clause in a contract, nonetheless, in most cases practically they will lead to the same result. Certainly, if owners would generally replace all the tiles then you need to do so both under the clause in your rental agreement and as a *mazik*. However, if owners would not replace all the tiles but people generally would say that the apartment is not in the same condition as it was when you received it, you would be liable based on the contract but not because of the laws of damages.

In conclusion: Whether you need to change all the tiles depends on several practical determinations, not on pure halachah. The determining criteria is whether, without replacing all the tiles, people in general (and not just you) would consider you as having returned the apartment in a similar condition to what it was when you began renting. If you go to beis din, they will make the determination after evaluating the situation.

48

Rented a Villa for Shabbos and the Electricity went out

Last weekend we rented a ten bedroom villa with a large dining room for a family Bar Mitzva. Shortly before Shabbos the electricity went off so we shut a few air conditioners and switched the electricity back on. A few minutes later, when it was already *bein hashmoshos*, the electricity fell again. We quickly called a goy, told him to turn off a few more air conditioners and to switch the electricity back on. About an hour later the electricity fell again and since it was already Shabbos we didn't want to ask a goy to turn it back on and so we were without electricity for the remainder of Shabbos. I should note that it was not a very hot Shabbos and there are many windows so even though we would have otherwise used the air conditioners, it wasn't really uncomfortable without them. However, we didn't have lights and we had to eat cold food on Shabbos day. Are we entitled to a reduced price and if yes, how much, if anything, do we owe?

Answer:

The first issue that needs to be addressed is whether your rental, since the problem existed at the outset but could have been rectified if you had called a *goy,* is considered a *mekach to'us*.

There is a major dispute among the poskim whether one who is in your situation may call a Shabbos goy to look and once he was there he would notice that there is no light and without you telling him to do

anything he would correct the problem. (See *Orchos Shabbos* chapter 23, footnote 24 for a lengthy discussion of the subject.) Rav Eliashev, Rav Shlomoh Zalman Auerbach and many others maintain that one is not permitted to do so, but other poskim, including the Chaye Odom and the Rav Shulchan Aruch and Rav Moshe Feinstein, permit one to notify a Shabbos goy and at most hint to him, without giving any commands, that there is a problem with the electricity in your house. The latter is also the general custom. Thus, the first issue is whether one who wishes to be stringent can afterwards claim that his rental is a *mekach to'us*.

The issue is discussed in a slightly different context by the Terumas Hadeshen (1, 322). He rules that while normally one who is given lower quality meat cannot cancel his purchase on the grounds that the sale is a *mekach to'us* (unless the price is too high), nevertheless if it is known (even if the seller was unaware) that this particular customer does not ever eat the lower quality meat he is entitled to cancel the sale. The reason he requires it to be known that the customer never eats this type of meat is because otherwise we suspect that this is not the case and the customer sometimes does eat such meat but wishes to cancel this sale because he was not satisfied with the quality or for some other invalid reason. We see from this ruling that we take into account a customer's personal behavior even if it is not a behavior that is shared by the majority of the population. The Terumas Hadeshen says this explicitly and proves his point from a ruling of the Gemara.

By the same reasoning, if a person has a personal, well-grounded reason in halachah to act a certain way, we take this behavior into account in determining that a sale is a *mekach to'us*. This analogy was made by Rav Ovadia Yosef (*Yabia Omer CM* 5, 6) as well. Therefore, the owner cannot tell you that you should have called a goy to straighten out your problem with the electricity since you are stringent on this issue like many modern poskim. There is no need for it to be public knowledge

that you are stringent since there is no reason to suspect that there is any other reason you did not call the Shabbos goy.

There is one more issue that needs consideration before we can rule that the rental is a *mekach to'us*. The Shulchan Aruch (*CM* 232, 3), based on the Rambam (*Mechiro* 15, 3), rules that if a customer uses the item that he purchased after he discovered that it has a defect, he may no longer cancel the sale. Thus, we have to consider whether your use of the villa after you realized that there was a problem with the electricity prevents you from voiding the rental agreement.

The Magid Mishna explains that the rationale of the Rambam is that when one uses the object in spite of the defect he shows that the defect is not critical. Based on this rationale many, including the Pischei Teshuvo (*CM* 332, 1), rule that if one who rented a horse discovered a defect when he was on the road, he may void the sale even though he continued using the horse until he returned home since his use doesn't show that the defect was unimportant. Rather, we attribute his use to necessity since the alternative is to walk. Similarly, your continued use doesn't indicate acceptance of the blemish since you did not have a reasonable alternative when you discovered the problem.

Having established that you may void the rental agreement we have to consider whether you owe anything for your use of the villa.

If you void the rental agreement then you are like anyone who uses someone else's property without a rental agreement. The basic rule in that case is that if one uses someone else's property he must pay for his use only if the owner suffered any loss as a result of his use. The reason is because otherwise it is *ze nehene ve ze lo choseir* – the one who lived there benefited but since the owner did not suffer any loss the beneficiary does not need to pay anything.

Based on this principle, the Ramo (363, 10) rules that if one lives in a house that was not up for rental he doesn't owe anything for using

the house since the owner did not lose any rental income. Thus, one could argue that since the Shabbos you used the house the owner couldn't rent out the villa anyway that you needn't pay anything for using the house.

However, the Gemara says that if one lives in a house and as a result he caused the walls to become even a little dirty he must pay for his use of the house. Many *meforshim* (*P'nei Yehoshua BK* 20A and many others) explain that the reason is because one generally must pay for the benefit he derives from another person's possessions. It is only in case the owner suffered no loss whatsoever as a result of the beneficiary's use that the one who benefited does not need to pay because it is *midas Sedom* for a person to prevent others from benefiting from his possessions if he suffers no loss. If he does suffer a loss, it is not *midas Sedom* to prevent others from causing him that loss.

Therefore, if there was any loss whatsoever (according to many including Tosafos in Kesubos 30B even a loss which is less than a *pruto* (about two cents) suffices!) that was suffered by the owner of the villa as a result of your stay in the villa, you are required to pay the value of the benefit you derived from your use of the villa.

We find in the Gemara (*BK* 20B) that even an expense that was incurred in order to enable the beneficiary to make use of the property also qualifies as a loss that causes the beneficiary to be required to pay for the benefit he derived. The case that is discussed in the Gemara is where one person had a field which was surrounded on all four sides by another person's fields. The Gemara (according to many *Rishonim* including Tosafos and the Ramban) rules that if the owner of the outer fields constructs an exterior fence to prevent intruders from entering his property, the owner of the inner field must pay his share of the cost.

The Gemara explains that the reason is because the inner field also benefits from the wall and the inner field caused a loss to the owner of

the outer field. The loss that he caused to the owner of the outer fields is that by virtue of his inner field, the owner of the outer fields was forced to make a longer fence since the perimeter of the field would have been shorter if his fields were consolidated, which they couldn't be due to the presence of the inner field.

Thus, we see that an expense that was caused by the beneficiary in order to enable him to derive benefit suffices to require the beneficiary to pay for his benefit. In your case, because of your stay the owner of the villa had to clean and otherwise prepare the villa for your use. Besides this you did use the electricity for the short time it worked and used water and caused other expenses.

Thus we have established that you do not have to pay the original price but you do have to pay for the benefit you derived.

The final issue is thus how much you need to pay. People in your situation often argue that they shouldn't have to pay anything because they never would have rented this type of property. However, even though this is true, nevertheless since you did derive benefit you need to pay.

It is not possible for one who is not acquainted with the property to give a precise amount. A suggested approach is: since you must pay for the benefit you actually received and the original price was based on the benefit you expected to receive, you should make a list of the benefits you expected to receive and the ones you actually received, and use this list to make an agreement with the owner to pay a percentage of the original price.

49

Owner rejects a replacement Renter

While I have been waiting for my apartment to be completed I have been renting a two bedroom apartment. Recently, our builder notified us that our building received its occupancy permit and in another six weeks we will be able to move in. Since I have another six months remaining on my lease, I searched for a replacement. I found a couple with two children and informed my landlord that we are planning to vacate in two months' time and gave him the details of my replacement. When he heard that my replacement ran a play group with seven children aged between one and two, he rejected my replacement. I resumed my search and found a very nice couple with four children aged five to eleven (three are girls) who were interested in renting the apartment. This time he refused claiming that he is not obligated to accept a family larger than mine. Since we only had two children when we moved in (Baruch Hashem a third arrived in the meantime) he claimed that he does not have to accept a replacement with a larger family. Do I have to meet every condition of my landlord or can I just tell him that I found him two suitable replacements and now it is his business: if he wants to rent to them good and if not, not, but I am leaving and have no further obligation to him?

Answer:

There are two Gemaras that bear on your question. The first is the Gemara which is the source for your right to break your lease.

The Gemara (*BM* 79B) discusses a person who hired a boat to transport his wares to a certain place in order to sell them at his destination. However, he managed to sell all his wares before reaching the final destination, obviating his need to continue. The Gemara rules that if others are available to hire the boat, the first customer may terminate his rental and pay only for the cost to transport his wares to that point. This teaches us the basic principle that one has the right to terminate a rental agreement prematurely if the owner does not suffer a monetary loss thereby.

There is another Gemara (*BB* 59B-60A) that discusses the right to bring additional users to a property. The Mishna, as understood by the Rambam, rules that one who buys a house that opens onto one courtyard may not open a second door from the house onto a second courtyard. The Gemara explains that the reason for this prohibition is that those who have been using the second courtyard can object on the grounds that opening the door will enable additional people to use their courtyard.

The Rambam (*Sechirus* 5, 5 cited by *CM* 154, 2) deduces from this section of Gemara that: a renter has the right to sublet provided that the one to whom he wishes to sublet, does not have a larger family than he has. Most importantly, the SA (*CM* 316, 2) quotes the Rambam's ruling verbatim without citing any dissenting opinion even though what the Rambam says is the subject of controversy.

Specifically, there are Rishonim who maintain that one may not sublet, altogether. They argue that the Rambam's application to house rental of a rule that was given for boat rental is incorrect because there are two differences. Some like the Ritva (*BM* 79B) argue that in the case of the boat the one who rented to the new renter was the owner of the boat and not the renter. Others, including the Ra'avad (as explained by the Magid Mishna), argue that in the case of the boat the crew of

the boat remained with the new renter, ensuring that no harm will befall the boat, whereas when one rents a house the owner will not be present with the new renter. However, the SA follows the Rambam's ruling without mentioning the dissenting opinion rendering this the authoritative opinion.

The limit that the Rambam places on the size of the new renter's family is also the subject of controversy. Many, including the Maharam of Rottenberg (*res. Prague* 680), claim that there is no limit on the size of the new renter's family. (They understand the Gemoro in BB, that we cited earlier, differently.) It is important to note that the Taz takes the Ramo to task for not dissenting to the SA's adoption of the Rambam's position. The Gra (316, 2) also cites the Maharam's dissenting opinion on this issue.

Thus, we have established that, based on the Rambam and SA which are authoritative here, you have the right to sublet the rental. Whether the size of the new renter's family is limited, is subject to dispute.

The second right that you have – and that is what you have been trying to do – is to suggest new renters to your landlord. As we mentioned, the source for this right is the case of the boat. There are two important features about that case to note. The first is that in that case the Gemara did not make it incumbent upon the renter to find a new customer. All that was required was that there are others who are available. The second important feature is that the Gemara places no restriction on the customers who qualify as replacements.

Based on the first feature, there are Poskim (see *Mordechai BB* 529 and *Nesivos* (316, 2)) who maintain that it is not the tenant's responsibility to find a new renter. As long as other renters are available, the renter may vacate. This assumes that there is no explicit provision in the rental agreement requiring the tenant to find a new renter. (Of course he has to give sufficient time to find a new tenant.) Others, including the

Chazon Ish (*BK* 23) maintain that it is the tenant's responsibility and they differentiate between property rental and boat rental (since when one rents a boat he hires the crew as well).

The second issue is whether there are any restrictions on the nature of the prospective renters. The Beis Yosef (312), when discussing a tenant who wishes to leave prematurely, deduces from the case of the boat rental that the tenant is permitted to vacate prematurely provided that alternate renters are available. He says that our only consideration is that the owner should not suffer a monetary loss as a result of his tenant's departure. Therefore, he stipulates that the alternate renter cannot be a person who is grossly unsuitable, due to our concern for the owner's potential monetary loss. The decision of the Beis Yosef is ruled by the Ramo (312, 7). We should note that there is no mention of any restriction on the size of the new renter's family.

There is an important responsa of the Rashbo (3, 36) that sheds light on the issue of the nature of the qualifications needed to qualify as an alternate renter. He says that there is no iron-clad rule that the new family may not be larger than the original family. The key factor is whether it is likely that the changeover will harm the owner. We have just seen that this was also the approach of the Beis Yosef that is ruled by the Ramo.

We have established that you are certainly allowed to break your lease if you find a suitable replacement. We have further established that the only criteria for a suitable replacement is someone who does not pose a reasonable threat that he will cause the landlord a monetary loss. From your description of your prospective replacements it seems that they are suitable replacements, and your landlord is abusing his right to object to replacements by strictly interpreting the rules in a manner that they were never intended.

There is a second, slightly different, reason, to accept your replacements even if they are not totally similar, according to the Shulchan Aruch. The reason is that that conditions nowadays are different from what they were in earlier generations. When people rent apartments, nowadays, most often landlords are unaware of the size of the tenant's family and they do not inquire about it either. Similarly, they do not ask whether the tenant's wife runs a playgroup, and they do not stipulate in the rental agreement any conditions on family size or occupation. If no conditions were stipulated, even if the landlord eventually discovers that his tenant has eight young children, he has no right to evict his tenant.

Therefore, if your landlord did not inquire about your family size or your wife's occupation prior to renting to you, as far as your landlord is concerned, you could have had as many children as your prospective replacement and your wife could have run a playgroup for two year olds. If this is the case, even though in actuality you do not have a larger family and your wife does not run a playgroup, since your landlord could not have objected if you had a larger family or that your wife runs a playgroup, he cannot disqualify a replacement on these grounds. The reason is because your replacement does not have to be more qualified than you had to be. This would constitute a second reason to disqualify your landlord's objections.

In conclusion: If there is no reason to believe that the prospective tenants that you suggested to your landlord pose a greater monetary threat to your landlord than you did, you can vacate without fearing that you will need to continue paying rent for the apartment that you vacated prematurely. It is advisable that you have proof that you made these offers so that your landlord will not be able to deny the facts if you eventually go to a din Torah.

50

Responsibility to repair an air conditioner in a rented apartment

I rented an apartment that was fully air conditioned. We didn't write anything in the contract about the fact that the apartment is air-conditioned but when I rented the apartment I saw it and assumed that this was how I was renting the apartment. We used the air-conditioner whenever it was hot. One day the air conditioner stopped working. I called the landlord and asked him to repair the air conditioner. He replied that he never obligated himself to provide me with air conditioning and therefore, it was not his responsibility to repair it. Can I obligate him to fix it? I should add that we used the air conditioner properly and cannot be blamed for its malfunctioning.

Answer:

There are two reasons why your landlord might be free of responsibility. One is (like he argued) that he never included the air conditioner in the rental. The second is that even if he did include it, perhaps he is not required to repair it.

One indicator if air conditioning was included in the rental could be price. If apartments that are not air conditioned clearly rent for less money and most people do include air conditioning in the rental of their house, then, based on price, you can prove that air conditioning was included in the rental.

The source that price determines the scope of an agreement is the Gemara (*BB* 92A) that discusses the sale of an ox that was discovered by the customer to be wild – and thus unsuitable for plowing – only after the purchase. The Gemara discusses a case where the customer demanded that the seller return his money and take back the ox because he wanted to use the ox for plowing for which this ox was not suited. The seller replied that the sale is valid since the customer can slaughter the ox and he never said that he wanted an ox for plowing. The Gemara rules that if the price was clearly for an ox that can be used for plowing the customer is entitled to return the ox. Tosafos proves that the reason the customer can force the seller to return his money is because not only price indicates the intent of the customer but also the majority of people who bought oxen intended to use their ox to plow.

Therefore, if the price of the rental indicates that you were renting an air conditioned apartment and the majority of apartments that were rented in your area are air conditioned, you can prove that you are entitled to an air conditioned apartment. This would apply even if you did not see that the apartment was air conditioned and even if you never began to use the apartment. This is ruled by the Ramo (*CM* 220, 8).

Since you did see that that the apartment was air conditioned before signing your rental agreement, even if price does not prove that air conditioning was included, in most places halacha would rule that it is included in your rental of the apartment.

The source for this issue is a beraisa, that is cited by the Gemara (*BM* 101B), which classifies the respective responsibilities of a landlord and his tenant. One of the items it lists is that a landlord is obligated to "open windows" for his tenant. The Rishonim suggest various explanations of this responsibility. The Ra'avad says that the Gemara is referring to a windowless house and is ruling that even if a renter noticed prior to

renting that the house did not have windows, nevertheless, the tenant can force his landlord to open a hole and install a window since by definition a house has a source of light and without a window it cannot be called a house. (Note that this was written before electricity.)

The Rambam (*Sechirus* 6, 3) however, when he codifies this ruling, writes "the landlord is required to repair windows that were damaged." The SA (*CM* 314, 1) quotes the Rambam and the Gra (note 1) explains that the Rambam understood the Gemara in this manner because the rule of the Ra'avad is obvious and does not require a beraisa to teach it to us. The Tur (*CM* 314), when he records this ruling, cites another Ra'avad who offers a third explanation, namely, that even if the house has sources of light, the landlord must install a window in any opening that has a frame for a window. Even if the window was boarded up at the time of the rental and this was noticed by the renter, the landlord is required to install a window by virtue of the fact that there is a frame for a window, unless it was stipulated otherwise. (In Israel contracts usually state that the tenant is renting the apartment "as is" in order to allow landlords to avoid this type of liability.) The Sema (314, 1) conjectures that this is the intention of the Rambam as well and in any case this is authoritative since no one disagrees.

Thus we derived the basic principle that if a feature is noticeable when a person rents a property, even if it is not strictly needed in order to enable the tenant to use the rental, it is included in the rental, unless it was stated otherwise or there is a custom to the contrary. We can derive this since one can live in a well-lit house if it has several windows and yet if the house has windows that were in disrepair the landlord is required to repair them.

Besides this proof, the contention that the air conditioning was never included in the rental is far-fetched since if that would really be the case your landlord could have forbade your use of the air conditioning even

after you moved in. In truth, he did not have that right since the custom nowadays is that renters use air conditioners that are present in rented apartments. Therefore, if the contract did not state explicitly that you were not allowed to turn on the air conditioning, you were allowed to use it, which means that it was part of your rental and like anything that is rented you may keep using it.

Therefore, the only remaining contention that your landlord can have is that he is not required to pay the bill for repairing the air conditioner since there are items which the renter is required to repair at his own expense.

If there is a well-known custom that landlords don't need to pay for repairing air conditioners then he is not obligated to do so since custom supersedes the strict halachah. However, if there is no such custom we must consider how the halachah rules.

The SA (314, 1) quotes the Rambam who rules that there are two criteria that need to be satisfied in order to require the landlord to pay for the repair. The first condition is that the repair requires a repairman and normally is not performed by an unskilled person. The second condition is that the item that requires repair is part of normal living. We should note that other Rishonim, including the Rosh, disagree, and require a landlord to repair anything even if it only satisfies the first criteria. However, since the SA rules like the Rambam your landlord would be justified if his position is supported by the SA.

The Rambam does not precisely define what he calls normal living. However the Aruch Hashulchan (314, 1) does. He says that the Rambam intends to exclude items that are generally not found in homes in the area and only the well-to-do minority have such items in their homes. The rationale is that if the house was not rented as a luxury apartment the landlord is not obligated to provide his tenant with a luxury apartment. (Thus, if it was rented as a luxury apartment then this exception will

not apply.) As long as the luxury item was in working order the tenant could use it but the landlord never obligated himself to repair the item. An example would be an apartment that had a Jacuzzi. Incidentally we note that the poskim (for example see Emek Hamishpot page 381) rule that a landlord in Israel is required to repair a solar heater since solar water heaters are a normal feature.

Therefore, if there is no established known custom that governs your situation, if air conditioning is not a luxury item in your neighborhood, i. e. it is normal for homes to have air conditioning, then you can require your landlord to repair the air conditioner. This is especially true if the air conditioning doubles as the heating system since heating is usually not a luxury.

In case the landlord is required to repair the air conditioning and yet refuses to pay for the repair you may hire a repairman yourself and deduct the expense from your rent. It is important for you to hire a reputable repairman who charges normal prices and to save your receipts since your landlord can later challenge you in beis din and you will need to prove your expenses. This is stressed by the Kesef Kodshim (notes in the margin of *CM* 314) in the case of a landlord who refused to repair a heating system.

Additionally, there is a limit on the cost that you can require your landlord to cover. If the repair will cost more than the amount of rent you will need to pay until the end of the rental period, you cannot (*CM* 312, 17) force the landlord to pay anything out of his pocket. The Aruch Hashulchan (312, 33) adds that you also cannot force the landlord to continue renting to you beyond the day your lease expires in order to make funds available to cover the repair.

In conclusion: If there is no custom to the contrary, and nothing was stipulated at the outset, your landlord's argument that air conditioning was never included in your rental agreement is not valid. Unless air

conditioning is a luxury that is not common to apartments in your area your landlord is required to pay for the repair if the cost does not exceed the total income he will have from the rental until the end of your lease. If the landlord refuses to pay for the repair, you can pay it yourself and deduct the cost from future rental payments.

51

Installed Air Conditioners in a Rented Apartment

When I moved into the apartment that I rented three years ago, the landlord agreed that I could install air conditioners. However, he stipulated that when I leave I must return the apartment to its original state. Now that I am preparing to leave, he decided that he would like me to leave the air conditioners. I have a few questions. First, am I obligated to leave the air conditioners now that he expressed a desire to keep them? Second, if I do leave them, how much can I charge? Finally, if he would not have expressed a desire to keep them, could I have forced him to buy them?

Answer:

The answer to your questions is a consequence of how we view your relationship with your air conditioners after you installed them in your landlord's property and what is your relationship with the improved property.

Normally, when one improves someone else's property he has the status of a *yoreid* and the owner must pay him because he is benefiting from the actions of the one who improved his property. However, one does not have to pay for a benefit that he derives from the actions of a person who acted solely on his own behalf. Such a person is not called a *yoreid*.

For example, the Rama (264, 4) rules that if two people, A and B, were in prison at the same time and prisoner A spent money only in order to

gain his own release, B does not have to share in his expenses even if B also gained his own release as a result of A's expenses.

In your situation, however, even though you installed the air conditioners in order to use them yourself, nevertheless, you have the status of a *yoreid*. The reason is that you were aware that one day you would vacate the property and perhaps you might leave the air conditioners behind. Therefore, we do not view your action as if it was done solely on your own behalf.

Proof of this can be derived from the Gemara (*BM* 39A) that rules that a person who occupied and improved the property of someone who was taken prisoner has the status of a *yoreid*. The reason he has the status of a *yoreid,* even though he improved the property in order to use it himself, is that he was aware that the owner may someday return from captivity and reclaim his property. Similarly, even though you had the air conditioners installed for your own benefit, you were certainly aware that the property was only rented and one day you would probably vacate the property. Thus you have the status of a *yoreid* and if you leave the air conditioners behind you will be entitled to payment.

The Gemara differentiates between two types of *yoreid*. The laws governing them, including the amount of remuneration they are entitled to, differ. There are people who are called a *yoreid bershus*. These are people who, while they were not hired to improve the property, nevertheless, they had permission to do so. For example, the person who occupied and improved the property of a captive is considered by the Gemara to be a *yoreid bershus* because the Chachomim granted him permission to do so in order to ensure that the captive's property is maintained in his absence. The other type of *yoreid* is called a *yoreid shelo bershus*.

In your case, since the owner granted you permission to install the air conditioners you have the status of a *yoreid bershus*. However, you differ

from the typical *yoreid bershus*. The owner cannot tell a normal *yoreid bershus* to remove his improvement. However your landlord has that right since he expressly conditioned his approval for you to install air conditioners on your returning the property to its original state.

This difference leads to other differences as well. Normally, when a person improves someone's property with the owner's permission, his right to remove what he installed is limited. But in your situation since the owner retained the right to force you to remove your improvement, you also retained the right to remove your improvement. The rationale for these differences is that normally when one improves someone's property, he intends to give his improvement to the property's owner, and also the property owner has the prerogative to force him to leave his improvement in place. However, since here the owner told you at the outset that you will have to eventually remove your improvement, you did not intend to give him the air conditioners at the time you installed them. It is only now that the owner is asking you to leave your air conditioners that you may are contemplating leaving him the air conditioners.

Thus, what you did at the outset is to place your air conditioners on your landlord's property without committing to give them to him. In principle you may remove them. This is similar to the ruling of the Avnei Nezer (*CM* 8) in the case of a rebbe who constructed a permanent *succa* on communal property and allowed the community to use his *succa*. After the rebbe passed away, his heirs expressed their desire to remove the *succa* – against the wishes of the local community. The Avnei Nezer ruled in favor of the heirs since he determined that it was clear that the rebbe never intended to give the *succa* to the community.

Thus, we have established your precise relationship with the air conditioners and the improved property prior to the owner's request that you leave the air conditioners. You owned the air conditioners and

you could have removed them. Also the landlord could have asked you to remove them. However, in contrast to the Avnei Nezer's situation, we assess that your original intention was to leave the air conditioners if the owner would agree to pay for them and the landlord never told you to remove them. He merely retained the right to demand that you remove, a right that in the end he chose not to exercise. Therefore, now that your landlord expressed his desire that you leave your air conditioners you can no longer remove them if you are paid in full for them.

We can now begin to answer your second question. When an outsider improves another person's property and eventually the owner expresses his desire to keep the improvement, there is a major dispute between the Rosh (BK 2, 6) and the Rashba over when the owner actually acquires ownership of the improvement. The Rosh maintains that the property owner only gets ownership when he expresses his desire to acquire the improvement and is prepared to pay for it. By contrast, the Rashba (*BK* 21A) maintains that when he expresses his desire to acquire and pay for the improvement he acquires it retroactively to the time it was first improved.

However, in your case even the Rashba agrees that the landlord does not acquire the air conditioners retroactively because he certainly did not wish to acquire them earlier. Evidence that he did not intend to acquire them earlier can be brought from the fact that he never offered to pay for them. If he had paid earlier, thereby acquiring the air conditioners, he could have asked for more rent.

Since the owner is only taking ownership of the air conditioners now, the amount that he is required to pay you is the current value of the air conditioners, which is the current price of air conditioners that were used for three years. In addition, you are entitled to the portion of the delivery and installation costs that can be attributed to him. The reason

is because you were a *yoreid bershus* and a *yoreid bershus* is entitled to the full value of his improvement which is based on the full amount that was invested in the property.

We should note further that at this point he cannot threaten to force you to remove the air conditioners in order to pressure you to lower the price. The reason is that the Chazon Ish (*BK* 22, 6) and others (See *Imrei Maharshach BM* 101A) clarify that when Chazal granted the owner of a property the right to ask the one who improved their property to remove his improvement it was in order to protect the owner from being forced to pay for an improvement that he genuinely was not interested in and not as a tactic to force the one who improved the property to accept a lower price. Thus, after he expressed a desire to keep your air conditioners he cannot go back and threaten to force you to remove them if you don't agree to accept a lower price.

This ruling of the Chazon Ish is the answer to your third question as well. We interpret your landlord's original stipulation that you must restore the rental to its original condition as a right and not an unconditional requirement. Therefore, if it is evident when you vacate that he is only employing this demand in order to get you to leave the air conditioner without paying for it, he is required to pay you in full since the demand to restore the rental to its original condition must be *bona fide*.

In conclusion: If your landlord offers to pay you the full current price for the used air conditioners you must accept his offer. The full price is the value of three-year-old used air conditioners plus his share in the installation costs. You can force him to keep the air conditioners if it is evident that his demand that you remove them is an attempt to get you to leave them behind without compensation when you vacate.

Employer-Employee Relations

52

Paying for an Embarrassing Haircut

Recently, I went to my regular barber to get a haircut. We didn't discuss what number shaver he should use, since I am a regular customer and I always have my hair cut with a number three shaver clip. He previously had served a number of customers who got their haircut with a zero (a chassidishe haircut) and without thinking he started cutting my hair with a zero. By the time we realized what happened it was too late and he finished cutting my hair with a zero. I was totally embarrassed with my haircut and for the next week I sat in yeshiva with my hat and jacket on to cover over my haircut. Do I have to pay anything for my haircut because in the end he saved me money because if not for his haircut I would have to pay someone to cut my hair and he saved me the cost of a normal haircut? On the other hand, I would never have paid a cent for such a haircut. Additionally, maybe he should pay me for the embarrassment he caused me?

Answer:

First, we should mention that the barber is considered at fault because he should have recalled the manner in which he cut your hair in the past. Even if you were a new customer he would not have been justified in giving you a zero haircut without your express approval since many people do not want such a haircut.

The Gemara (*Bovo Metsiyo* 117B and other places) discusses a somewhat similar case of a person who gave his wool to a dyer to be dyed black and

the dyer dyed it red. The Gemara says that the original agreement that they made is void because the dyer did not do what he was contracted to do. The Gemara says that the owner of the wool has to pay the dyer the amount one pays for someone who improved a property on his own initiative in a manner that was not needed by the property. The amount owed is the lesser of the following two amounts: the expenses of the dyer and the profit that the owner of the wool had. The reason for this ruling is that once the original agreement is nullified, the dyer is working without a contract and without having been asked to do so by the owner of the wool. The dyer thus worked on his own without permission from the owner of the wool. We mentioned last week that this is called by Chazal a *yoreid shelo bershus*.

When one computes the expenses of the worker there are two components. There are the out of pocket expenses such as the cost of the dye. In addition, Rashi (*ibid im hashevach*) and Tosafos (Bovo Basro 143B) maintain, and the Shach (306, 5) rules their opinion, that the work of the craftsman is also an expense of his. In the case of a barber, since there are usually no expenses on materials the only expense is the cost of his labor. While there is an opinion (Nemukei Yosef) that the worker is not paid as a regular employee, most Rishonim maintain that he receives the amount that people normally charge for the job. In case some people charge more and some less he will receive the smaller amount even if he normally charges more, unless he is more skillful and people of his skill level regularly charge the higher amount.

The above is how we compute expenses. However, as mentioned before, since the barber didn't do as he was supposed to he is only entitled to the lesser of expenses or profit. Therefore, we have to consider how to calculate your profit from his work.

When the Gemara (*Bava Metsiyo* 101A) discusses the amount that is received by one who benefited from someone who worked for him

without a contract and performed a necessary task, it says he receives the amount that the recipient would have paid for the job. This is considered the amount the recipient profited. Thus, the amount of the profit is the amount he would have paid for the job. Since you wouldn't have paid anything for the work you received, your profit is zero. Since you are required to pay the lesser of the two amounts: profit and expenses you owe nothing for the haircut.

There is an additional reason why you don't need to pay for the haircut. It is clear from the Gemara (*ibid*) and it is ruled by the Shulchan Aruch (*Choshen Mishpot* 375, 2) that when one performs a task that he was not asked to do, the recipient is not forced to accept the job and pay for it. If he accepts it he has to pay for it, but he has the prerogative to refuse the job. For example, if someone built something on someone else's property the owner of the property can tell the builder to remove his "wood and stones." Therefore, you can tell the barber "remove my haircut." Of course there is no way to remove a haircut. However, the result remains that one cannot force another person to accept his improvements.

The issue of whether removal is a valid request when it is not a realistic option is discussed by the Ketsos, Nesivos and Chazon Ish. The Nesivos (375, 2 and 306, 7) disagrees with the Ketsos who ruled that in the case we mentioned at the outset (where someone dyed the wrong color) the owner of the wool could refuse to pay for the dying by saying "remove your dye". However, the Nesivos argues that the owner cannot say "remove your dye" since it is not possible to do so. However, the Chazon Ish (*Bava Basra* 2, 6) rules that if it is clear that the owner of the wool is not interested in the wool which was dyed the wrong color, then we accept his refusal to pay with the statement "remove your dye." In your case, it is obvious that when you say "remove your haircut" you are not engaging in a ploy to avoid payment but that you seriously are

not interested in the haircut. Therefore, we have a second reason to free you from paying.

Finally, you ask if perhaps you are entitled to payment for the embarrassment the barber caused you. However, the Gemara (*Bava Kama* 86B) writes that one is only liable to pay for embarrassing someone if the embarrassment was intentional. However here, where it was unintentional, he is not liable.

In conclusion: You do not have to pay for the haircut, and the barber does not have to pay for causing you embarrassment.

53

A Handyman who Botched a Job due to lack of Experience

We manage many apartments. We employ a handyman who knows how to fix many things and has very good hands. He is not a professional electrician or plumber but based on his skill and experience he is usually successful repairing whatever we ask him to repair. By employing such a handyman we save much money since his price is half of what a professional charges. Recently, we asked him to repair an electrically operated window shade. However, in his attempt to repair the blind, he damaged it. The reason he damaged it is that even though he has successfully repaired electric blinds in the past, he was unaware that this particular one was manufactured differently and what normally would work, damaged this blind. Is the handyman liable for the damages?

Answer:

The Gemoro (*Bava Kama* 99B) discusses a shochet who erred when slaughtering an animal and the Gemoro rules that if the shochet can prove that he is experienced he is not liable if he worked for free but is liable if he worked for pay. If the shochet cannot prove that he is experienced he is liable even if he worked for free. There is a major dispute among the key Rishonim why the shochet is sometimes liable.

Tosafos (*Bava Kama* 27B, *Ushmuel*) explains that the reason the shochet is sometimes liable is that when the shochet damages he is classified as

an *adam hamazik*. If he is experienced and worked for free we view the damage as the type of *oness* for which *adam hamazik* is not liable. If he is paid he assumes greater responsibility and therefore he is liable even for this type of *oness*. If he is inexperienced we view his damages as a result of carelessness for which one is always liable.

The Ramban (*Bava Metsiyo* 82B) disagrees and maintains that *adam hamazik* is liable for every type of *oness*. However, he argues that when one is asked to perform a task he cannot be viewed as an *adam hamazik* since he is acting with the permission of the owner. Therefore, the only reason he may be liable is that if he works for free he is a *shomeir chinom* who is liable for careless actions. If he works for pay he is a *shomeir sochor*, a paid watchman, who must take greater care.

Thus, we can deduce that according to all opinions the reason one who is inexperienced is liable is because we view the damages as a result of carelessness. Therefore, we must ask ourselves if your handyman's actions can be viewed as carelessness.

The Terumas Hadeshen (1, 186) discusses the issue of a shochet who slaughtered in a manner that according to the strict halacha is kosher, but according to custom one may not partake of such an animal. For all practical purposes, the owner of the animal is in the same position as if the shochet had slaughtered improperly according to the letter of the law, since the owner may not consume the meat.

The Terumas Hadeshen ruled that whether the shochet is liable depends on whether this *chumro* is taught to shochtim or not. He explains that if it is taught to shochtim then the shochet should have been aware of the custom and he is liable. However, if it is not part of the usual curriculum then we can justify the shochet's lack of knowledge and he is not liable.

Thus, we see that when the worker's lack of knowledge is reasonable we absolve him of liability.

Another instance where this principle is evident is in the case of an expert in counterfeit coins. The Gemoro says that if a top expert errs then he is not liable because he can't be criticized for lack of knowledge since he knows everything that one is expected to know. The Gemoro explains that the reason he erred in the case at hand is because it was only very recently that the government changed the coins and he hadn't yet become aware of the change. There is a dispute whether the expert is liable even if he was paid for his services. The Rashbo rules that he is not liable since he is not guilty of lack of knowledge but the poskim (See *Shach* 306, 11) dispute whether the Rashbo is authoritative.

The Imrei Hatsvi in his commentary to this Gemoro, questions why one who is not an expert is ever liable since one who hires a non-expert should expect that the worker will err sometimes. He answers that the only time a non-expert is liable is where he told the employer that in spite of his lack of experience he can do the job properly. He also cites the Maharshal (*Yam Shel Shlomo Bava Kama* 9, 23) who says slightly differently: that the employee should have warned the employer not to rely on his expertise. In either case if the employer was aware of the employee's lack of knowledge and hired him because he was cheaper, the employee is not liable for his mistakes. Similarly, if in the past whenever the handyman informed the managers that he doesn't have experience they told him to try anyway, he would not be liable since that was the nature of his job.

In conclusion: Whether the handyman is liable depends on the circumstances. If he acted in a manner which the employer expected him to act – namely to try to fix items even if he lacks experience – then he is not liable for the damage. However, if he should have informed the employer that he has no experience fixing this particular brand, then he is liable for the damages. Furthermore, if during the course of the job he became aware that his actions could very well cause damage but went ahead anyway, he is liable.

54

A Sofer who doesn't meet his Deadline

I hired a sofer to write a sefer Torah for me. We signed a contract at the outset that he would give me the completed sefer Torah within a year but we didn't write any penalty if he fails to deliver by the end of the year. A year has elapsed and he hasn't delivered the sefer Torah. When I recently inquired, he told me he only wrote about half and it will take him another half a year to complete the job. What are my options? Can I pay less for the sefer Torah? Can I fire him since who knows if he will keep his new deadline? I paid him so far for the cost of the parchment and gave a partial payment for his work.

Answer:

First it is important to understand how the halacha views your contract with the sofer.

There are two ways one can view the contract. One is that we can view it as an employment agreement i.e. you hired the sofer to write for you. The other way is that we can view it as a sales agreement between you and the sofer i.e. you agreed that you will buy the completed sefer Torah from the sofer.

An example of the second approach is a response of the Mahara Sasson (no. 119) where he was asked about a person who did not remit payment on time to the scribe who wrote his kesubo. He ruled that the customer did not violate the Torah prohibition against tarrying to

pay his employee since the scribe has the status of one who sold the kesubo. He explains that since the scribe used his own materials to write the kesubo, the halacha views the scribe as writing the kesubo for himself. Later, when he delivers the completed kesubo, he is selling the kesubo to the one who commissioned him to write the kesubo. Since it was only a sales agreement, one who pays late does not violate a Torah prohibition.

However, one cannot compare one who writes a sefer Torah to one who writes a kesubo. The reason is that people who buy a sefer Torah do so in order to fulfill the mitzvah to write a sefer Torah. The Gemoro)Menachos 30A) says that the proper way to fulfill the mitzvah is by writing a sefer Torah and not by buying a prepared sefer Torah. Therefore, the Maseis Moshe (3, 25) rules that one who commissions a sofer to write a sefer Torah intends to employ the sofer to write for him and not to buy the sefer Torah. Therefore, your sofer is your employee and you have signed an employment agreement.

The Gemoro does not discuss exactly this case but does discuss the case of an employee who quit before completing the job they agreed to. The Gemoro (*Bava Metsiyo* 76B) says that if the employee is not allowed to quit, the employer can fool him by offering to pay extra if he continues on the job, but at the end the employer can refuse to pay him the extra money. This din is true not only when dealing with employees but whenever a person doesn't want to do what he is supposed to do: one is allowed to entice him to do what he is supposed to do by offering him a bonus and in the end not pay him the extra amount.

For example, the Gemara (*Yevamos* 106A) rules that if the proper thing for a brother-in-law to do is *chalitzo* and not *yibum* but the brother-in-law insists that he wants to do *yibum*, beis din tells him that they will pay him a large amount if he will do *chalitzo* and after he does *chalitzo* they do not have to pay him what they promised.

Therefore, the best thing for you is to offer the scribe a bonus if he finishes earlier and in the end not pay him the extra amount.

In case this does not work, it is advisable to make a specific timetable to ensure that he will finish in another half a year. If you can, insert a penalty clause in case he doesn't keep to the schedule. That would be best since that will encourage him to finish on schedule. If not, you should warn him that if he does not keep to the schedule you will hire another sofer to complete the sefer Torah.

The source that one can fire a worker who does not work properly is a Ramo (*CM* 333, 5) who writes that one may remove a worker who does not work properly. The examples that are mentioned by the Ramo are a worker who stays up late at night or overeats or starves himself, since all these interfere with his performance. The Pischei Choshen (Chapter 10, footnote 24) derives that anyone who doesn't take his work seriously can be fired after being warned, if his actions are not usual. Since it is not usual for one to tarry for a long period of time you will be justified in firing your sofer and hiring a different sofer to complete the job if he keeps on delaying a significant amount. Therefore, it will depend how much he delays. If the delays are only slight you would not be allowed to fire the sofer. However, if he is habitually late or falls far behind you may fire him.

In case it comes to a point where you are justified in firing him, you will have to pay the first sofer for all the work that he did for you. However, the Gemara writes that if a worker quit and his quitting is not proper then he is entitled only to the amount you made up originally minus the amount you need to pay to his replacement. Therefore, while you cannot impose a unilateral fine, you do not have to suffer a loss due to your employee's actions. The total amount you will need to pay remains the amount you originally made up to pay and the employee will have to bear any loss that results from his unjustified behavior.

We should note further that whether you will need to pay anything for the work that was done depends on the availability of a replacement. The Ramo writes that a sofer may never quit since he is irreplaceable since a sefer that is written by two different sofrim is worth less than one that is written by one sofer. The Mishpetei Choshen (333, 109) writes that if the handwriting of the two sofrim is similar then the sofer is considered replaceable. However, if it is not (See *Sho'eil Umeishiv* vol 3, 1, 469), you can tell the sofer to keep his work and he must refund all the money you paid him.

In conclusion, you should try to entice the sofer to finish on time. If that fails you should warn the sofer that if he continues delaying significantly you will replace him. If he does delay significantly, you may replace him. Whether you will need to keep what he wrote depends on the availability of a sofer whose handwriting is similar to the first sofer. If you do choose to use what the first sofer wrote, you can reduce his salary by the amount you will need to pay to his replacement to complete the sefer Torah.

55

Cancelling an Employment Agreement Due to an Employee's Procastination

Before Rosh Hashanah I hired a roofer to repair a leak in the roof of my house in Eretz Yisrael and I gave him a down payment. We didn't set a date for the completion of the job because I understood that it would be done right away since it was obvious that I needed the job to be done before the onset of the rainy season. The roofer came twice to take measurements but when I saw that he wasn't doing the actual repair I started calling him almost every day and he kept reassuring me that he will do it. Finally, after two months, I gave up on him and brought in a different roofer who promptly completed the job. Am I entitled to the return of my entire down payment since the first roofer didn't actually do the job?

Answer:

In order to answer your question we have to formulate your question in halachic terms.

There are two possible relationships an employer can have with someone he hires. If someone just makes a verbal agreement to hire an individual, then the person he hired is not an employee in the halachic sense. If the employer changes his mind at this stage the only liability he could have is for any damages he caused to the person he hired. For instance, if the worker turned down a

different job because he counted on the job he was hired to do, the employer who changes his mind could possibly be liable for the loss of potential earnings which he caused. However, if there was no damage, the employer has no liability

If the employer goes a step further and makes a kinyan with the employee, then they have a full employer-employee relationship. If at this stage the employer changes his mind, he is in effect firing his employee and the issue is not damages but whether the employee is entitled to wages. Therefore, we must determine if you made a kinyan.

There are two acts that you did which, according to many, constitute a kinyan. One was when you made a down payment to the roofer you may have made a kinyan of kesef with the roofer. The opinion of many meforshim (including *Rashi* on *Bava Metsiyo* 48A) and poskim (e.g. *Machane Efraim* (*Sechirus Poalim* 3), *Nesivos* (333, 1) and *Chazon Ish* (*Bava Kama* (21, 28)) among others) is that a kinyan of kesef is effective when hiring a worker. A second act of kinyan, according to many including the Tur (333, 2) and others (*Rivash res.* 476, *Sema* (333, 16), *Shach* (333, 14), was when the roofer took measurements because that constitutes the start of his work. These poskim maintain that starting to work constitutes a kinyan, even for workers who are not paid for their time but for their performance of a job. Thus, we have to investigate whether you were permitted to fire your worker at the time and in the manner in which you did.

It is clear, and this is the ruling of the Pischei Choshen (*Sechirus* (10, footnote 4)(, that one who puts off performing his work is considered derelict in performing his job. The Gemoro (*Bovo Metsiyo* 109 A) rules that an employer may fire a derelict employee. However, the Gemara rules that generally one must warn his employee before firing him. Thus, if you had warned your roofer that if he doesn't do the job within, say a week, you will hire someone else, it would be clear that you acted

properly. However, since you never warned the roofer explicitly, being derelict alone would not justify your firing him.

We should clarify what is at stake if you did not act properly. If you were not justified there are two possible liabilities. The first is that you would be liable for the work he actually did, which in your case is his two visits and, perhaps other preparatory work. In general, one who fires his employee improperly must also pay him for loss of potential income. Thus, if the employee could not find alternative opportunities, the employer would have to pay him his wages almost as if he worked. (It is reduced slightly since people would take a cut in salary if they did not have to actually work. This is dubbed *sechar batoloh*.). In your case, the second payment does not apply since it is obvious that he had other work because otherwise he would have done your job. Thus, the following discussion will only determine whether you are liable for the actual work that he performed.

The Gemoro, cited above, says that employees who caused irreparable damage may be fired even if they were not warned. Thus, a shochet who slaughtered improperly and thereby rendered the meat a *neveilo*-forbidden to be eaten by a Jew, may be fired without warning since it is understood that this is not what he was hired to do. However, it is difficult to simply rely on this Gemara since the Ramabam (*Sechirus* 10, 7) limits the sanction to fire without warning to a public employee, and your employee was working for you privately. Also the Ra'avad who disagrees with the Rambam says the employee must have committed an infraction three times before he may be fired without warning.

However, if we study further we can justify your firing the roofer without warning. Rav Moshe Feinstein (*Iggros CM* (1, 47)) explains that the reason a warning is necessary is because if there is no warning we cannot assume that the employee will cause future damage to his employer. It is only if the employee failed to heed the employer's

warning that we can assume that he will cause future damage. Therefore, in your case where damage was imminent, you were justified in firing your employee even though you didn't warn him that you would fire him, since even without that warning it was clear that continuing with your employee was likely to cause you future damages.

Further proof that warning is not necessary if future damage is clear can be derived from another anecdote that is recorded in this section of Gemara. The Gemara writes that when a sharecropper of Rav Yosef passed away leaving five sons-in-law, Rav Yosef refused to allow the sons-in-law to continue their father-in-law's job even though the father-in-law had a permanent position. Rav Yosef justified his action with the argument that it was most likely that the sons-in-law would be derelict and cause him damage. This is stated very clearly by the Me'iri, but most likely all agree. Thus we see again that warning is not necessary when damages are likely.

A further reason that you are not liable is because the Chazon Ish (*Bava Kama* 23, 2) and Rav Moshe Feinstein (*Iggros CM* 1, 75) both write that custom overrides the rules of the Gemara because when one makes an employment agreement it is conditioned by local custom. It seems that a delay of two months is outlandish and the custom is to dismiss employees who procrastinate to such an extent.

In conclusion: Ideally, you should have warned the roofer explicitly that if he fails to complete the job by a certain date you will cancel your agreement. However, in this case because of the likelihood of damages and the outlandishness of the roofer's procrastination, you are not liable for even a partial payment and you are entitled to a total return of your down payment.

56

Paying a Child on time for Learning

Sometimes during the summer vacation my ten year old son needs a little extra incentive to learn so I tell him that I will pay him two dollars for every hour that he learns. Am I obligated to pay him the same day like a worker?

Answer:

Before we address your question we should mention a few points by way of introduction. The Gemoro (*Succa* 46B) writes that one who tells a child that he will give him something must honor his word because otherwise the child will learn to lie. Moreover, most poskim maintain that one who violates this Gemoro is even considered a *mechusar amono*-a non-trustworthy individual, which has halachic consequences. (See our *sefer Mishpetei Yosher* pages 356-7 and 344-351 where we discuss this issue at length.)

Furthermore, one who tells a child that he will pay him to perform a task is not allowed to refuse to pay him since if he does so he will violate Torah prohibitions including theft and *oshek sechar sochir*. The latter is a specific Torah prohibition that one violates if he fails to pay his worker and one certainly violates a positive and negative Torah commandment when he refuses to pay an adult worker. The Chafetz Chaim points this out in *Ahavas Chesed* (9, footnote 16) and proves that a child must also be paid on time and one who fails to pay a child on time violates the same Torah commandments as one who does not pay an adult on time.

In one sense, the law concerning a child is even stricter. When an adult doesn't request his salary, the employer is not enjoined to pay the

employee on time, whereas by a child he must still pay him. The reason is that with the adult worker we interpret his failure to request payment as indicating that he is waiving his right to immediate payment whereas by a child we attribute his failure to request payment to bashfulness. Therefore, the employer must pay on time even if the child never requests payment.

Based on the above, your question has nothing to do with the fact that your son is a minor, but only with the nature of the task. The law that one must pay on time is specific to employees. If one owes a debt or must pay for damages he caused, he must pay but there is no mitzvah requirement to pay immediately as there is for a debt to an employee. Therefore, we must investigate whether you are indeed employing your son to do a job, or perhaps even though you obligated yourself to pay and you must pay, he is not halachically your employee.

The reason he may not be your employee is, as you say, you offered him money as an incentive. The question thus is a specific instance of a more general question: does one who offers someone an incentive to perform a task have to pay immediately? There is no general rule stating whether one who performed a task because he was offered an incentive by someone is considered by the *halachah* as that person's employee. Furthermore, there is no Gemara that deals directly with this issue. What is found is only poskim who discuss whether specific types of incentives create an employer-employee relationship.

The poskim discuss two incentives. One is where a person offered someone an incentive to perform an action he should have performed even without the incentive. The typical situation is where someone was not keen on performing a mitzvah that he was obligated to perform and only performed the mitzvah after being offered an incentive. The question the poskim have in this case is whether in order to attain the status of an employer, the employer must be the cause for the employee

to perform the task which is obviously not the case where there was already a mitzvah obligation.

The second situation where such a question is discussed is where a person offered someone money to do something for himself. The reason the worker may not have the status of an employee is because the one who offered the incentive did not expect to receive anything in return for his money. We find in the Gemara (*BM* 118A) that if A asks B to do something for C, B is an employee of A. That is because when he does something for C it has the same status as if he worked for A. (This is derived from the halachah that cosigner A becomes obligated to pay B, when B lends money to C because A told him to do so.) However, we do not find that if A asked B to do something for B, then B is an employee of A.

The first type of incentive is the subject of a dispute between the Ketsos (81, 4) and the Tumim (81, 6) against the Nesivos (81, 2). A person offered money to his son-in-law to teach his own son Torah. The Ketsos and Tumim claim that the father-in-law effectively hired the son-in-law to teach his own son. The Nesivos, who was a contemporary of the Ketsos, disagreed. In the first edition of the Nesivos, he argued that the son-in-law cannot be classified as an employee because the son-in-law was already obligated by the Torah to teach his son Torah. (The father did not send him to yeshiva or hire a private tutor to teach him.) He agreed that the father-in-law can obligate himself to pay, but he says that is just like any monetary obligation that a person can accept upon himself and it is not governed by the laws of employees.

The Ketsos (in the *Meshoveiv Nesivos*) cites the Maharam of Rottenberg who clearly disagrees with the Nesivos, as proof that the Nesivos is incorrect. Additionally, others cite the Ramban (*Yevamos* 106A) who writes that a doctor has the status of an employee when he works for a fee even though he is obligated to heal his fellow Jew, as disagreeing

with the Nesivos. (The Gemoro (*Nedarim* 38B) derives from the mitzvah of *hashovas aveido* that a doctor has a mitzvah to heal his fellow Jew.) Furthermore, Rashi and many other Rishonim (*Yevamos* 106A) write that one who offers money to a man to perform *chalitzo* with the latter's sister-in-law is considered as having hired the man to perform *chalitzo* even though that is what he was supposed to do.

In the second edition of his sefer, the Nesivos responded to the Ketsos' criticism and admits that the Maharam disagrees with him. He cites the Shach however, who maintains that when a person offers money to someone to do what he is supposed to do anyway and does not derive any benefit from what he paid for, then the worker is not an employee. This is somewhat different from what he first wrote. However, this applies to your situation since you have no direct benefit from your son's learning.

In summary, the Ketsos and Tumim maintain that when one worked because he was offered an incentive, he is classified as an employee even if the employee was paid to do what he was supposed to do anyway and even if the one who paid did not derive any benefit from what he paid for. The Nesivos seems to agree that where the one who paid gained from the action of the worker, even if the worker was just doing what he was supposed to do, the worker is an employee. However, if the worker was doing what he was supposed to do and also the one who paid did not gain from what he paid for, the Nesivos maintains that the Shach would not classify the worker as an employee. He agrees that the Maharam would classify him as an employee.

The Shimru Mishpot (1, 81) discusses a case of an incentive that was offered to do something one should not do. One boy offered another boy money if he would jump from one porch to another, a dangerous feat. After the boy succeeded, he asked for his payment. The other boy refused. The boy who jumped claimed he was an employee and deserved payment.

The Shimru Mishpot agreed that the boy did not have to pay, citing a Rama (129, 22) who rules that one does not have to pay someone who agreed to serve as a cosigner for a fee since people normally (then) did not charge to serve as cosigners. His argument is that people do not charge to jump porches. His comparison is debatable because in the case of the Rama people served as cosigners without asking for money, but people do not jump for free. They simply don't do dangerous things. Therefore, since the boy only agreed to jump because he was offered money one can argue that he is an employee. A similar argument is given by the Maharit (1, 45)

Returning to your question if you have to pay immediately, there is a second issue that needs clarification. The Shoeil Umeishiv (2, 3, 42) was asked about another case of an incentive. Someone wanted to help a poor tailor. He gave the tailor material and told the tailor he should sew himself a garment and he would pay him for the work. The Shoeil Umeishiv ruled that if the benefactor does not pay on time he does not violate *bal tolin* even though the tailor was his worker. He bases his position on the words of the pasuk (*Vayikro* 19, 13) that is the source of the prohibition to pay a worker late. He interprets this to mean that the Torah only forbids paying a worker late if the one who must pay already received the fruits of the labor. However, here since the goods (the finished garment - *peulas sochir*) remained with the tailor, there is no Torah prohibition to pay late. (As an aside, we should note that obviously the Shoeil Umeishiv maintains that the second type of incentive creates an employer-employee relationship.)

In your situation too, since you are paying your son to do something for himself he would maintain that you would not violate the prohibition of *bal tolin*, even according to the Ketsos and Tumim. However, this *chiddush* of the Shoeil Umeishiv is very difficult because the Gemara (*BM* 112) and the Toras Kohanim and the Targum all interpret the words *peulas sochir* to mean the salary, and not the goods as the Shoeil

Umeishiv interprets. Therefore, it is very difficult to rely on the Shoeil Umeishiv especially when dealing with a Torah prohibition.

In conclusion: You should pay your son on time and have in mind to fulfill the Torah mitzvah to pay your workers on time. Even though according to the Nesivos and the Shoeil Umeishiv you will not violate a prohibition if you don't pay on time, but the Ketsos and Tumim disagree with the Nesivos, and the Shoeil Umeishiv is very difficult and you are dealing with a Torah prohibition.

We would add that since you are trying to educate your son, this will enhance his education since he will learn from his father's actions the importance of paying employees on time and nothing educates better than personal example.

57

Switching *Succa* Crews

I am responsible for building the *Succa* for our chassidus. As many chassidim come to daven with the Rebbi and everyone shakes *lulav* and *esrog* in the *succa* and comes to the *tisch,* we have to build a huge *succa.* I hired a group of teenagers at an hourly rate for each worker and they began building. They build fine but are not very fast. Then I heard of another crew that is more experienced and skillful and builds much quicker. May I hire the second group and just pay the first group whatever I owe them for their work up until now or am I committed to continue with them?

Answer:

Let us begin by rephrasing your question in a halachic manner so that we can apply the relevant halachos. When you hire a worker and make up that you will pay by the hour, or for that matter any other time period, your worker assumes the status of a *po'ail*. This is in contrast to one who is paid by the job who is called a *kablan*. Had you hired the crew and agreed to an amount that you would pay for building the entire *succa*, regardless of the amount of time it takes them to build the *succa*, the workers would have the status of a *kablan*, which is governed by a different set of halachas.

The second important point that you mentioned is that your workers had already begun building the *succa*. This is important since the Gemara (*BM* 76B) says that the halacha would be different if you would have released the workers before they began working.

The case which is discussed by the Gemara is where an owner of a field hired workers and, after they merely started going to their job, he realized he didn't have work for them and wanted to cancel their employment. The Gemara rules that unless the fact that there was no work was due to unforeseen circumstances, the field owner must pay them basically (we will explain what "basically" means later) whatever he committed himself to pay, unless, they could use the time that became available to them to perform another paying job that would cover their loss of wages. According to many Rishonim (Ramban, Rashbo and others) this is the halocho, and this is the approach ruled by the Shulchan Aruch (333, 1). The reason is that going to a job is an act of *kinyan* known as *hascholas melocho* – beginning to work.

The reason we call the act which signifies beginning to work an act of *kinyan* is because it creates a mutual obligation, like any other act of *kinyan*. When one buys a field and performs an act of *kinyan* he obligates himself to pay while the owner thereby passes ownership of the field to the buyer. Similarly in cases of employment, when the workers begin to work they, thereby commit themselves to perform the entire job they were hired to do while the employer commits himself to pay them whatever he said he would pay for the job.

While it is true that sometimes the employer has to pay workers even if he released them before they began working, the rules governing that payment and the nature of that payment are different from the payment and the nature of the payment for a worker who was released after he began working. That payment is required only if the workers had turned down a different job which no longer is available when they were later released, and the nature of that payment is that it is payment for causative damages.

However, if an employer releases a worker after he began working, he has to pay even if the worker did not forfeit another job by accepting

the employer's offer. Furthermore, the nature of the payment is payment for employment. The distinction manifests itself in a number of ways. For example, when you pay for employment you must pay with cash but when you pay for damages you may pay with goods of equivalent value.

In order to derive the rules governing this *kinyan* it is important to understand the source for this *kinyan*. Whereas the sources for other acts of *kinyan* are derived by the Gemara from pesukim, there is not a word in the Gemara telling us the source for this *kinyan*. As we mentioned earlier, the entire source is a ruling by the Gemara in a specific instance of *hascholas melocho*.

There are two schools of thought. The approach of the Ritva (*Kiddushin* 47B, *BM* 99A) is that the *kinyan* was established by the Rabbonon in order to prevent losses that would result if one of the parties reneges on his commitment.

The other approach is that beginning to work is an action which somehow qualifies as a Torah *kinyan*. There are several approaches as to how this is achieved. One approach was suggested by R. Yitchok Elchonon (*Nachal Yitzchok* (39, 17) and the Ohr Someach (*Sechirus* 9, 4). They point out that we find in the Gemara several instances where a worker is halachically equivalent to an immovable object. One of the methods for acquiring an immovable object is by means of *chazoko,* an action that shows ownership (such as locking the door). The ruling of the Rambam is that even an act where the new owner just derives benefit from the immovable object (such as lying on the ground he wishes to acquire) is also considered an act of *chazoko* and enables the buyer to acquire the immovable object.

Thus when a worker begins working and the employer begins benefiting from the worker, one can derive the *kinyan* of beginning to work from the pasuk in Chumash which is the source for the act of *kinyan* of *chazoko* on immovable objects.

The Chazon Ish (*BK* 21, 32) and others suggest a different approach for considering beginning to work a Torah *kinyan*. They also derive the *kinyan* from a *kinyan* that is effective in acquiring immovable objects. However, their approach is that the *kinyan* is not *chazoko* but *kesef,* giving money. The money in this case is the obligation that falls on the employer to pay for the worker's work, an obligation that begins when the action of the worker obligates the employer to pay him the amount of one *pruto*.

The Acharonim use this approach to explain the ruling of the Gra (333, 36) that beginning to work does not affect a *kinyan* when the worker is a volunteer, since the employer never became obligated to pay anything. If one follows the other approaches, there is no reason a volunteer does not become obligated to fulfill his original commitment. Therefore, it seems that the Gra also followed this approach.

Thus, we see that since this crew began building, you are obligated to continue using the crew that you hired and if you hire another crew you will still be obligated to pay the first crew.

We have to consider how much you will have to pay the first crew. Basically, you have to pay the salary you committed yourself to pay, since the *kinyan* obligated you to do so. However, the salary that you will need to pay is adjusted to take into account the fact that the workers do not actually work. The Gemoro and Shulchan Aruch write that each situation must be judged individually. For example, the Gemara (BM 77A) rules that for workers who would rather work there is no reduction. However, the Taz (333, 1) brings from several early Rishonim, including Rashi, that the amount is half of their salary. This is not the accepted practice. (This was very pertinent at the beginning of the corona pandemic.)

Some (Rav S. Rosenberg in *Hayoshor Vehatov* 4, page 38) differentiate that a worker for whom the job is his livelihood obviously would not

be amenable to taking half his salary and remaining idle, since he needs money to support his family and half his salary will not suffice. However, for teenagers who are just working to earn extra spending money perhaps, the Taz is pertinent.

Another factor to take into account in computing the amount you will have to pay is the availability of alternative employment. If alternative employment is available you only need to pay the difference in wages, if any, between the amount you originally committed yourself to pay and the amount they would earn (*CM* 333, 2) if they take an available job. Even if they decide not to take another job you will be free from paying them anything more than that difference.

Another important point to mention is that in case before hiring them you did not describe exactly what was involved in building your *succa*, even if the other *succa* that they could build is significantly more difficult to build that would still qualify as alternative employment. The reason is because you could have given them a very difficult *succa* to erect since the only job description you gave at the time they were hired was that they are to erect your *succa*.

Until now we have dealt with the monetary effect of your terminating their employment. However, we must also consider the moral issues that are involved. There are in fact two issues. The first is that the Gemara says that one who is released from employment can have *tar'umos* (complaints) about his former employer's behavior even if he has no monetary loss. The Rosh writes that the basis for the employee's complaint is because he was forced to expend extra effort to find alternative employment. The Shach (333, 1) deduces that if alternative employment is readily available there are no grounds for a complaint. Therefore, you have to consider employment conditions in your community to evaluate this factor.

The second moral issue is that you will be called a *mechusar amono,* an unreliable individual. Even though the Gemara never mentions this issue in the context of employment agreements, it was obvious to the Sema (333, 1) that this is the case. Even though there are no monetary ramifications from being a *mechusar amono,* nevertheless the Rabbonim look at such behavior with criticism (*ein ruach chachomim noche haimenu*). Some poskim maintain that the community should embarrass such people in order to prevent them from acting as a *mechusar amono*. (These issues are discussed at length in our *sefer Mishpatei Yosher* Vol 1.)

It is possible to avoid being classified as a *mechusar amono* if you assuage their feelings. However, this needs to be done and cannot be ignored.

In conclusion: There are two issues to consider. As far as monetary compensation is concerned, if there are other jobs available you will only need to pay the difference, if any, between the amount they would have earned by you and the amount they could earn at an alternative available position. If they cannot find alternative employment, the amount you have to pay is the amount you originally committed yourself to pay adjusted to take into account the fact that they will not have to work, which according to some is half of their salary.

There also are two moral issues that must be taken into consideration: *tar'umos* and *mechusar amono*.

58

Fired After he Began Preparing for his Job

I was recently hired to teach a class in a yeshiva. In order to teach the material, I purchased various seforim, for which I was reimbursed, and began preparing lessons. However, before I taught my first class, I was abruptly notified by the school that my services were no longer necessary. Do I have any monetary claim against the school since I already started by purchasing the seforim and preparing lessons?

Answer:

The laws concerning hired workers are derived from a *braiso* that is discussed in the Gemara (*BM* 76B). The *braiso* discusses two stages in the employment of field workers. The first stage is where the owner of the field and the worker merely entered into an employment agreement. The Gemara rules that at this stage if either side reneges on his commitment, even though it is improper, there are no monetary consequences. However, if the workers actually went to the field and only then were told that there was no work for them to perform, the employer is obligated to pay them the full amount he agreed to pay them (with a minor adjustment for the fact that they didn't need to work) even though they basically performed no field work.

From this ruling of the Gemara, the Rishonim derive that by going to the field in accordance with their employer's directives, the employees advanced their agreement to the second stage. Since it was only at this

stage that the employees learned that their services were no longer necessary, the employer is obligated to pay them their wages.

Thus, your question really boils down to this issue: Does your buying seforim and preparing lessons constitute an action that advances your agreement to the second stage? In order to answer your question we will determine the precise mechanics of how going to work in the field advanced the field workers' agreement to the second stage, and then we can see if your actions are equivalent.

Many Rishonim (Ramban, Rosh and many others) understand that when the laborers physically went to the field, that action qualified as an act of *kinyan*. Every agreement between parties requires an act of *kinyan* in order to make the agreement binding. For example, when one buys a movable object and picks up the object that he acquired, an action that is called *hagboho*, the purchaser makes his agreement with the seller final. Before this act, both he and the seller may change their minds. The act of picking up the object makes the agreement final in the sense that both sides no longer may back out of their agreement.

Similarly, in order to prevent parties from backing out of an employment agreement, an act of *kinyan* is required. These Rishonim explain that the act of going to the field is an act that satisfies the requirement to perform a formal act of *kinyan*. They furthermore, gave a name to this act of *kinyan* which indicates why this act is considered a *kinyan*. The name they gave it is *hascholas melocho* – beginning to work.

This explains the difference between the two stages. The first stage is when the employer and employee made an employment agreement but did not yet perform an act of *kinyan*. Once an act of *kinyan* is performed, their agreement enters the second stage.

Based on the above, we can rephrase your question as follows. Does at least one of the two actions that I performed namely, purchasing

seforim and preparing lessons, qualify as an act of *kinyan?* Specifically, is at least one considered to be *hascholas melocho?*

At first glance it would appear that it should be since the actions you performed were necessary preparations to enable you to teach, the job you were hired to perform. In this sense it would appear to be identical with going to the field which likewise is a necessary preparatory act that was performed in order to enable the laborers to work in the field, the job that the laborers were hired to perform.

To decide whether the actions really are equivalent it is necessary to delve further and understand the rationale why beginning to work constitutes an act of *kinyan* since all acts of *kinyan* are either derived from *pesukim* or were instituted by the Rabbonon based on logic. For example, by performing the act of *hagboho* a buyer acquires a movable object, because when the buyer raises the object he is exhibiting control over the object which is a feature of ownership. Beginning to work is not derived from any *pasuk* and the Gemara does not mention any rationale for its validity.

The Ritva (*Kiddushin* 47B c.v. ho) says that this *kinyan* was enacted by the Rabbonon in order to ensure that people's work should not be done in vain. If workers who went to their job could still be fired, their going to the job would have been done in vain. Therefore, the Rabbonon enacted that they cannot be fired at this stage. If one follows this approach the yeshiva could not fire you either since your actions would also be rendered worthless if you could be fired.

The Chazon Ish (*BK* 21, 32 c.v *veyesh*) and Erech Shei (192, 13) understand that the critical feature why beginning to work constitutes a *kinyan* is not the act of beginning to work but the money that the employee earned by beginning to work. Just like when a groom (the one who is "acquiring his wife") gives money to his bride the money serves as a *kinyan* (that is why giving a ring affects a marriage), and when a

customer pays the seller for an immovable object the payment serves as a *kinyan,* so too when an employer gives money to his employee the money serves as a means of *kinyan*. Even if the employer did not yet physically give over money to the employee the fact that he has an obligation to pay him money suffices.

Therefore, if an employee performed an action for which the employer obligated himself to pay (even verbally) the fact that the employer obligated himself to pay serves as a *kinyan*. It is similar to when one does not give cash but gives over an IOU.

If one follows this approach in order to qualify as *hascholas melocho* the action which the employee performed must be one for which the employer obligated himself to pay. In the time of the Gemara (See *BM* 83A) employers paid their employees for the time they spent going to (but not coming home from) work. Since by going to the field the employer became obligated to pay the workers some money, he could no longer fire them. This is also the approach of the Machane Efraim (*Sechirus Poalim* 4) who therefore rules that *hascholas melocho* is not a *kinyan* for a voluntary worker since the employer never became obligated to pay him anything.

If one follows this approach, since your employer did not obligate himself to pay you for preparing lessons and buying seforim, your actions did not constitute *hascholas melocho* and the yeshiva could fire you.

The Ohr Someach (*Sechirus* 9, 4) offers a third approach. He understands that the reason *hascholas melocho* serves as a *kinyan* is because the employer began "using" his worker. This again is similar to acquiring immovable objects where use is a *kinyan* known as *chazoko*. For example, if one who buys a house begins living in the house (and he locks or unlocks the door) with the seller's permission, even if he did not pay a cent, the seller cannot back out of their agreement. The Ohr Someach explicitly proves that as a consequence of his approach in order to qualify as an act of *kinyan* the work that was performed by the worker must be

worth at least a *pruto*. Therefore, those who follow this approach would also rule that your actions do not qualify as *hascholas melocho,* since your actions are not usually remunerated.

The Chikrei Lev's (*CM* 2, 72) reply to a related question shows that he also agrees that in order to constitute *hascholas melocho* the action must be one that obligates remuneration. He was asked to decide a dispute between the Jewish community and an employee who was hired to serve as a rabbi or cantor for a year. The employee claimed that the year began at the time he began traveling to his new job but the community claimed that it only began when he started working. The Chikrei Lev ruled that since we see in the Gemara that the travel of the farm workers to the field qualifies as *hascholas melocho* it must be that one deserves remuneration for going to his job.

We should note that the Levushei Mordechai (*CM* 1, 34) was asked a very similar question as yours. In his situation, a person was hired to serve as a community rabbi and he rented an apartment for his family and went to bring his family to his new community and then he was fired. The Levushei Mordechai ruled that the rabbi's actions constituted *hascholas melocho* and he could not be fired. However, he just based himself on logic and does not cite any proof for his decision.

From the above we see that while there are sources that rule that you could not be fired, since many maintain that your firing was effective you cannot force your employer to pay you as an employee.

However, if you turned down another offer because you were hired for this job the Shulchan Aruch (333, 2) rules that you have a monetary claim against the yeshiva because they caused you a monetary loss.

We should note further that unless the yeshiva had a very good reason to fire you, their action is improper and they would be classified as an unreliable individual-*mechusar amono* (See *Sema* 333, 1). This is a lengthy topic and for further details see our *sefer* Mishpatei Yosher (page 343).

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Sofer wrote nicer than expected and Demands more Money

I approached a *sofer* to write a Megillas Esther for me. He quoted a price of 3000 shekels, which I agreed to. At the time of our agreement he had just begun to write it. Now that he has finished, he is asking 4500 shekels, claiming it is much nicer than he originally thought it would be. What is the halacha in this case?

In a follow-up exchange, the questioner clarified that the parchment belonged to the *sofer* and was included in the price. Furthermore, the *megilla* is still by the *sofer* and the customer has not yet paid for the *megilla*. Thus, the issue is whether the customer can force the *sofer* to give him the *megilla* for the original price.

Answer:

The first and foremost issue that requires clarification is the relationship between you and the *sofer*. This is the subject of a major dispute among the poskim.

Some poskim maintain that you and the *sofer* entered into an employment agreement which contains two components: 1] Sale of the parchment for whatever it is worth, and 2] A work agreement to write for the balance of the three thousand shekels. The second approach is that the *sofer* is not an employee at all, but rather you and the *sofer* entered into a sales agreement whereby the *sofer* committed himself to give you a

completed *Megilla*s *Esther* that was written by him, in exchange for three thousand shekels. The reason this is such a critical issue is that there are different rules that govern these two types of agreements.

There are two primary sources for the second approach. The first is a responsum of the Rosh (104, 6) that is ruled by the Shulchan Aruch (*CM* 333, 8). The Rosh was asked to decide a case where a person approached a craftsman and asked him to produce something on his behalf that he needed for the next day, at which time he would pay. However, the next day when the craftsman informed the customer that he produced what was ordered, the customer replied that he already acquired it from someone else. The craftsman claimed that he had no other use for the object that he had produced specifically for this customer. The Rosh ruled that the customer was required to pay the craftsman because he caused him a loss.

Many commentaries (e.g. *Nesivos* 333, 16, *Chazon Ish BK* 23, 35) are amazed by the Rosh's reasoning. They say that the Rosh should have said that the reason the customer must pay is because the craftsman did the work he was hired to do, and one must pay his employee and cannot tell the employee to keep what he produced as payment for his work.

The commentaries reply that it is obvious that the Rosh understood that the agreement was not an employment agreement but rather that it was a sales agreement. Since the customer refused to take delivery of the object that was produced on his behalf he was not required to pay for the actual object but only for the loss that was sustained by the craftsman in producing a useless object, based on his commitment to pay.

We should note that determining the Rosh's reasoning is not merely a theoretical issue but an issue with practical consequences. For example, if one owes the craftsman a salary, as the commentaries think, the

worker must be paid with money. But if the customer must pay causative damages, as the Rosh rules, he may be paid with goods.

The second source that maintains that the worker is selling what he produced and not an employee, is a responsum of the Mahara Sassoon (119) concerning a case which is very similar to yours. In his case, a *chosson* ordered a *kesuba* from a *sofer* but then refused to accept the completed *kesuba*. The Mahara Sasson ruled that since the parchment on which the *kesuba* was written belonged to the *sofer* one cannot consider the *sofer* to be an employee. He explains that the halacha recognizes only two types of employees: those whose pay depends on the amount of time they work and those who are hired to perform a defined task. The *sofer* in this case clearly was not of the former type since his payment was independent of the time he spent writing the *kesuba*. The Mahara Sasson argues that he did not fall into the latter classification either because only when one works to improve someone else's object does he fit into the latter category. Since the *sofer*'s work improved his own parchment, he cannot be viewed as an employee in any sense. We must, therefore, view the agreement as a sales agreement. He cites as support the previously mentioned responsum of the Rosh.

Thus, the Mahara Sasson clearly maintains that your agreement with your *sofer* is a sales agreement. It is very important to note that many later poskim including the Ketsos (339, 3), R. Akiva Eiger (notes to *CM* 339, 6), Aruch Hashulchan (339, 7) and the Chafetz Chaim (*Ahavas Chessed* 10, footnote 4) all follow the approach of the Mahara Sasson.

The poskim who rule that you did enter into an employment agreement are the previously cited Nesivos and Chazon Ish who disagree with the Mahara Sasson. They maintain that the fact that the parchment belongs to the *sofer* is not sufficient to determine that the agreement is a sales agreement. Only in a situation, like the responsum of the Rosh, where not only did the craftsman use his own raw materials but

also the customer used an expression that indicated that he desired the craftsman to produce the object for himself and that he would then pay for it, do we view the agreement as a sale. Since you did not use such an expression they would rule that the *sofer* is your employee.

We should note that there are many ramifications of this dispute some of which indicate that unlearned people really view this as a sales agreement and some that indicate that they view it as an employment agreement. For example, suppose the *sofer* had a fire that was not caused by his negligence and the completed *Megilla*s *Esther* was destroyed by the fire. If your agreement was an employment agreement you would have to pay him for his work. However, if it is a sales agreement you would not have to pay anything since you did not receive what you ordered. It seems that most people think that you would not have to pay which indicates that people view it as a sales agreement.

However, there are other hypotheticals that indicate that people view the agreement as an employment agreement. For example, suppose in the case of the Rosh that the reason the customer changed his mind is because of an unexpected change in circumstances. If one follows the approach that it is a sale, the customer would not have to pay the craftsman anything since one does not have to pay for damages that he caused unintentionally. However, if it is an employment agreement then the customer would still need to pay since his employee did the work he was hired to perform.

Thus we have established that since your *sofer* wrote on his own parchment your relationship with your *sofer* is the subject of a dispute. We must now consider what the approach that it is a sales agreement would say about your question.

If one follows the opinion that your agreement is a sales agreement, your *sofer* is reneging on his commitment to sell you the *megilla* he wrote

on your behalf for three thousand shekels. However, since the *megilla* is fully his, you cannot force him to give you the *megilla* that he wrote in order to fulfill his commitment. The only option at your disposal is to say to the *sofer* that one who reneges on a commitment is called a *mechusar amono*-an untrustworthy person. We note that one must not act in such a manner and beis din has the authority to embarrass such a person by publicizing his behavior, but they cannot actually force him to give you the *megilla* for three thousand shekels.

However, in your situation this option is weak because first of all there is a major dispute whether one who reneges on a commitment because circumstances changed after the agreement was made, is in fact considered a *mechusar amono*. When the *sofer* made the agreement he expected to write an ordinary *megilla* and only at the end he realized that he wrote a much better one than he committed himself to write. Therefore, even though the majority opinion is that one who changes his mind when circumstances change is still called a *mechusar amono*, there are many opinions that rule that one who does so does not warrant that appellation since he has a good reason for changing his mind. Therefore, beis din will not embarrass one who reneged on his commitment under such circumstances.

Furthermore, in your situation, if what the *sofer* says is correct that the difference in the market price is so great (50% more), then even those who generally rule that one who reneges on his commitment is called a *mechusar amono* even when the price changes, agree that since the price change is so great the *sofer* may change his mind. The reason is because it is obvious that the *sofer* never intended to forego such a large profit. (See our sefer, *Mishpatei Yosher* (page 378) where this ruling is discussed in detail.).

The forgoing is not the law if one follows the approach that you made an employment agreement. However, since you are trying to force him

to give you the *megilla* for the original price, he can refuse since his refusal is justified, according to this opinion.

All of the above would not be relevant if you had bought the parchment from the *sofer* and the *sofer* wrote on your parchment. This is the general procedure (due to halachic considerations) when one commissions someone to write a sefer Torah on his behalf.

In conclusion: In practice, in this case, you cannot force the *sofer* to give you the *megilla* for the original price.

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Student doesn't show for Private Lessons

I give private lessons in a local yeshiva after school hours. I don't teach in this school so I have to go especially to the school for these lessons. Sometimes children, without any advance notification, and often without their parents' prior knowledge, simply don't show up for these lessons. Do I have the right to charge the parents for these hours as if I worked?

Answer:

Going forward you should avoid the entire issue by making up with the parents in advance that they will be charged if you are not given advance notice. Furthermore, if you did not stipulate otherwise, there is a known custom in your place that deals with this situation, you should follow this custom.

If you did not deal with this circumstance in your agreement and there is no known custom (in order for a custom to bind the parties the custom must be known to the public) then we have to revert to the laws of the Shulchan Aruch. Since you were hired to teach the child, if he does not show up it is same as with any worker who was hired for a job and in the end was not given any task to perform.

It is important to clarify at the outset that in your case the employer is the parents and not the student, since it is the parents who hired you.

The Gemara (*BM* 76-77) and Shulchan Aruch (*CM* 333, 1-2) discuss this type of situation in the context of farm workers and differentiate

whether the employer had information that the worker did not have that indicated the possibility that there would not be any work. Furthermore, even if the employer had such information and the worker did not, they differentiate if the workers were notified that there was no work before they set out to work in the field or were only notified that there was no work after they arrived at the field. Since we already discussed (article of Parshas Shemos) some of the relevant issues we will only summarize the portion that is pertinent to your question.

If the workers were informed that there would be no work before they went out to work then even if the employer had prior information, the workers are entitled to be paid only if they lost out on another job. However, if they did not suffer a monetary loss, that is, they did not turn down any job offer on account of this job, they are not entitled to any remuneration. However, if the workers already set out for work, the workers are entitled to remuneration even if they did not suffer a monetary loss.

Many Rishonim (Ramban, Rashbo, Ritva and others) explain that the reason the law changes when the workers set out for work is because setting out for work was an act of *kinyan* (known as *hascholas melachah*) for farm workers in the time of the Gemara. Just like any other agreement becomes binding only when an act of *kinyan* is performed, so too an employment agreement becomes binding only when an act of *kinyan* is performed and the act of setting out for work in the case of farm workers in the time of the Gemara was an act of *kinyan*.

Thus, in case the parents had knowledge that their child might not show up which you did not have and you did not lose any other job, the determinant if you are entitled to be paid is whether an act of *kinyan* was performed to validate your agreement.

In order to apply this criteria to situations like yours it is crucial that we understand the nature of this *kinyan*. We should note that unlike other

*kinyan*im that are derived from *pesukim* the Gemara does not cite any *pasuk* as the source for this *kinyan* and doesn't even mention that it is an act of *kinyan*. It is only the Rishonim who understand the Gemara in this manner and they do not give a Torah source for this *kinyan*.

We saw in the earlier article that there are three approaches. One approach is the Ritva (*Kiddushin* 47B) that it is an enactment of Chazal whose purpose was that the parties in an agreement should not suffer a loss. If one could release a worker after he began working it would turn out that up until then he worked in vain.

The second approach (advanced by Chazon Ish, Machane Efraim and Erech Shei) is that the *kinyan* is based on the fact that the worker began earning money. Since the employer owes his employee whatever he already earned, the employer and employee became obligated to each other. The employee is obligated to work and the employer is obligated to pay the employee the entire salary that he was told he would earn from performing the entire job.

The third approach is (Ohr Someach) is that the *kinyan* is based on use. By using his employee to perform work that is worth a *pruto* the parties obligated each other to fulfill their agreement.

Thus, there is a major dispute whether work that was performed by the employee but is not remunerated (such as in your case) obligates the parties to abide by their agreement. We should note that in the time of the Gemara workers were paid for the time they spent going to work, (See *BM* 83) which explains why the Gemoro says that going to work is an act of *kinyan*.

As a result, many poskim (e. g. *Avnei Nezer CM* 52, 4, *Chikrei Lev CM* 2, 72 who proved that one must pay his employee for the time he spent going to work from the ruling that it is a *kinyan*) ruled in practical situations that when one is not paid for the time he travels to work, going to work is not an act of *kinyan*.

Thus, if you were hired on a one-time basis and you didn't suffer a monetary loss because your student skipped his lesson, you could not force his parents to pay you because you haven't yet earned any money. However, in case you were hired to give a number of lessons and you already gave one lesson the ruling may change.

The reason the *halachah* may change is a ruling of the Ramo (333, 2) that when a teacher who was hired for two years gives his first lesson it is considered as *hascholas melocho* for the entire two years. The reason is because the entire two years is viewed as one interval. While there is an opinion (*Beis Shlomo CM* 115 according to *Machane Efraim*) that if the agreement stipulates that the tutor will be paid at certain intervals, each interval is considered as a separate unit, the consensus (e.g. *Chazon Ish BK* 23, 2) is that since the agreement was for the worker to work for two years, starting to work serves as an act of *kinyan* for the entire two year interval.

The reason one may not be able to invoke the ruling of the Ramo in your case is because you are not hired for a time period but per lesson (See *res* of *Maharia Anzil* 15). Certainly, if the custom is to view the entire agreement that you made as being one unit, then by giving the first lesson you made a *kinyan* to give all the lessons. For example, if you offer two rates, one a price per lesson and one, for example, for ten lessons, and the parents opted for the ten lessons, then the ten lessons are considered as one unit and when you gave the first lesson you made a *kinyan* to work for all ten lessons and if your pupil failed to arrive you would be entitled to be paid. However, if they opted for the per lesson rate, even if they made up with you to give ten lessons, starting to give the first lesson would not serve as a *kinyan* on all ten lessons.

It is important to note that (*CM* 333, 1) even in those situations where the parents are not required to pay, their action was improper and you are justified in complaining.

The entire discussion until now is only if the parents had reason to believe that their child might not show up and they failed to inform you. We mentioned earlier that the employer is the parents and not the child. As a result, the *halachah* changes if the child's absence took the parents totally by surprise.

The reason for this change is because the *halachah* writes, again in the case of farm workers, that if the reason the employer did not have any work is due to totally unexpected circumstances, then the employer does not owe the workers anything even if they only learned that there would be no work when they arrived at the field. The example discussed by the Gemara (*BM* 76B) is where the workers were supposed to hoe the field in the morning and there was an unexpected downpour at night. The Gemara rules that the employer does not have to pay the workers if there was an unexpected downpour. Thus, if the parents did not have any reason to believe that their child would absent himself they would not have to pay you for this lesson since his absence was totally unexpected.

In conclusion: If the parents were aware that there was a chance that their child may not show and they failed to inform you, and you made a package deal, and this is not the very first lesson, they would have to pay you for the lesson. If they were totally surprised or this wasn't a package deal or it was the first lesson in a package deal, they would not be liable. If you stipulated at the outset or it is customary that parents pay when their child doesn't show up they would have to pay.

As usual, the best advice is to make an explicit contract and avoid problems.

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Asking a favor from someone who can't refuse

Sometimes I could use a favor. For example, I am older and my children are all married and live out of town and it is difficult for me to put up my *succa.* I am a rebbi in a Yeshiva high school and I would like to ask my students to put my *succa* up for me. I think that my students would rather not do it and will only agree because it is uncomfortable for them to refuse. Am I permitted to ask them? And if not, is it permitted if I offer them money?

Answer:

The source for forbidding this practice is a ruling of Rabbeinu Yonah in the Sha'arei Teshuvo (3, 60). He rules that a Jew may not ask someone to do something on his behalf if the person will be too embarrassed or too afraid to refuse. He cites as his source the *pasuk* that says, "*uve'acheichem bnei yisroeil ish be'ochiv lo sirde bo beforech,*" you may not rule over your fellow Jew with *"forech*."

We must first understand the meaning of the word *forech* or *perach*.

The first time the Torah uses this word is in the Torah's description of the Jews' enslavement by the Egyptians. The Torah writes that the Egyptians forced our ancestors, their Jewish slaves, to do work that is described as *perach*. The Rambam (*Avodim* 1, 6) describes this as work whose only goal is to enslave, what we call "busy work." The master does not need the work and the only reason he is assigning his slave this task is to keep him busy.

The Gemoro (*Sotah* 11B) says that the Egyptians would force men to do women's tasks and vice versa. Obviously, if one wants a job to be done well he asks someone who is skillful to perform the task. Since the Egyptian's goal was not the performance of the task but merely to subjugate the Jews, they made people do tasks that they found difficult – even though the results were poor. Similarly, Chazal (*Sotah* 11A) say that the storage cities the Jews were forced to build, Pisom and Ra'amseis, would collapse regularly. This didn't bother the Egyptians because they were not interested in the accomplishments of their Jewish slaves.

Many claim that the other Rishonim disagree with R. Yonah because they understand that R. Yonah is forbidding one to give his fellow Jew any work that is called *perach*.

If one understands that R. Yonah is ruling that the reason one may not ask one who cannot refuse, to do something is because that is *avodas perach* then many do, in fact, disagree. The reason is that the Toras Kohanim (25, 46) writes that the prohibition of giving a Jew *avodas perach* applies only to an *eved ivri*, a Jewish slave. A Jewish slave is sold for a number of years and during that period he must carry out all of his owner's whims and wishes. The Torah commands his owner not to assign him menial or unnecessary tasks. In contrast, an employer is allowed to assign an employee a purposeless task, since the employee is free to quit.

Thus, the Rambam (*Avodim* 1, 6), in the *perek* where he writes the laws of Jewish slaves, records the prohibition that one may not command his Jewish slave to perform a purposeless task. He continues in the next halocho that one may not ask his Jewish slave to perform menial tasks e.g. to take his shoes off for him. He adds that one may ask his Jewish employee to perform menial tasks because, "he is performing these tasks willingly." If an employee is not happy with the work he is assigned, he may quit.

This is even more pronounced in the Sefer Hachinuch (*mitzvah* 346). He titles this prohibition: "One may not assign his Jewish slave purposeless tasks." He explains that this prohibition does not apply nowadays since Jewish slavery does not exist today, as *yoveil* does not apply today. Thus we see that he certainly maintains that the prohibition applies exclusively to Jewish slaves. He can't agree with R. Yonah, according to this explanation, because according to R. Yonah the prohibition applies even today and is not restricted to Jewish slaves.

Similarly, the Magen Avrohom (169, 1) explains that the reason Jews in his time could ask their Jewish servants to take off their shoes for them even though this is listed by the Gemara as a menial task is because the servants were not slaves since they could quit whenever they wanted. They were called servants because of the nature of their work but they were not slaves in any sense and the prohibition applies only to slaves.

An additional difficulty with this explanation is that why should R. Yonah include work that is performed under duress of sorts as *avodas perach*? As in your case, you need the job done, so what does it have to do with *avodas perach*-purposeless work?

However, there is another Gemara to consider which will help us arrive at a different and better understanding of R. Yonah. The Gemara (BM 73B) writes that R. Se'oram, the brother of the Amora Rava, forced Jews who were doing aveiros to help carry his brother, Rava, and Rava justified his action. Rava cited as his source the *pasuk* that was cited by R. Yonah.

In order to understand his derivation and its relationship with R. Yonah it is important to consider the entire *pasuk*. The first half of the *pasuk* states if a Jew owns a non-Jewish slave, his heirs inherit the slave and they should continue enslaving him. The *pasuk* continues with, "and your brother your fellow Jew." Finally, the *pasuk* ends with the words, which were cited by R. Yonah, "you may not assign him *avodas perach*."

Rava explains that the Hebrew word "and your brother" is a part of both the first phrase and the second phrase. Thus it means that some Jews are equivalent to non-Jews and should be enslaved, and others are not equivalent and it is forbidden to enslave them. The Gra understood the Gemara in this manner and explains in *Peninim Meshulchan Hagro* that this is why there are two *negginos* on the word "and your brother" because they make it as if it is written twice: once as part of the first part of the *pasuk* and once as a part of the end of the *pasuk*.

Rava explains that what determines into which group a Jew falls is his behavior.

For those Jews who fall into the group that must not be "enslaved," we must determine what work is included in this prohibition. To determine this it is important to consider the nature of the work these people were forced to do. R. Yehonoson (brought in *Shitto Mekubetses*) explains that Rava was the town's rabbi and the people thronged to hear his *drosho*, necessitating that he be carried on a pallet by people. There were other amoraim in the Gemoro (See *Beitso* 25B) who were also transported in a similar manner. The work that the people who carried the pallets were forced to do was necessary and thus work that could not be classified as *avodas perach*.

The Chassam Sofer explains that what the *pasuk* is teaching is that one may force free people who don't behave properly to work against their will. The derivation is from what the Torah is teaching us in our relationship with Jewish slaves. The Torah said, as we have seen, that one is not allowed to assign a Jewish slave *avodas perach*. Thus when one buys a Jewish slave he does not own the right to assign his slave a meaningless task. However, the Torah adds that if the Jewish slave acts improperly, his owner may assign him purposeless tasks even though he does not own his slave for these tasks and for these tasks his Jewish slave has the status of a free man.

From here we derive that one may force a free person who is not acting properly to perform work on one's behalf. The *pasuk* says that this exception applies exclusively to people who act improperly and by implication we derive that it is prohibited to force a person who does act properly to work against his will.

If one understands R. Yonah in this manner everything works out beautifully. R. Yonah was not discussing purposeless work. He understood the Gemara in the manner we explained now and took the Gemara one step further. Just like the *pasuk* forbids physically coercing a Jew who acts properly to do work for us, so too it is forbidden to ask people who will be coerced due to the status of the one who requests their assistance to work for them.

If one understands R. Yonah in this manner there is no proof that the Rambam, Chinnuch, Magen Avrohom and others disagree.

Whichever explanation is correct, we find many gedolim who followed R. Yonah's ruling. In Orchos Rabbeinu (3, 130) he writes that the Chazon Ish ruled like R. Yonah and said that one who asks someone to speak in public when the person does not want to speak but it is hard for him to refuse, violates this prohibition. This was written by the Chazon Ish explicitly (Kovetz Iggros 2, 89). Orchos Rabbeinu writes that the Steipler told those who were asking distinguished people to speak at his grandson's bar mitzvah to stop their repeated requests in order to avoid violating this ruling of R. Yonah.

Similarly, R. Moshe Sternbuch writes (*Teshuvos Vehanhogos* 1, 540) that he heard that the Brisker Rav was very careful not to violate this ruling of R. Yonah to the extent that he wouldn't even ask anyone to bring him his hat. He also writes that he heard that once the Chazon Ish and Rav Elchonon Wassermann participated in the *chasuna* of a talmid chacham and Reb Elchonon repeatedly asked the Chazon Ish to speak and he said that he was not violating this ruling of R. Yonah. However,

the Chazon Ish replied that he was not so certain, upon which Reb Elchonon asked the Chazon Ish for forgiveness.

Thus if you ask your students to build your *succa* when they only do it because they can't refuse, you will violate this ruling of R. Yonah.

You asked if paying money will solve the problem. If we understand R. Yonah in the above manner there are some who say that it does not. The reason is that, as we have seen, the source for R. Yonah's ruling is his understanding of Rava's ruling that there is a distinction between people who act properly and those who do not. The Orach Hashulchan (*Osid*, *Yoveil* 40, 12) and Rav Moshe Feinstein (*Dibbros Moshe BM siman* 72 note 92) explain that R. So'aram certainly paid the people who did not act properly for their work because one who doesn't pay his workers is stealing. The only thing that Rava permitted was to force them to work but he paid them the wages they were entitled to.

Therefore, if the Torah forbids this practice with people who do act properly and R. Yonah says verbal coercion is equivalent to physical coercion, then we have a source that paying does not solve the problem. However, it will solve the problem if some of your students will willingly build your *succa* when you pay them, which is fine even according to R. Yonah.

In conclusion: R. Yonah would prohibit your requesting your students to build your *succa* for you if you think they are only building it because they can't refuse your request. However, if they can refuse you or if by offering them money they will willingly build your *succa,* you are okay.

The best idea is to ask for volunteers since then no one will feel obligated and those who volunteer, especially if they are paid, are not being coerced to work for you.

Agents

62

A Real Estate Agent who Siphoned Off Funds

I work as a real estate agent. Recently a builder granted me exclusive rights to sell apartments in the condominium he is completing. We agreed that I would be paid ten thousand dollars for each apartment I sell. We made up to sell the apartments for three hundred thousand dollars each. In order to earn a little extra, I told the buyers that the price is three hundred twenty thousand dollars but in the contract we can only write three hundred thousand dollars because the seller wishes twenty thousand in cash in order to lighten his tax load. Afterwards, I gave the seller three hundred thousand and kept the extra twenty thousand for myself. I already sold three apartments in this manner. One of the buyers commented that he knows that I am keeping the extra twenty for myself but he doesn't care because it is still a worthwhile deal. Was I acting properly, and if not do I have to return the money to the buyer or give it to the seller? How about the customer who realized what I was doing?

Answer:

This is a common ploy of dishonest agents. Rav Mendel Schaffrin wrote (*Hayashar Vehatov* vol. 2 page 21) that the price is the price that was set by the seller and any extra money taken by the agent is theft which must be returned to the buyer. He says that until the agent returns the money he is *posul* to act as a witness like any other thief,

unless he erred like you and when he realized that he acted improperly, he returned the money.

There is a similar case which is discussed in the Shulchan Aruch (185, 1). The owner of an object asked an agent to sell an object at a certain price, but the agent sold it to a customer at a higher price. The question is: who keeps the extra money that the agent got from the customer. The Shulchan Aruch writes that the extra money belongs to the owner of the object and not to the agent. The Sema (185, 2) explains that the reason is because the owner never meant to give anything extra to the agent. It is just that he erred in thinking that he couldn't get more, or he needed the money quickly. Since the object belongs exclusively to him he is entitled to whatever was paid in exchange for his object.

Thus, we have confirmation that the agent is not entitled to the extra funds that he received by deceiving the customer. The question is only why in the case in the Shulchan Aruch the extra money goes to the buyer and Rav Schaffrin said that extra money must be returned to the customer.

It would seem that the explanation is that in the case of the Shulchan Aruch the agent intended to sell the object as an agent of the owner. He erred only in thinking that since it is by virtue of his efforts that the customer paid a higher price, therefore he deserves the extra money. The Shulchan Aruch teaches us that this is incorrect since the object belonged to the owner and not the agent, and consequently, the one who is entitled to the profit is the owner.

However, the agents who sell at a higher price and keep the money for themselves justify their behavior in the following way. Rav Schaffrin writes in his article that they say that they consummated two sales. First, they sold the apartment to themselves at the cheaper price and then, after they bought the apartment for themselves, they resold it at the higher price. Thus they are entitled to the difference in price. The result

is that the sale which they made on behalf of the owner (to themselves) only netted the smaller amount and therefore the extra money must be returned to the buyer and not the seller.

Rav Schaffrin writes many reasons why the justification of the agents does not stand up. One of his arguments is that if the agent was purchasing on his own behalf he would not be entitled to any fee as an agent because one may not be both a party to a sale and an agent at the same time. One is an agent only when he acts on behalf of others. This is especially true in your situation where the builder paid you a fixed price to sell on his behalf. Another proof he offers that the agent was not a buyer is that the owner has to intend to sell to his buyer and here he did not intend to sell to you.

It would seem that based on these reasons, the ruling that the additional funds must be returned to the buyer is still open to debate because effectively the agent was acting as an agent, even if he did not think so.

It would seem that the issue whether the extra money which you took must be returned to the buyer or passed on to the seller is very pertinent to your particular situation since one of your customers realized what you were doing but agreed nonetheless. If normally the extra money must be returned to the customer, then in the case where he agreed even after realizing what you were doing, you would not need to give him anything because he was *mocheil* the debt. However, if the money must be paid to the seller then it would seem that even in this case the seller is entitled to the money since he wasn't *mocheil* anything.

In truth, it seems that in any case you may keep the money which was paid by the one who realized that you intended to pocket the money because this customer never intended that the money should go to the seller or to be a payment for the apartment. He was basically paying you a bribe. It was wrong to do what you did. However, since you were the exclusive agent the only way to buy the apartment is through you and

by paying you a bribe. Since the customer willingly gave you a bribe you needn't return the bribe.

One can deduce this from the Shulchan Aruch (9, 1) who rules that a dayan who received a bribe must return the money to the one who gave the bribe only if the one who gave the bribe asks for it. The reason (See *Shevus Yacov 1, 135)* one need not return it otherwise is because we understand that if the one who gave it doesn't ask for it back he is *mocheil* the debt. Therefore, here where he said right away that he is giving it to you willingly, you can interpret his actions to mean that he doesn't mind if you keep the money.

In conclusion, it was wrong for you to add to the purchase with intention of keeping the money for yourself. In general, you must give the money either to the seller or the buyer but you may not keep it yourself. However, the money you received from the one who saw through your scheme you may retain.

63

An Agent Gave Unsolicited Information and later demanded an Agent's Fee

Four months ago I was looking to buy a condominium. Since I could not afford to pay an agent I traveled to the community where I wanted to buy. While I was there, a man who saw that I was looking to buy an apartment came up to me and, without asking any questions, informed me of an available apartment. I pursued the matter further and eventually purchased that condominium. I should note that it is quite likely that I would have found that condominium even if he had not told me about it, since it was a well-known fact in the community that this condominium was for sale.

About a month later, the person who told me about the apartment called me, identified himself as an agent and demanded that I pay him an agent's fee since the information he provided led to my purchase. I feel that I shouldn't be required to pay since I only used the information because I didn't know that he was an agent. I think that he deliberately withheld this information in order to demand subsequent payment. Who is correct?

Answer:

If we follow the law in Israel, the agent is not entitled to any fee since in order to charge an agent's fee the agent must first sign his customer

to an agreement hiring him to act as his agent. However, when dealing with chareidim, batei din in Israel do not follow this law since the custom among chareidim is to pay an agent's fee even if the customer did not sign an agreement. Since custom suffices to create an obligation you, as a chareidi, cannot free yourself from the obligation because of the Israeli law.

In order to answer your question it is necessary to classify your relationship with the agent.

The agent provided you with a service that people normally pay for i.e. he worked for you. However, in contrast to most people who hire people to work for them, you did not ask him to work for you. When one asks someone to work for him he is employing him and their relationship is governed by the rules of *sechirus poalim*. However, when someone works for someone else on his own initiative he is not an employee and he is not entitled to be paid as an employee because no employer ever obligated himself to pay him.

In the Torah literature he is classified as a *yoreid*. The reason for this name is because the case which is discussed in the Gemara (*Bava Metsiyo* 101A) is where a person planted trees in another person's field without having been asked to do so. One of the salient differences between a *yoreid* and an employee is that if one pays an employee late he violates the din of bal talin but if one pays a *yoreid* late he does not violate this issur.

Even though the beneficiary of the *yoreid's* work never obligated himself to pay, nevertheless the Gemara (*Bava Metsiyo* 101A) rules that he has to pay a *yoreid* something. There are two approaches to explain what obligates the beneficiary to pay the one who worked for him in spite of the fact that he never obligated himself. Some meforshim explain that he must pay for the benefit he derives from the worker. This is supported by the Gemara (*Bava Metsiyo* 117B) that states, "It is

forbidden to benefit from someone else's possessions (without paying for them)." The Gemara gives as an example someone who effectively worked for someone else on his own initiative. This is also the approach of the Ketsos (246, 2).

Other meforshim state that the requirement to pay is not because of the benefit received but because of the savings that the beneficiary had because of what the *yoreid* did for him. This is known in the Gemoro as *mishtarshi*. The case discussed in the Gemara (*Chulin* 131A) is where the non-Jewish government took away someone's crop before he had a chance to separate terumoh. The Gemara rules that if the reason the government took away his crop is because he owed the government money he must give replacement terumoh to the cohein since the terumoh that was present in the untithed crop was used to pay back his debt, effectively saving him money.

If one follows the second approach it is quite clear that you are not obligated to pay the agent. The source is Tosafos (*ibid*, c.f. *Sha'anei*) who explains why, in spite of the above, one who eats his own terumoh is not obligated to pay for it since he saved himself the cost of a meal. Tosafos explains that even though the person ate, nevertheless, he could have fasted and not incurred the expense of a meal. Therefore, when he ate he did not necessarily save any money.

In your case you say that you probably would have found the condo yourself. Therefore, it isn't certain that the agent saved you any money. Even if you would have bought a different condo without paying an agent's fee you would not have to pay, because you could have bought some condo without paying an agent's fee. Thus, we have shown that if the reason why one must pay a *yoreid* is because of the savings, you are not obligated to that person.

Since many maintain that the reason one must pay is because of the benefit derived from the *yoreid,* we have to investigate if you have to pay for the benefit you received.

You mentioned that most likely you would have come upon this apartment by yourself. The Pischei Choshen (*Sechirus* 14, footnote 10) discusses a similar case. In his case, a seller advertised in the newspaper. In the interim an agent sent him a customer who bought his apartment. The question was whether he had to pay the agent since most likely the seller would have found some customer as a result of his advertisement. The Pischei Choshen writes that the beis din has to make a careful evaluation of how much benefit the seller had. Therefore, in your situation also, beis din would have to evaluate how likely it is that you would have found out the information by yourself.

There is an additional reason to free you from paying anything. When one works without having been asked to work, the owner of the property has the prerogative to tell him to remove his improvements. However, in your case it is not possible to remove the benefit since you already bought the property.

The Chazon Ish (*Bava Kama* 22, 6) says that beis din tries to find out the truth. If beis din believes that the owner would really rather not have the improvement, then we accept his request for the one who improved to remove what he did, even when is impossible for him to do so. Thus, if beis din will determine that you really would not have wanted the information because you could not afford the expense you will not have to pay anything.

In conclusion: If it is plausible that you would have anyway found out the information that was provided by the agent, or you can show that you really would have turned down the information had you known that you will have to pay for it, then you do not have to pay the agent.

64

Passing On Information Received from a Real Estate Agent

In our community there is a person who arranges rentals for Shabbos for a fee. People going away for Shabbos inform him of the availability of their apartments and people who are interested in renting turn to him for apartments. This week I am planning to go away for Shabbos so I informed the agent and he sent me a potential tenant. However, my apartment was not suitable for this renter. May I inform my sister, who is also planning to go away for Shabbos, about this renter since her apartment is suitable for this renter, or do I have to tell my sister to approach the agent and let him make the deal and receive his fee? My friend told me that if I don't tell the agent I may be violating the *issur* of *oni hamehapeich becharoro*. Is he correct?

Answer:

It is not exactly correct that you will violate the *issur* of *oni hamehapeich becharoro,* but there are three reasons why you have to pay the agent his fee. Furthermore, we will see that your friend wasn't far from the truth in mentioning the prohibition of *oni hamehapeich becharoro*.

The first reason you may not tell your sister is that by telling her you will violate the prohibition against telling *loshon hora*. The Rambam writes (*Deos* 7, 5), "One who tells another something which, if heard by others, will cause physical or monetary harm to a third individual, violates the prohibition of *loshon hora*." The Chafetz Chaim in a number of places

explains that even though one is not saying anything bad *per se* about another it is still *loshon hora*.

There is a common misconception that *loshon hora* is only when one says something which is bad about the person. However, the Chafetz Chaim in many places cites the Rambam that anything which is **harmful** constitutes *loshon hora*. He gives (*Loshon hora Klal* 2, *Be'er Mayim Chaim* 3) as an example one who reveals to another about someone's plans to travel to a certain place to buy goods from a specific seller. Since revealing his travel plans may undermine his plans, as others may go to that seller and buy him out or bid up the price harming the one who was planning to buy there, telling over this information constitutes *loshon hora*.

In a second place (*Rechilus* 9, *Introduction of Be'er Mayim Chaim*) the Chafetz Chaim elaborates at length about this Rambam. He explicitly writes that even if the victim did not suffer an actual monetary loss, but was just thwarted in his plans to earn a profit, it constitutes *loshon hora*.

He also writes that the fact that this speech only **causes** damage does not diminish the prohibition because the Gemoro (*Bava Basra* 26A) writes that it is forbidden to cause damage. The fact that one does not have to pay for causative damages only applies to his monetary liability. Nonetheless, the act is strictly forbidden. He writes specifically that speech that results in thwarting someone's efforts to find employment or to enter into a partnership is *loshon hora*.

In another place (*Rechilus* 8, 5) the Chafetz Chaim quotes the Sha'arei Teshuvoh (3, 225) of Rabbenu Yonah who cites a number of reasons why one must not reveal someone's secrets. Sha'arei Teshuvoh writes that while it does not constitute *rechilus*, it is forbidden because it causes damage since it may thwart the person's plans.

Additionally, it is a violation of tzniyus. Tzniyus is not only how one dresses! One sees in the Gemoro that keeping secrets constitutes

tzniyus. The Gemoro (*Megillo* 13B) proves that Rochel, Shaul and Esther all had the virtue of *tzniyus* from the fact that they were able to keep a secret. The Chafetz Chaim (*Be'er Mayim Chaim* 7) writes that R. Yonah maintains that it is worse than *avak loshon hora* and *rechilus*.

It is unclear how to explain the apparent discrepancy that sometimes the Chafetz Chaim considers it to be *loshon hora* and sometimes *avak loshon hora*. It would seem that these are two different opinions: the Rambam who considers it *loshon hora* and Rabbenu Yonah who mentions other reasons to forbid. The difficulty is just how to reconcile the various statements of the Chafetz Chaim. We should further mention that even if it is *avak* some maintain that *avak* is also forbidden from the Torah. However, in either case it is forbidden.

In conclusion: Since revealing to your sister the identity of the person who wanted to rent an apartment for Shabbos will prevent the agent from earning money that he would have earned otherwise, you would be violating the *issur* of *loshon hora (*if you do not pay the agent his fee). According to the Rambam it is full-fledged *loshon hora,* and according to Rabbenu Yonah it is *avak loshon hora*.

The second issue is another prohibition involved in revealing secrets. The Gemoro (*Yuma* 4B) derives from a pasuk that one may only tell to another something that was told to him, if he was told explicitly that he may repeat it to others. Lacking such permission, a person may not tell it to others. From *Res. Chasam Sofer Orach Chaim* 124 it is clear that he understands that the *amora* in the Gemoro who said it, understood it to be a real *drosho* and not an *asmachta*. The Semag (*Lo Sa'asei* 9) brings this as an example of *avak loshon hora*. The She'iltos (*Vayeishev* 28) brings it as an example of *rechilus*.

Whereas, until now the issue was only information which, when told to others, would damage someone, this prohibition applies to anything that was told to another. The Chafetz Chaim (*LH* 2, *BMC* 27) limits the

prohibition to where there is some indication that the one who told the information desires that the information should not be spread around. He gives as an example a case where someone called someone else to his house to tell him something. The fact that he was called to his house indicates that he wanted this information to be kept private.

In your situation it is obvious that the agent does not want the information that he gave you – the identity of someone who is looking to rent an apartment in your community for Shabbos – to be told to others. Therefore, if you were to reveal this to your sister you would be violating this prohibition as well, which may also be *avak loshon hora,* or it may be an additional prohibition.

The third issue is a prohibition known as *oni hamenakeif*. There is a Rabbinic prohibition to use someone's efforts to earn a profit at the expense of the one whose efforts you are using. The example discussed in the Mishna (*Gittin* 59B) is where a person banged on an ownerless olive tree causing the olives to fall to the ground, and someone else picked up the olives from the ground before the person who knocked them to the ground could gather them. Strictly speaking, the second person is the legal owner since the first person does not acquire the olives by knocking them down off the tree. It is only when one picks them up that he makes a *kinyan* of *hagbo'h*o (lifting) and acquires the olives. Therefore, the second person is the legal owner of the olives. However, the *Rabbonon* forbade the second person's actions and enacted that this is a Rabbinic form of stealing.

Another situation that is discussed in the Gemoro (*Bava Basra* 21A) is where a person set out bait to cause fish to congregate and before he could catch the fish someone else caught them. The second person is considered to be a Rabbinic thief since he used the first person's efforts in order to catch the fish, preventing the first person from catching the fish that he worked on with the goal of catching the fish himself.

Similarly, the agent worked on gathering information in order to match people looking for apartments with those going away for Shabbos. If your sister would use this information that came from the agent and rent to a person who had turned to the agent for an apartment, thereby preventing the agent from making a match that he had worked on, she would be a Rabbinic thief.

One can obtain much more information about this prohibition in our sefer, *Mishpatei Yosher* (*Oni Hamehapeich*, Chapter 5).

What your friend told you that it is *oni hamehapeich* is not strictly true, since that prohibition only applies when one buys or rents property or an object that another person was about to close on with the object or property's owner. Here your sister did not have any deal with the agent. Therefore, *oni hamehapeich* in the strict sense does not apply, but this is somewhat similar and it does apply.

In conclusion: It is forbidden for you to pass on to your sister the information you received from the agent in order to not pay him his fee. If you do so, you perhaps violate the Torah's prohibition of *loshon hora* or at least *avak loshon hora*. Furthermore, if your sister uses this information in order to circumvent the agent she would be a Rabbinic thief of the money that the agent would have earned.

If you tell your sister and she uses the information but pays the agent his fee anyway, there is no problem.

65

Determined from a Rental Agency's ad which house was available

I was combing the newspaper in search for a house to rent. I noticed an ad by a rental agency for various houses and for each house they listed the street on which it was located. One of the houses they listed was in an area that I know well and I knew that there are only about a hundred fifty houses on that street. Since I also knew some of the people who live on the street I figured I can find out which house was available and that way I can save on the fee that the rental agency charges. I was successful and I found the owner and closed with him without telling the rental agency anything. I acknowledge that if I wouldn't have seen the advertisement I would not have known that there was a house for rent since most houses in the vicinity are owner occupied. Am I obligated to report to the rental agency that I rented and pay them something or not since I didn't use their services? I asked some friends and they told me I shouldn't say anything because I did the work myself and for what the agency did one doesn't owe anything. Is that correct?

Answer:

Since the answer to your question depends on local factors we will give general rules that will enable you to determine the answer to your question.

Before obligating a person to pay anything, the first question one must always ask is what justification is there for obligating the individual to pay.

In your case the only thing the agency did for you is to provide you with the information that was instrumental for you to rent the house.

When one performs a job for another person, the beneficiary is obligated to pay only if normally people pay for this job. Even if a person asks someone to do something on his behalf and agrees to pay for the job, he is not obligated if the accepted custom is not to pay for this action!

The source for this principle is a ruling of the Rosh (*res* 64, 3) that is ruled by the Ramo (129, 22) in the case of an individual who offered money to someone to cosign a loan for him. The Rosh wrote that since the custom (at his time) was that people did not charge for cosigning a loan the borrower was not obligated to pay the cosigner. Therefore, in places where it is not customary to charge for providing even the precise location of an available house, you would not need to pay. We should note that in the charedi community in Israel it is customary to charge for this service and very often this is all that rental agents do for their customers (because that is the desire of the customer).

The second factor to consider is that you did not use their services. The purpose of their advertisement was to attract you to use their services. If you use them, you effectively hire them as your employee and are obligated to pay them in case you rent a house that they suggest to you. However, you did not contact them and you never agreed to employ them. Thus, you definitely do not have to pay them as employees.

However, even when a person performs a job that he was not hired to do he is often entitled to payment as a *yoreid,* one who performed work on another person's behalf even though he was not hired to do so. For example, the Gemoro (*BM* 101A) rules that if a person planted a tree in someone else's field and the owner of the field leaves the tree in his field, the owner of the field must pay the planter for having planted the tree for him. The reason is that in Torah law there is a concept that a person must pay for benefits he receives. (The fact that the reason one

must pay a *yoreid* is because he benefited from the *yoreid* is stated by the Ketsos (246, 1 and 2) and provable from the Milchamos (*BB* 2B).)

However, in your situation one cannot say that in placing the advertisement the agency was a *yoreid* since they did not intend to benefit you or anyone else by their advertisement. Their intent was solely to help themselves by attracting customers who would hire them and pay for their services. We can prove that one is not entitled to payment as a *yoreid* if his action was for himself and not in order to help another person from a ruling of the Ramo (*CM* 264, 4) in the case of two people who were incarcerated simultaneously. If one of the prisoners spent money (lawyers, bribes etc.) to gain his freedom he may not demand payment from the second prisoner who also gained freedom incidentally as a result of his efforts, unless his original intent was to gain freedom for the other prisoner as well. If the reason he spent money was solely in order to gain his own freedom he is not entitled to payment from his fellow former prisoner.

Thus we have learned that one must pay a *yoreid* because he must pay for the benefit which the *yoreid* gave him. But in case the *yoreid* did not intend to benefit the recipient, he cannot demand payment from the recipient. Therefore, the rental agency is not entitled to payment from you as a *yoreid*.

There is a second completely distinct situation where one who derives benefit must pay his benefactor. In the first case the benefactor bestows a benefit upon his beneficiary. In the second case the beneficiary himself acts to derive benefit from a benefactor.

Tosafos (*BK* 101A) writes that there is an important limitation to this liability. The beneficiary is only liable if he himself or his animal acts to derive the benefit. Tosafos derives this rule from a ruling of the Gemara (*ibid.*) that if a monkey took A's dye and used it to dye B's wool, B does not have to pay A. Even though B benefited from A's

dye, since neither B nor his animal took the dye (and A did not dye the wool), even though he is a beneficiary, he is not obligated to pay for his benefit. Rav Chaim Brisker (see *Birkas Shmuel BK* 14) explains that the basis for this liability is that it is a kind of theft of benefit that the beneficiary must pay for, and one is only responsible for his own and his animal's actions but not for the actions of a third party.

The Gemara is replete with examples of this. For example, the Gemara (*BK* 20B-21B) has a lengthy discussion whether and when one who squatted on another person's vacant property must pay for the rent that he saved, i.e. the benefit he derived from the property. The upshot of the Gemara's discussion is that one who derives benefit must pay for the benefit only in case the owner suffered at least a small loss. The loss can be minute. A *pruto* (about three cents) certainly suffices and according to some (See Maharsho Kesubos 30B) it can be even less!

Moreover, one can derive from Tosafos (*BK* 20A) that even if the loss is not certain but only probable it suffices. Furthermore, most Rishonim say – and that is the ruling of the SA (CM 363, 7) – that the beneficiary must pay for the entire benefit that he received even if it is much larger than the benefactor's loss.

We can now derive guidelines that will allow you to determine whether you owe the agency money. It is true that the agency is not entitled to money as a *yoreid* but perhaps you owe money because you derived benefit from the information in their advertisement. We should note that this is not comparable to other information that one derives from printed matter. For example, if one learns from a text how to produce toothpaste and then sells it, the author of the book cannot demand a share of the profits since he gave the information away to the public. However, here the advertiser (a kind of author) tried to hide the information that you derived from his advertisement. Based

on what we learned, it is possible that you owe money for the benefit you derived.

The upshot of the above discussion is that there are two factors that will determine whether you actually owe the agency money for the benefit you derived. Since one must pay for the benefit he gained only if his benefactor suffered a loss or even a likely loss, you will have to do an honest investigation to determine whether the agency most likely would have found a different customer for the house. For example, if they are the only agency that operates in this area and the location in question is a desirable location, their loss is likely. However, if there are many competing agencies, then their loss cannot be classified as likely and you would not need to pay them. Furthermore, if in your community one does not pay for merely receiving information from a real estate agent then you also would not need to pay since you did not derive a benefit with monetary value.

Ma'aseir Kesofim

66

Using *Ma'aseir* Money to Publish a *Sefer*

I found someone who agreed to sponsor the publication of my forthcoming *sefer* about Jewish Philosophy that is directed to *kiruv* of non-observant Jews. Our agreement is that in return for sponsoring the *sefer* the sponsor may place an advertisement for his company in the *sefer*. Our question is whether he can use his *ma'aseir* money to pay for the *sefer*.

Answer:

In order to answer your question we must study two issues. The first issue is whether one may use *ma'aseir* money in order to sponsor a *sefer* even if the sponsor does not advertise. The second issue is whether the fact that he will gain a free advertisement changes the answer. In this article, we will study the first question and Be'zras Hashem we will clarify the second issue in the next article.

We find in the early poskim two primary purposes to which one should direct his *ma'aseir* money. One is to support the poor, and the second is to support those who study Torah, either by giving his money directly to them or by giving to an institution where Torah scholars study or are produced.

The source for the first use is the *mitzvah* in the Torah to give *tsedokoh* to poor people. When one gives his *ma'aseir* money to poor people he is at the same time fulfilling the *mitzvah* of *tsedokoh*.

The primary source that one may use his *ma'aseir* money to support those who study Torah is the Midrash Tanchumo (*Re'ei* section 18) that interprets the words in the Torah (*Devorim* 14, 22), "*aseir te'aseir,* you shall tithe," as teaching that when one earns money he must set aside a tenth to support those who dedicate themselves to Torah study. The Chafetz Chaim (*Ahavas Chessed* 2, 19) explains that this is parallel to the *mitzvah* to tithe one's crop. When one harvests his crop he is enjoined by the Torah to set aside a tenth of his crop for the Levi'im and Kohanim because they were set apart by Hashem to study and teach Torah to the Jewish nation. Similarly, when one earns money from non-agricultural sources he should use the tithe of his profits to support those who engage in the same pursuit as the Kohanim and Levi'im in the time of the Beis Hamikdash, i.e. people who dedicate themselves to Torah study.

The Chafetz Chaim resolves the issue of precedence between these two as follows. If one has close relatives who are poor he should first use his *ma'aseir* money to fill their needs since he is responsible for their support (and he is not supposed to ask others to support them if he is capable of doing so). If he doesn't have such relatives or if their immediate needs have been met, then his next priority is the support of Torah scholars. He shows that when one uses his funds to support Torah scholars he is promised that Hashem will bring blessing to his possessions.

The Rishonim discuss whether one may use his *ma'aseir* money to support other important causes like building shuls and mikvahs or to cause people to do *teshuvah* (e.g. a weekend retreat for non-religious people). The Ramo (*YD* 249, 1) follows the opinion of the Maharil that one may not use his *ma'aseir* money for these purposes. Some (e.g. Chasam Sofer (*res. YD* 231)) understand the Maharil and Rama literally to maintain that one may not use his *ma'aseir* money to support these causes. Others (*Arugas Habosem res. YD* 220, *Sha'arei Tsedek* page 312)

understand that even they only meant that this was the custom in their time and one may not deviate from the custom (when and where that is the custom).

Many poskim disagree and maintain that one may use his *ma'aseir* money to support other *mitzvah* causes provided that he has no prior obligation to support them. The custom nowadays is to follow this latter opinion. Thus, in practice one may use his *ma'aseir* funds to help build a mikvah, shul, support the local *hachnosas orchim* fund, *chevra kadisho* and the like.

We should note that the dispute has nothing to do with the relative value of the various uses. The issue is only the proper use of one's *ma'aseir* money.

Having established that nowadays one may use his *ma'aseir* money to support all *mitzvah* causes we have to consider whether sponsoring the publication of *seforim* falls into this category.

The Omar Shmuel (*res YD* 4) was asked by a poor talmid chochom who didn't have enough extra money to publish his *chiddushei Torah*, if he could use his personal *ma'aseir* money to cover the cost.

The Omar Shmuel replied that for several reasons he is permitted to use *ma'aseir* money. The reasons are very important because they enable us to determine when his ruling applies.

His reasons are based on the Gemoro's explanation (*Kesubos* 50A) of the virtue that is described in Tehillim: "Happy is the one... whose *tsedokoh* is everlasting." The question is that when one gives a poor person money (the usual act of *tsedokoh*) the act is transitory. He gives *tsedokoh* and the *tsedokoh* is finished. The *pasuk* is obviously describing something that is different.

The Gemoro lists two acts of *tsedokoh* where the *tsedokoh* is everlasting, and the Omar Shmuel says that both apply to one who publishes his *chiddushei Torah*. The first is one who studies Torah subjects and then

teaches them to others. Rashi explains that the *tsedokoh* action is that he toiled in order to teach students. One who pays for publishing *chiddushei* Torah is performing this act since he is helping to impart Torah knowledge to others.

The second act that is classified as everlasting *tsedokoh* is one who lends his *seforim* to others. The Omar Shmuel reasons that one who pays to publish *chiddushei Torah* is performing this act as well since he is using his money to make seforim of Torah available to others. Since the Gemoro describes these as being acts of *tsedokoh* he reasons that one may use his *ma'aseir* money to enable these acts to take place just like he may use his *ma'aseir* money to enable him to give money to a poor person, the classic act of *tsedokoh*.

He adds that whereas the second reason is only valid according to those who maintain that one may use *ma'aseir* money in order to perform all *mitzvos* (here the *mitzvah* is to lend to others) the first reason is valid according to all opinions since it is supporting Torah study. However, this last statement may not apply to your *sefer* if its purpose is not Torah study but to return Jews to Torah practice. If your *sefer* also includes Torah content then it would apply to your *sefer*.

We should note that the argument that an act that is described as being an act of *tsedokoh* qualifies as a *ma'aseir* expense is not a new argument of the Omar Shmuel. It was first advanced by the Maram Matz and the *Sefer* Chassidim, two very early sources, in order to permit use of one's *ma'aseir* money to buy seforim in order to lend to the public. This is cited by many including the Maharshal, Taz (249, 1) and Shach (249, 1). What is new is the Omar Shmuel's application to one who pays for publishing *seforim*.

We should note further that the consensus of modern poskim (Chazon Ish (cited by *Orchos Rabbeinu* (vol 3 page 138), *Shevet Halevi* (7, 195) and others) is that the particular application to one who buys seforim

and lends to others applies nowadays only to one who actually places the *seforim* that he purchases with his *ma'aseir* money in places that are used by the public to study Torah since nowadays people don't usually borrow *seforim* from private homes.

Similar to the Omar Shmuel, the Orchos Rabbeinu (1, page 300) testifies that the Steipler (he was his *chavrusa*) would use money that others gave him to distribute to *tsedokoh* to help people to publish their *seforim*.

Two conditions apply to this ruling. One, which is stipulated by the Omar Shmuel himself, is that when the author sells the *sefer* the profits must be used for expenses that also qualify as *ma'aseir* expenses because otherwise the *ma'aseir* money was used to generate income for the author. If the author is poor and needs the money to live then he can keep the money since in any case people can use their *ma'aseir* money to support him. However, if not then he must use the money either to help publish more *seforim* or give it to a *tsedokoh* cause.

The second condition follows from the rationale that was cited above. Since the reason use of *ma'aseir* money is permitted is because it is being used to disseminate Torah knowledge, the *sefer* must serve this purpose. For example, sometimes people publish *seforim* about Judaism that do not impart Torah knowledge e.g. Jewish history, culture, biographies. Based on the above, worthwhile as they may be, one could not use his *ma'aseir* money to help publish these *seforim*. Also sometimes people publish *seforim* that don't fill a public need e.g. an obscure deceased relative's Torah notes that will not be studied by the public. Again, helping publish these *seforim* would not qualify as a *ma'aseir* expense since they will not impart Torah knowledge to the public at large.

In the Derech Emuno (1, *Matnos Aniyim* 7, *Tziyun Halocho* 60) R. Chaim Kanievsky says that the Chazon Ish ruled similarly, that the only *seforim* that one may use *ma'aseir* money to help publish are those that contain Torah knowledge that is needed by the public. The Chazon Ish derived

his ruling from the halocho that one may use *ma'aseir* money to purchase a *sefer* Torah that is needed by the public. He adds that even if a *sefer* does not meet this qualification, if the author is poor and he will use the money that he will earn from sale of the *seforim* to help support himself, one may use his *ma'aseir* money to help publish the *sefer* since the donor is helping a poor person to earn a livelihood, one of the highest forms of *tsedokoh*.

In conclusion: If there is a public need for your *sefer*, then the sponsor can certainly use his *ma'aseir* money to help pay for its publication if he does not advertise. Be'ezras Hashem next week we will deal with the advertising issue.

67

Using *Ma'aseir* Money to Get an Advertisement

In the previous article we learned that generally one may use his *ma'aseir* money to sponsor the publication of a Torah *sefer*. We left open the question whether the sponsor may still use his *ma'aseir* money to pay for the sponsorship if in return for the sponsorship he is granted free advertisement for his business in the *sefer*.

Answer:

In order to answer the question it is important to clarify the issue.

The Sifrei derives from a *pasuk* (*Bamidbar* 5, 10), that even though a *kohein* is entitled to receive *terumah,* he may not take the *terumah* from the one who set it aside, without his permission. The one who separates the *terumah* has the right to select the *kohein* to whom he will give his *terumah*. Thus, a farmer who set aside *terumah* may refuse to give it to *kohanim* who approach him because he wishes to dispense his *terumah* to his grandson who is a *kohein*. This right is known as *tovas hano'o*. The Gemoro (*Bechoros* 27A) even rules that a farmer may accept money from a non-*kohein* so that the farmer will give his *terumah* to the non-*kohein*'s grandson who is a *kohein*.

Thus we see that even though a non-*kohein* farmer does not own his *terumah* and cannot do whatever he wishes with his *terumah* since he must give it for free to a *kohein*, nevertheless he may derive benefits

from his *terumah* even if they are worth money. It is these benefits that the Gemoro calls *tovas hano'o*.

There are other gifts to *kohanim* where the one who set it aside does not have this right. When one sets aside the portion which in the third and sixth year of the seven year *shmitah* cycle is given to a poor person, known as *ma'aseir onei,* he does not have the right to refuse any poor person who comes to him and asks for it. The Mishna in fact specifies exactly how much he must distribute to each poor person who approaches him. Thus, for this gift to others the owner of the field does not have *tovas hano'o*.

When it comes to *tsedoko,* the Shulchan Aruch (*YD* 257, 10) rules that an individual has the right to select the individual or cause he wishes to assist with his *tsedoko*. Thus, for example, while one should not turn anyone away empty-handed, nevertheless, he may and should support his poor relatives before others. One who collects funds from others must be fair and may not favor his relatives since it is not his money. However an individual has the right to decide how to spend the money he has set aside to fulfill the mitzvah of *tsedoko* i.e. he may derive *tovas hano'o*.

A very pertinent illustration of what is included in the category of *tovas hano'o* can be derived from a ruling of Rav Moshe Feinstein (*YD* 1, 143). In many countries, including the U.S., when one donates to a qualifying charitable organization it reduces his tax-burden. Thus, suppose a person donated ten thousand dollars and since it lowered his taxable income he saved fifteen hundred dollars. The question is may the donor keep the savings for himself (and he will just need to give *ma'aseir* on the money he saved since his income increased) or do we say that, since the savings resulted from use of one's *ma'aseir,* the entire savings bear the status of *ma'aseir* money.

Rav Moshe ruled that since the money that the tax-payer saved by giving *tsedoko* is only incidental to the donation, the money belongs to the tax-payer just like any other income that he earned.

Another example of *tovas hano'o* is discussed by the Taz (*YD* 249, 1). He rules that one may use his *ma'aseir* money in order to purchase an *aliya* to the Torah for his friend. If one purchases an *aliya* for himself he may use his *ma'aseir* money since one may use his *ma'aseir* money to enable himself to perform a mitzvah that he is not obligated to perform and otherwise could not perform. What the Taz derives from the rule that one has the right to derive *tovas hano'o* from his *ma'aseir* money is that one may even use the money to buy an *aliya* for another person even though the purchaser himself will not perform a mitzvah thereby and he will just improve his relationship with the one whom he will honor with the *aliya*. Since improving his relationship is viewed as an incidental benefit of the expense, one may use his *ma'aseir* money to pay for the *aliya*.

Another common question, which sheds light on what is considered *tovas hano'o*, concerns use of *ma'aseir* money to attend a yeshiva banquet. Both Rav Moshe Feinstein (*CM* 2, 58) and Rav Yacov Kamenetsky (*Emes Leya'acov YD* 249) ruled that one may use his *ma'aseir* money to pay for a ticket but he must exclude the amount he would have spent to eat this type of meal (which may be more than he spends on his regular supper). The reason is because receiving a meal is not an incidental benefit to the expense since people pay money to eat out.

The responsum of Rav Moshe Feinstein (*OC* 4, 76, 2) concerning the issue of use of *ma'aseir* money to pay for raffles where the proceeds will help support a *tsedoko* organization is very enlightening. Rav Moshe writes that one must differentiate between two types of raffles. If there is no limit on the amount of tickets that may be sold, then a raffle

ticket is basically worthless and one may use his *ma'aseir* money to cover the entire cost of a ticket. The reason is because it is clear that the only reason he is buying the ticket is because he wishes to help the organization and the raffle ticket is an incidental benefit. However, if the organizers cap the amount of raffles that they will sell then a ticket has value. (We should note that this commitment is binding and the organization may not renege on its commitment.)

Rav Moshe compares it to any purchase of a debt obligation (including bonds). The value of the obligation is not the same as the face-value of the obligation, but, nevertheless it has value. Therefore, in this case one may not use his *ma'aseir* money to pay for the ticket just like he may not use his *ma'aseir* money to buy milk from a yeshiva even if the yeshiva makes a profit from the sale of the milk. The critical factor is not what the yeshiva earns but what one is giving. Therefore, if, based on the value of the prizes, the cost of a ticket and the amount of tickets that will be sold, people would sometimes buy such a ticket even if it was just a lottery and not sponsored by a worthwhile organization, then one may not use any of his *ma'aseir* money to pay for the ticket since it is not clear-cut that the money is being given as a contribution and not as an investment.

We should note that this ruling applies even for individuals who never buy lottery tickets since it suffices that some people would buy such tickets.

We should note that Rav Chaim Kanievsky (*Derech Emuna*, *Matnas Aniyim* 7, 5 in BH) independently rules basically the same as Rav Moshe and just adds (and Rav Moshe almost certainly agrees) that in case there is a cap on the amount of tickets even if the price is clearly higher than the amount anyone would normally pay, one may only use his *ma'aseir* money to pay for the clearly extra amount since up to a certain amount people would spend even if the seller was not a worthwhile cause. This

is similar to the ruling of Rav Moshe and Rav Yacov concerning a yeshiva banquet.

Another illustration of this principle is a ruling of the Chazon Ish (*Orchos Rabbeinu* 1, 303). He ruled that if it is clear that the only reason one is purchasing a *sefer* from a poor author is because he wants to support the author then he may use his *ma'aser* money to pay for the *sefer*. He adds that the customer may afterwards keep the *sefer* for himself. Again the rationale is that the *sefer* is an incidental benefit of the charitable purchase.

Based on the above, we can answer your question. If it is clear that people would not spend money to advertise in your *sefer* then, since it is obvious that the only reason the sponsor is giving you money is because he wants to help publish the *sefer,* he can write off the entire amount he gave you as a *ma'aseir* expense and we classify the advertisement that he will receive as *tovas hano'o*. However, if people would pay money to advertise in your *sefer* motivated solely by business considerations, then he could only write off the amount that is clearly more than the amount anyone would spend to advertise in this publication.

68

Do Losses Offset Gains when Computing *Ma'aseir*

I own a taxi company but besides that I sometimes make investments. Each month I check my earnings from my cab company and give tsedoko accordingly. Recently, I took a big loss on one of my investments. May I reduce my income by the amount of the loss and just give *ma'aseir* on the remaining gain, or must I give *ma'aseir* from my income and ignore the loss?

Answer:

Your question is important because the poskim write that one should try to determine the exact amount that he should give as *ma'aseir* because there is something special about giving a tenth or two tenths. (See for example Ahavas Chessed 19 in the footnote. Recall that giving a tenth prevents one from becoming poor.) Thus, even if one gives more than a tenth, he should still try to determine how much he should give.

The difficulty that the poskim have with issues concerning *ma'aseir* from one's income, *ma'aseir kesofim*, is that there is almost no discussion in the Gemara about the entire subject. Therefore, the poskim were forced to find comparisons in other areas of *halacha*. Concerning your question the poskim found two areas in *halacha* to which they compared *ma'aseir kesofim* and we follow both approaches.

Some poskim (*Sha'ar Efraim* 84, *Chasam Sofer* notes on *YD* 249) found an analogy in the laws of investments since the issue of losses offsetting

gains is discussed in this context. The issue is where A invests money with B and makes an agreement that A will get a certain percent of the gains but suffer a different percent of the losses. If B makes two investments with A's money and one profited and one lost money, the issue of losses offsetting gains comes up. If losses offset gains and there is a net gain, then A will just get his percent of the net gain and his percent of the losses is irrelevant. However, if they do not offset gains one must compute each investment separately using different percentages and A will receive the percent of his gain minus his percent of the loss.

The *halacha (*See *YD* 177, 33) is that if one investment agreement covers both investments then losses offset gains but if each investment is covered by a separate agreement then even if the two agreements are the same one must compute each investment separately.

These poskim rule that this principle should decide the issue when dealing with *ma'aseir* as well. The difficulty is that we don't write agreements with Hashem concerning our investments. The poskim rule that computation defines the investments. When one makes a computation of his gains and losses for a certain period of time and determines how much money he must give as *ma'aseir,* he concludes one period and everything afterwards is computed separately. Therefore within one computation period losses offset gains whereas in two periods they do not.

The second approach found a different source for determining how to decide the issue in the case of *ma'aseir kesofim*. These poskim (*Noda Biyehuda YD* 2, 198, *Knesses Hagedolo YD* 249) compared *ma'aseir* on one's income to *ma'aseir* that one must give on the produce of his field. Concerning the latter, the pasuk says that one may not tithe the crop of one year together with the crop of another year.

Thus, for example, if one has five fields where he grows wheat, he can gather all the wheat together and separate a tenth from the entire crop. The fact that the wheat grew in five different fields is irrelevant. However, one may not gather together the crop of two years, even from the same field, and tithe both together because each year is considered a separate unit. This is a common issue with quince because the new year for fruit begins at Tu Bishvat and this fruit begins growing right around Tu Bishvat. Farmers must be careful to tithe the quince that began growing before Tu Bishvat separately from those that began growing after Tu Bishvat.

The poskim who use this comparison rule that losses may be used to offset gains that were realized in the same year.

Since there is no proof that either opinion is incorrect and it is possible to satisfy both opinions, we act in a manner that is in accordance with both opinions. Thus, one should compute his gains and losses at least once a year and determine his net profit for the entire period and figure out a tenth and write down that that is the amount that he must give as *ma'aseir* for that period. If he gives one fifth then he should he should compute one tenth and give twice one tenth. (See the above referenced footnote of the Chafetz Chaim where he makes the point that one should separate a tenth two times and not lump the two tenths together as one fifth.)

If one makes his computation for less than an entire year, then one may only use losses to offset gains within that computation period even though the losses and gains took place in the same year because we act in accordance with the opinions that rule that the determining feature is just the computation period and not the entire year.

The Chavos Ya'er (224 in parenthesis) writes that one should make his computation before Rosh Hashana since the Gemara (*Beitsa* 16A) writes that Hashem decides on Rosh Hashana how much one will earn

that year. Therefore, each Jewish year is considered a separate unit. Rav Shlomo Zalman Auerbach (*Kol Hatorah* 39, page 90) writes that it is not crucial when one makes his calculations but it should be at least once a year and should be a fixed day and not done haphazardly. The Shevet Halevi (Rav Wosner 9, 201, 5) and the Tsedoko U'mishpot (5, footnote 39) rule that one may use the secular calendar year which is often more convenient since one must compute gains and losses anyway in order to pay taxes. The Sha'arei Tseddek (9, footnote 52) is not so happy with this ruling because it is not in accordance with the Chavos Ya'ir since Hashem's year for determining one's income is Rosh Hashana and not the secular year. The Aruch Hashulchan (*YD* 249, 7) also writes that one should make his computation based on the Jewish year.

There is another reason that it may not always be a good idea to combine one's *ma'aseir* computations with his tax computations and that is because the rules of the tax authorities are different from the Torah's rules. Our issue is a case in point. Whereas for tax purposes one may carry over capital losses from one year to the next, under Torah law, one may not do so as we have seen.

Another related issue where the two differ, concerns what are considered profits. Whereas for tax purposes an individual who has a whole or partial interest in a small corporation does not need to pay personal income tax on profits that were earned by his corporation but were left with the corporation, when one computes his *ma'aseir* he must include these profits as personal earnings. (See the above citation from Rav Shlomo Zalman and the *Kovetz Teshuvos* of Rav Eliashev (2, 54)). Thus, when one takes out money from the corporation he should add to the amount an extra amount for the *ma'aseir* on the profits he is leaving in the corporation. Note that this does not include one who owns stock in a large company. Many leading poskim (including *Iggros Moshe Even Ho'ezer* 1, 7) rule that a shareholder is not considered an owner unless he has a real say in the company and only then is considered a partner

in the company. (For an in-depth survey see *Otsar Hamishpot* Volume 2 pages 683-714.)

Another difference between Torah law and secular tax law concerns real estate where, while the tax authorities allow one to avoid paying taxes if the profits are "rolled-over" into another property, according to the above poskim for *ma'aseir* purposes one has to include in his *ma'aseir* calculation each deal that was done that year and he cannot wait until he takes out his money (if that ever happens).

Once one has computed how much money he was supposed to give that year for *ma'aseir* he has to compare that with the amount of tsedoko he gave during that period. If he gave more that he was required to, based on his *ma'aseir* calculation, he has a credit with his *ma'aseir* which he can carry over to the next year (*Noda Biyehuda YD* 1, 73 cited by *Pischei Teshuva* 249, 1 and ruled by *Aruch Hashulchan* 249, 7). If he gave less than the amount that he needs to give based on his *ma'aseir* calculation, he should set aside the amount he owes and distribute it to tsedoko causes. It is important to not say when setting aside the money that it is tsedoko money, but rather to set it aside and say that it will become tsedoko when it is actually distributed since otherwise one might violate the prohibition of *lo se'acheir*. (See *Derech Emuna*, *Matnas Aniyim* 8, footnote 72 in the name of the Chazon Ish.)

In conclusion: If you didn't make a formal calculation each month and just looked at your profits in order to guide you how much to give, you may use your loss to offset your gains when you make your formal tsedoko calculations later in the year.

69

Giving *Ma'aseir* on Parental Support

In order to help me learn in a *kollel* in Eretz Yisroel my parents give us four thousand dollars a month. The reason why they give this amount is because our rent costs two thousand dollars, and, since my wife is still studying, we need about two thousand dollars to live. My parents are always careful to give *ma'aseir* on their income so I wanted to know if I have to give *ma'aseir* again and if yes, do I have to give *ma'aseir* on the entire amount?

Answer:

Let us begin with your final point that your parents already gave *ma'aseir* from this money. The basis for your question is that you are comparing *ma'aseir* on a person's money to *ma'aseir* from one's crop where once *ma'aseir* has been given, one need not and cannot give again. While there is an opinion (*Maharil Hachadoshos* 109) that *ma'aseir* on one's money is similar to *ma'aseir* on one's crop, this is not the consensus opinion and not the custom.

For example the Taz (*YD* 331, 32) discusses dowries that are received by the *chosson*. He says that it is a misconception that a *chosson* does not have to tithe the dowry that he receives from his parents since *ma'aseir* on one's money is not like *ma'aseir* on one's crop. The crop that grows on ground in Eretz Yisroel is initially forbidden to be eaten because it has the status of *tevel* and one must tithe it in order to render it fit for consumption. However, money has no special status. It is just that when one receives money he has to give ten percent to proper causes.

It is similar in that sense to taxes. An employee is required to pay tax on income he receives from his employer even though the employer paid corporate taxes. The rationale is that each body needs to pay tax on its income. Similarly, each person who receives money, whether he earns it or receives it as a present or even if he finds it, must give *ma'aseir* on his income. This is also the ruling of other early poskim like the Rosh (*Takonos Ma'aseir*) and the Shelo (*Gemoro Megillah*) and modern poskim like Rav Moshe Feinstein (YD 2, 112).

We should note that, according to some opinions, it is even possible for a person to have to give *ma'aseir* twice on the same money. This happens if a person lost money and gave up hope of having it returned and later on it was returned. Some maintain (*Haflo'o Kesubos* 50A) that since when the owner gave up hope it is as if he lost the money, therefore, when he gets it back it is like he had new income. While this argument is correct others argue that since one had to lose money in order to "earn" this money, he does not have to give *ma'aseir* since his gain is offset by his loss.

This was the ruling of Rav Shlomo Zalman Auerbach (*Kol Torah* 39) concerning restitution for property that was taken away during the holocaust. He ruled that one need not give *ma'aseir* on the money he receives as compensation for the loss of his own money. If it was his parents' property he needs to give *ma'aseir* since it is no different from any other inheritance on which one must give *ma'aseir*. However, if it was his own he need not give *ma'aseir* because one can look at it as a forced sale where payment was made decades later.

In any case, the point is that one must give *ma'aseir* on money that previously had *ma'aseir* given on it, unlike a crop in Eretz Yisroel that only can be tithed once.

We should note further that actually your parents are probably gaining against their own *ma'aseir* by helping you since if they give you on their

own volition and you are needy they can count the money they give you as a *ma'aseir* donation and deduct the entire amount from their *ma'aseir* obligation.

Before considering whether you have to give *ma'aseir* on the money that is earmarked for your rent it is necessary to consider whether one has to give *ma'aseir* on goods he receives. This is a very common issue since many couples receive an apartment that was paid for by their parents and the question arises whether the couple needs to donate a tenth of the value of the apartment as *ma'aseir*.

This issue is the subject of a three way dispute among modern poskim. One approach is the opinion of Rav S.Z. Auerbach (*ibid*) and Rav Y. Y. Fisher (*Even Yisro'eil* 9, 92) who ruled that one has to give *ma'aseir* even on goods that he receives. Rav Auerbach agreed that one does not have to sell his apartment in order to give *ma'aseir* but over time as funds become available he should give the *ma'aseir*.

The second opinion was advanced by the Chazon Ish, as explained by the Steipler, who maintained that one is not required to give *ma'aseir* from objects. The Steipler (*Orchos Rabbeinu* 1, 296) explained that the Chazon Ish's rationale was that when one gives *ma'aseir* he is doing so in order to fulfill the mitzvah of *tsedoko* and one is not required to sell his property in order to fulfill the mitzvah of *tsedoko*. Following this line of reasoning, it would seem that when one does sell his apartment he will have to give *ma'aseir* since, according to the Steipler, the Chazon Ish does not say that one does not have to give *ma'aseir* from goods. He merely says that one needn't give *ma'aseir* when it requires selling the goods.

However, the Chut Shoni (*Shabbos* 2, page 331) of Rav Nissim Karelitz rules that one does not have to give *ma'aseir* even after he sells the goods and has money. His rationale is (explained in *Yom Tov* page 351) that *ma'aseir kesofim* is a *minhag* and there is no *minhag* to give *ma'aseir* from

objects. Therefore, he maintains that when one sells the apartment he does not need to give *ma'aseir* either because at that stage he is just exchanging his object for money but not earning any more money. This was also the opinion of Rav Wosner (*Shevet Halevi* 5, 133, 7) that since there is no *minhag* to give *ma'aseir* on objects, one does need to give *ma'aseir* when he receives an object as a present.

This issue pertains to your question as well. For example, the Chut Shoni writes that if one's parents give him exactly the amount he needs for his rent and if there is extra money he needs to return it, then he does not need to give *ma'aseir* on the rental money. This is a logical consequence of his opinion that one does not need to give *ma'aseir* when he receives a good since a rental is just a short term purchase. Just like if one's parents give him exactly the amount he needs to purchase an apartment, according to this approach, the son does not need to give *ma'aseir* on the money because essentially the parents gave him the apartment, so too if one's parents give him exactly the rental money the son would not need to give *ma'aseir* on the rental money since it is as if the parents rented the apartment.

Even if one follows the opinion that one needs to give *ma'aseir* even when he receives goods there is a way to avoid giving *ma'aseir* on the rental money. Rav Chaim Kanievsky (*Derech Emuno* vol 1, chapter 7 *Tzi'yun Hahalocho* 67) writes in the name of the Chazon Ish, that if parents pay directly to the owner of a rental on behalf of their children the children do not need to take off *ma'aseir* because they never receive money. Even if the parents give the money to their children on behalf of the owner of the apartment the children do not need to set aside *ma'aseir* because the children can have in mind not to acquire the money for themselves but rather to accept it on behalf of the owner.

We should note that this tactic would work even according to Rav S.Z. Auerbach since when one rents his net value doesn't increase so he hasn't acquired anything.

There is one final issue that pertains to the entire amount that your parents give. Rav Mosh Feinstein (*YD* 2, 112) was asked by an avreich whose father-in-law gave him ten thousand dollars in order to live off the profit and continue learning. (This was in 1967 when that was reasonable.) The son-in-law wanted to give *ma'aseir* on the ten thousand dollars but his father-in-law objected since it would cause him to have to give an additional amount in order to enable his son-in-law to continue learning.

Rav Moshe ruled that if the father-in-law objects, the son-in-law may not give *ma'aseir*. The reason is because one may place conditions on his presents, which is what the father-in-law did. We should note that the Chazon Ish agrees (*Derech Emuno ibid*) since he specifically addresses this issue when he discusses whether a child who receives money to buy something needs to give *ma'aseir* and he comments that the child must give *ma'aseir* because his parents would not mind. This implies that if they do mind the child is not allowed to give *ma'aseir*.

In conclusion: If your parents expressly mind, you may not give *ma'aseir*. However, if they do not expressly object you have to give *ma'aseir* on the two thousand dollars that you can spend as you please. On the two thousand dollars that your parents give to pay for your rent you should have in mind that you are accepting the money on behalf of the owner if you do not wish to give *ma'aseir* on that amount. If you can arrange that your parents pay the owner directly, that would be even better.

Lost Objects

70

Lending out Unclaimed Teffilin

Two years ago someone brought me a pair of tefillin to repair. He mentioned that this was a spare pair of tefillin and he was thinking of setting the tefillin aside to lend to others-a gemach. Since then, he never picked up the tefillin, never paid for my work and they are just sitting by me. I have no idea who he is or where he lives. Tefillin that are left unused require maintenance and I already once needed to work on them. What can I do with them? What I would like to do is lend them to others, like he mentioned that he was contemplating doing. Is that permitted?

Answer:

We should first note that if you wish you certainly may use the tefillin for yourself on occasion since Chazal made a general observation that people are happy if someone uses their mitzvah object even if he never asked for permission. For example, the Shulchan Aruch rules that anyone may use another person's tallis or tefillin if the owner left them in shul even if he did not receive express permission from the owner to do so. However, there are poskim (*Bach*, and *Magen Avrohom* siman 14 in *Orach Chaim*) who maintain that one may only do so on occasion but not every day, and this is the ruling of the Mishnah Berurah (14, 13). Also one may only use the mitzvah object in the place he found it. He may not take it to another place since we are not certain that the owner does not mind. Therefore, based on these general principles, you cannot start using these tefillin for yourself every day and make your own tefillin into a gemach.

Moreover, since your status is at worst that of a watchman (*shomer*), the Shach (72, 8) rules that a watchman may use on a temporary basis any mitzvah object that we do not fear will be damaged. Some Rishonim (*Mordechai Bava Metsiyo* 263 and *Nemukai Yosef B.B.* 87B) even maintain that you can lend it to others even if they take it to other locations. It would seem that the Mishnah Berurah (658, 21) and Aruch Hashulchan (658, 14) side with this opinion. Therefore, you may even lend the tefillin to others on occasion.

All the above is true in general. However, we should take into account the fact that the tefillin were left by you for two years. We find that these rules are dependent on circumstances and are not categorical.

For example, the general rule, in earlier days when seforim were scarce and expensive, was that one was not allowed to use another person's sefer without permission since most people would mind, out of fear that the sefer would be damaged. Moreover, the Gemoro (*Bava Metsiyo*) rules that one who was asked to watch another person's sefer is not allowed to read from the sefer. However, the Rama (*CM* 292, 20) rules that if the person who was entrusted to watch the sefer was a talmid chochom then he is allowed to use the sefer since we assume that the owner expected that a talmid chochom would do so. Therefore, it would seem that you could even use or let others use the tefillin regularly.

In your situation where the customer owes you money for the repair and he hasn't come for two years, the Mishpat Ho'aveido (267, *Eifas Tsedek* on *Birur Halacha* 20) remains in doubt that perhaps we can assume that the owner meant to leave it with you permanently since we can assume that he probably did not forget about his tefillin and decided that he'd rather save the cost of repairing the tefillin. If this is the case you can do whatever you want with the tefillin.

Furthermore, we can take into account the fact that the owner mentioned that he planned to use the tefillin to lend to others. We

find that, in general, a person who is allowed to use another person's object may not give others permission to use it because one cannot assume that the owner doesn't mind. However, if the owner showed that he doesn't mind, e.g. he in the past allowed this other person to use the object, then the Gemara (*Bava Metsiyo* 5A) rules that watchman may entrust the object to other people. Therefore, by saying that he planned to use the tefillin for a gemach the owner said that he doesn't mind if others use the tefillin. The fact that you are running the gemach on his behalf would seem to be serving his interests and thus should be permitted.

While all of the above is probably correct, it is based on *umdeno*-our evaluation of the customer's wishes. This is only a probable answer. However, there is a somewhat different approach that is certainly permitted.

This approach is based upon the Gemoro (*BM* 29B) that rules that one who finds tefillin may evaluate their value and acquire the tefillin for himself at this value, if he wishes. The Gemoro says that the reason the finder may do this is because there are many tefillin available for purchase. Therefore, the owner does not mind if the finder wishes to buy his lost object. While many poskim (e.g. Rav Eliashev as cited in Mishpat Hoaveido on page 191) rule that today this rule does not always apply to tefillin because people are often very particular to acquire only tefillin written by a particular sofer, since in your situation these were standard tefillin you may certainly do what the Gemoro permits.

If you follow this approach what you are doing is buying the tefillin for yourself. We should note that since there is no market for used tefillin you would have to evaluate carefully how much a person would need to be paid in order to sell these tefillin. The reason is that you have to pay an amount for which the owner of these tefillin would be willing to part with these tefillin.

There is a dispute if one needs beis din to do the evaluation. However, for two reasons you can do the evaluation without beis din. First, both Rav Moshe Feinstein (*Iggros Moshe* (CM2, 45)) and the Chazon Ish (many anecdotes that are recorded in *Orchos Ish*) maintained that one who knows prices can do it on his own and if he needs help can ask experts. Second, since we mentioned that it is necessary nowadays to pay an amount that reflects the amount that a person would be willing to sell the tefillin for, it would suffice to record the price of new tefillin of this type and the condition of the tefillin in question.

Another issue is what you have to do about paying. While there are Rishonim (*Rashi*, *Ramban*, *Ritvo* in their commentary to *Bava Metsiyo* 29B) who maintain that you have to set money aside equal to the value of the tefillin, there are others (e.g. *Rashbo ibid*) who say you do not need to actually set money aside. The recent Acharonim (*Chasam Sofer*, *Iggros Moshe*, *Pe'as Sodecho*, *Ohr Dovid*) were of the opinion that you do not need to set money aside.

There is an interesting issue that the Pe'as Sodecho considers. He lived in a time of hyperinflation in Israel and suggested that since we have to take into account that it may be a long time before the true owner asks for his money, one should write the value in terms of something that is stable (e.g. gold in some periods).

We should note that even though, once you don't have to set money aside, it would seem that the two approaches are very similar in practical terms, they really are in many ways quite different.

In the first approach, ownership is retained by the original owner of the tefillin. Your liability is limited to damages that result from carelessness. Furthermore, the owner will receive credit for the mitzvah of lending out the tefillin.

In the second approach, by contrast, you bought the tefillin and owe the owner the evaluated amount minus the cost for your work. But all the credit for lending out the tefillin will be yours.

In conclusion: You *certainly* can buy the tefillin without having to pay anything until the owner shows up, if that ever happens. Alternately, even if you don't purchase the tefillin you *probably* may lend the tefillin to others.

71

Found a Schoolbag on a Park Bench

I was walking one evening in a park in a *frum* section of the city and noticed a high school girl's schoolbag lying on a bench. I looked around but didn't see anyone who might be the owner. I was in a predicament. My thoughts were that perhaps it is best to leave it there since probably the owner will realize in the morning that the schoolbag is missing and will then return to look for her schoolbag. If I took the schoolbag she would never know who found it and I might not be able to discover who lost it. However, perhaps I should take it since there are all kinds of people who roam the park and perhaps by the morning someone will just take the schoolbag and perhaps there were identifying features which would enable me to discover who lost it. To take the schoolbag and leave a big sign wasn't feasible because I didn't have paper and scotch tape and I don't live close to the park. What should I have done?

Answer:

The underlying spirit of your question is correct. While the Torah prohibits us from ignoring a lost object and also commands us to actively attempt to return it, one must know the recommended procedures in every case. The principle is that the Torah requires one who discovers a lost object to act in a manner that will maximize the probability that the lost object will be reunited with its owner.

A practical application of this principle, which pertains to this situation as well, is the following ruling of modern poskim including Rav

Eliashev zatsal. The opinion of most Rishonim (see *Shach* 260, 24) is that if one notices a lost object that has identifying features (*simanim*) in a place which is not totally safe one must take the object and put up a notice. However, contemporary poskim (See *Hashovas Aveido Behalacha* 1, 9) rule that if the object is not valuable one should leave it there even if the place is not safe since, nowadays, it is much more likely that the owner will retrieve his lost object if it is left there. Thus, for example, if one notices a child's lost yarmulka in the playground one should leave it there. Even though there are identifying features, nowadays the likelihood that the yarmulke will return to its rightful owner is much greater if it is left where it was, so that is what one should do unless he knows or can determine by himself to whom the yarmulke belongs.

In your situation, there almost certainly are identifying features since there are personal effects inside the school bag. However, perhaps the contents are not valuable and there is nothing inside the schoolbag that will enable you to identify its owner, in which case it is better to leave the bag where it is. On the other hand, perhaps there is a name and maybe a telephone number some place inside the bag in which case you should take the school bag and call up its owner since that is certainly the best thing to do. Therefore, in order to decide what to do it is critical to determine if there is anything that will enable you to contact its owner.

It would seem that there is no problem to pick up the school bag, search its contents and check if indeed you find a telephone number, name and address etc. However, one has to be careful because the Gemara says that one who picks up a lost object has the legal status of a shomeir, a guardian over the object. There is a dispute in the Gemara (*BK* 56) if he has the responsibility of a paid watchman, a shomeir sochor, or a volunteer watchman, a shomeir chinom. But certainly one who finds a lost object must watch over it.

Based on this Gemara, Rav Moshe Feinstein (*Kuntress Hashovas Aveido*) points out a common mistake that stems from people's lack of knowledge of this law. People often pick up a lost object and instead of posting a notice that they found a lost object they pin the lost object itself to the bulletin board. He states that this is forbidden since the finder is obligated to watch over the lost object on behalf of its owner and not leave it attached to a bulletin board, which is not a safe place. Second, since doing so constitutes negligence on the part of the finder, according to both opinions of the status of the finder, he will be liable to the owner for the entire value of the lost object if anyone besides the true owner takes the object.

This ruling is also why modern poskim (Rav Eliashev, cited in *Mishpat Ho'aveido* 267, 10, 3, Rav Shlomo Z. Auerbach cited in *Hashovas Aveido Kehalocho*) rule that one may not turn over a lost object to the police if the police do not adhere to the Torah's rules concerning how a finder must watch over a lost object and also they must only return the object to one who proves he is the true owner by describing identifying features.

Thus, if you pick up the school bag you may not be allowed to put it back on the park bench because you became a watchman for the object and not only is it prohibited but you even will be liable if anyone else takes it.

Therefore, if you are able to look through the bag without picking it or its contents up to a height of twenty-five centimeters (about a foot) that would be ideal because one doesn't become a shomeir until he performs an act that would enable him to acquire the object if he wanted to buy it and it was for sale. Since one who wishes to acquire a school bag must pick it up (*hagboho),* therefore, if you don't pick it up you won't become a shomeir.

The Pischei Choshen (*Aveido* 2, footnote 23) extends this leniency by ruling that if one picks up a lost object with the specific intention to

become a shomeir only if he is able to return it to its rightful owner, this conditional intention is effective and if he cannot determine who the owner is, he is not responsible for the lost object and he may return it to where he found it. This is ideal in your situation since you can have conditional intention and if you look through it and you can determine the identity of the owner, take it and call her up, and if not just leave it where it is.

However, the ruling of the Pischei Choshen is controversial since the Gemara (*BK* 56B) states that the Torah imposed the status of a shomeir on anyone who finds a lost object and Rashi explains that this is derived from the pasuk (*Devorim* 22, 2) that states that one who finds a lost object must keep it in his house until the rightful owner claims it. Rav Chaim Brisker (cited by *Birkas Shmuel BM* 17, 4) understood that the act of picking up a lost object imposes on the finder the status of a watchman even if he has no desire to assume this status and even if the act that he performed would normally not impose on a watchman the legal responsibility of a shomeir. Similarly, the Chazon Ish (*BK* 6, 6 in parenthesis) proves that even if one picks up a lost object with specific intention to return it to where he found it, nevertheless, he has the status of a shomeir and will be liable in case something happens.

However, it seems that even Rav Chaim and the Chazon Ish agree that in this specific case that you would be allowed to return the object to the park bench if you can't discover any phone number etc. The reason is because the Torah requirement to watch over a lost object is confined to one who is enjoined to return the object to its rightful owner. However, since the poskim rule that in case you cannot identify the true owner the Torah wants you to leave it, therefore, the Torah never imposed upon you the status of a shomeir. Therefore if, after carefully examining the contents you cannot determine its true owner, you may return it to the bench.

We note further that in case there are no identifying marks at all then there is an additional reason why you may return the school bag to the park bench. (As we said above, this is probably not true in your case.) The reason is because the majority opinion is that the Torah never commanded us to return lost objects without identifying features and contemporary poskim (Rav Eliashev and Rav Nissim Karelitz) rule that one may act in accordance with this lenient opinion. This reason applies regardless of where the lost object is located but only applies when there are no identifying features, which, again, is probably not the case in your situation.

In conclusion: You should open the school bag and search for anything that will enable you to contact the owner. If you are successful in your search, take the schoolbag and contact its owner. If you can't find anything you should leave the school bag where it was. Ideally, you should make this examination without picking up the school bag or its content significantly, but even if it was necessary to raise it you should return it to the park bench if you were unsuccessful in determining the owner, unless the contents were valuable.

72

Moved a child's scooter that was left in an unsafe place

On a recent evening, I was walking near my house and lying on the sidewalk was a brand new child's scooter. In order to make sure that no one would trip over the scooter in the dark I stood it up against a wall. It is a place where kids leave their old bikes, but since all kinds of people walk in the area it is definitely not safe to leave a brand new attractive scooter lying overnight. Was I supposed to take the scooter home in order to safeguard it and put up a sign that I found it? Even if not, you wrote previously (Teruma-Found a schoolbag on a park bench) that one who picks up a lost object becomes liable for its loss so did I become responsible for the scooter by virtue of having moved it?

Answer:

Both of your questions depend on the status of the scooter. Since almost certainly the scooter was placed there and did not fall there, the scooter has the same status as any object of value that is found placed in an unsafe location.

This issue is discussed by the Gemara in connection with the mitzvah to return lost objects – *hashovas aveido* – in several contexts. One situation (*BM* 21B) is where food was left in a place where people may assume that they may take it. Another (*BM* 25B) is where a person left an object in a garbage dump where the sanitation workers eventually dispose of anything that is found there. A third (*BB* 87B) is where a person gave

money or an object to an underage child who is not as careful as an adult in caring for his possessions. In all these cases, the Gemara rules that the finder is not commanded to pick up the lost object.

Similarly, when an object is in the physical possession of its owner who is not caring for it properly, one is not obligated to intervene. Thus, the Rambam (*Gezeilo Ve'aveido* 11, 11) rules that if one sees a cow in a barn and is aware that the owner unwisely left the door open, he is not obligated to close the door to ensure that the cow does not escape. Similarly, the Gemara (*BM* 23B) says that one does not have to care for a barrel of wine that was left open by its owner, thereby allowing snakes and bugs to enter.

The Gemara classifies an object that is found in this manner an *aveido mida'as* – an object that was rendered lost by its owner. The Rambam (*ibid*) derives from the words used by the *pasuk* which commands one who finds a lost object to return it to its owner, that this class of objects is excluded from this command.

Since when one gives a child an object it already is viewed as an *aveido mida'as,* we can say that the answer to your first question is that you were not obligated to return it. We should note that this is the difference between our case and the case of the lost schoolbag that we discussed previously. The lost schoolbag was an object that the finder under normal circumstances has a mitzvah to return since the owner was a high school girl (an adult) who apparently forgot her schoolbag where it was found. But in your case, there was no mitzvah to return the scooter.

Turning to your second question, we should note that in order to rule that you are liable in case the scooter eventually was not found by its owner we would need to decide two issues. First, we would need to decide that even though you were not commanded to care for the scooter, nevertheless, you become liable if you start to care for the scooter since physically it was a "lost object." The second issue is to

determine that the act that you did is considered as having started to care for the scooter.

Thus, our first issue is whether anyone who begins taking care of an *aveido mida'as* becomes responsible for the lost object by beginning to care for it.

The Gemara does not discuss this issue in the context of an *aveido mida'as* but only in a different case of one who is not commanded to return a lost object.

The Gemara (*BM* 30, B) rules that a distinguished individual who, because of his dignified status, would not retrieve his own object if it were lost, is not commanded to return someone else's similar lost object. For example, a distinguished rosh yeshiva who would not carry his own son's lost bike on the street is not obligated to return another person's lost bike since it is beneath his dignity. However, the Gemoro recounts that Rabba ruled that his very distinguished student, the *Amora* Abaye, became obligated to return a lost goat by throwing a clod of earth at it. Thus, even though Abaye was not originally obligated to return the goat, by virtue of his throwing a clod of earth at it, he became obligated to ensure that the goat was returned to its owner even if that required him to carry the goat on the street, something he would not do otherwise.

However, there are two points to consider. First, even in the case of the distinguished individual there is a major dispute why Abaye became required to return the goat to its owner. Some, including, according to many, the Rambam (*Gezeilo Ve'aveido* 11, 14) and the Shulchan Aruch (*CM* 263, 2), understand that it was because Abaye began returning the goat to its owner that he became obligated to complete the job. (They understand that he threw the clod of earth in order to coax the goat to return to its owner.) According to these Rishonim you have an issue.

However, many Rishonim (including the *Rosh BM* 2, 21 and according to the *Sema* (263, 4) the *Rambam*) understand that the reason Abaye became liable is because his action caused the goat to become more lost. According to this opinion, merely doing an action that is helpful does not impose an obligation on the finder to complete the job by returning the object to its owner. Thus, according to the latter opinion there is no basis for requiring you to return the object since you were not required at the outset to return it.

Moreover, there is a further dispute whether the situation of a distinguished individual who began restoring an object to its owner (and is therefore obligated to complete the return of that object) is equivalent to that of one who began returning an *aveido mida'as*. The Gemara (*BB* 88A) at one stage understood that they are equivalent and the Lechem Mishna (*Gezeilo Ve'aveido* 3, 15) maintains that according to one approach of the Beis Yosef (*Commentary* to *Tur CM* 263) in his understanding of the Rambam, that equivalency remains at the conclusion.

However, the Terumas Hakrey (*siman* 263) and the Divrei Mishpot (end *siman* 261) for different reasons maintain that even those who rule that a distinguished person must continue, agree that when one acts to assist the owner of an *aveido mida'as* to recover his lost object he is not liable if he fails to complete the job of returning the lost object.

The rationale of the Terumas Hakrey is that the only reason a distinguished individual is required to complete the task is because when he begins caring for the lost object he shows thereby that he is willing to forego his honor in order to return the lost object. Since he is willing to forego his honor there is no reason to free him from the mitzvah to return a lost object and therefore, he is obligated to complete the task. The presumption is that really a distinguished individual has a mitzvah to return a lost object just like anyone else. It is only because the Torah

does not require a person to act beneath his dignity in order to return a lost object that he is not required to perform the *mitzva*. (This is in fact stated explicitly by the Gemara in Brochos 19B.) Thus, when he shows that this is not beneath his dignity, his waiver from the mitzvah is rescinded.

This, however, contrasts with an *aveido mida'as* where inherently there is no mitzvah of *hashovas aveido* since the owner caused it to become an *aveido*. Since there is no mitzvah to return an object that is classified as an *aveido mida'as* one does not create a mitzvah (and thereby assume responsibility) by performing a helpful action.

The Divrei Mishpot has a very different approach. He understands that perhaps those who rule that the distinguished person must return the lost object that he began returning, also rule that the finder who began returning an *aveido mida'as* must return the *aveido mida'as*. However, in contrast with common lost objects where the finder automatically assumes the status of a watchman (*shomeir*) for the lost object, one who finds an *aveido mida'as* does not have the status of a watchman since the finder was not required to pick up the lost object in the first place. This status in the case of common lost objects is derived from a *pasuk* in Chumash (see *Rashi BK* 56B).

We have seen that according to many opinions you did not assume any responsibility for the scooter by standing it up. First, many maintain that even a distinguished individual is not obligated to continue. Second, according to many, even those who rule that a distinguished individual must continue, agree that with an *aveido mida'as* one is in any case not liable for any ensuing loss.

There are two more reasons why you may not be responsible. One is that many maintain that if one does not perform a *kinyan* on a lost object he does not assume the status of a watchman and perhaps you did not perform a *kinyan* on the scooter. The other reason is that many

maintain that in order to assume the status of a watchman the one who picks it up must do so with the intention to return the object to its owner. Since the last two reasons require further discussion we will not study them at the present but based on all these four factors you can rest at ease that you did not become liable for the scooter.

73

Father found a Lost Object and Passed Away

About twenty years ago my father was traveling on a bus in Israel and found an envelope containing twenty one-hundred-dollar bills in the overhead compartment. He tried very hard to locate the owner but all his efforts failed. Since that time he always kept the envelope and informed us that the money is not his. Recently, my father passed away. Do I have to continue holding on to the envelope or can I take the money for myself since by now the owner probably gave up hope of ever recovering the money?

Answer:

Your father acted very properly and your question is very well taken and not simple at all. Let us explain.

Before we can answer your question we need to introduce several concepts that are the basis for the laws governing lost objects.

When one finds a lost object the first and foremost question is whether the owner is aware of his loss and gave up hope of recovering his lost object, a state which is called *ye'ush* in the Gemara. If the owner is aware of his loss and gave up hope, since there was *ye'ush* the one who finds it may keep the object for himself and he is not obligated to search for the former owner. It is a good thing to go further than one's obligation and act *lifnim meshuras hadin* and try to return it, but one is not obligated to do this and if he tries and fails to identify the loser he may keep the lost object for himself.

However, if the owner is either unaware that he lost the object or he is aware that he lost an object but he still hopes to recover it, the finder may not keep it for himself and he must try to return it.

The Gemara further says that if the lost object has identifying features we assume that the owner does not give up hope of recovering his lost object. The reason is because the owner expects the finder to publicize the fact that he found a lost object, as he is obligated to do, and the loser will prove that it is his by informing the finder of the identifying features. For example, in your situation if your father publicized that he found money, as he was supposed to, the owner could prove he was the loser by saying that there were twenty hundred-dollar bills and your father would return the envelope to him.

Applying this to your father's situation, since he found a lost object that had identifying features he could not keep the money for himself and he had to publicize the fact that he found money, which he did. Until the owner repossesses his lost object the Torah imposes on the finder the status of a shomeir, a watchman for the owner, and he is obligated to take care of the lost object in a manner that will ensure that it is preserved for its owner.

Even after a while, when we assume that the owner gave up hope of ever seeing the money again, your father could still not keep the money for himself since it came into his hands before the owner despaired of recovering the money, a concept called by the Gemara *be'isuro oso leyodei*. Furthermore, since what he found was money, he was not even allowed to use the money and write down the identifying features and note that he owed the money to the one who could tell over the identifying features. Therefore, everything your father did was exactly correct and until he passed away his relationship to the lost object was that he was a shomeir of the money for the loser.

Now that we have determined your father's status we must determine what status you have and what you can do with the lost money, assuming that by now, twenty years after the money was lost, the loser despaired of ever recovering his lost money.

Strangely, your question is not discussed in the Gemara or in the Shulchan Aruch and its commentaries.

In order to answer your question we must begin by analyzing why the finder of a lost object cannot take possession of the object once we can assume that the owner gave up hope of recovering it since at that time there was *ye'ush*. The Rishonim have two approaches. The approach of the Ramban (*Milchamos* on *BM* 26) is that since the finder has the status of a watchman for the true owner, we view the lost object as remaining in the possession of its owner and *ye'ush* does not affect an object that is situated in its owner's possession. Therefore, from the standpoint of halachah, it is as if *ye'ush* never took effect. The second approach, which was advanced by Tosafos (*BK 66A hocho*), is that *ye'ush* is effective but it cannot remove the finder's prior obligation to return the lost object.

Since these are the explanations of why your father could not assume ownership when the owner gave up hope, we must consider how each of these approaches affects you. If we follow the approach of Tosafos it would seem that you could take possession since your father's obligation was his own personal obligation and you never were obligated to return the object as long as he was alive. Upon your father's death, since the owner already gave up hope you never became obligated to return the object. Similarly, according to the Ramban, since when one passes away he ceases to have any possessions, it would seem that *ye'ush* could take effect upon death and since you took possession after *ye'ush* you could keep the money like anyone who finds a lost object after the owner gave up hope of recovering his lost object.

However, there are two sources that indicate that you cannot take possession and that you bear your father's obligation.

One source is a Gemoro (*BK* 111B) that discusses stolen property. When one steals an object and sells or gives it to someone else, after the victim gave up hope of recovering his object, the buyer is not obligated to return the stolen object itself. Just like one may keep a lost object that he found after the loser gave up hope of getting his object back, so too one may keep a stolen object that he acquired after the victim despaired of recovering his stolen object. However, the Gemoro rules that even if the victim despairs of recovering his stolen object and then the thief passes away, the thief's children do not acquire the stolen object. By analogy to lost objects, this implies that even if the finder passes away after the loser gave up hope, the finder's children do not acquire the lost object.

The second source is the Rosh's (*BM* 2, 9) explanation of the Gemoro (*BM* 26A) that says that if a passer-by discovers an object in an ancient wall he may keep it, because we assume that it was left there by the Emorites when Yehoshua conquered Eretz Yisroeil. The Rosh explains that the reason he may keep it is because the Jewish owners of the wall over all the centuries never acquired the hidden object. The first Jewish owner did not acquire it since it belonged to the entire Jewish nation by virtue of Yehoshua's conquest of the land, before the land was parceled out. Since the entire Jewish nation was unaware that their object was lost they never actually gave up hope of finding the object. Similar to what we discussed earlier, the first Jewish owner of the wall could not assume ownership of the object since it entered his possession prior to its owner's *ye'ush*.

The Rosh says that the reason the one who finds it over a thousand years after Yehoshua's conquest can keep it is because just like the first Jewish owner did not become its owner so too his descendants never became

the owners. The Rosh does not offer a rationale for his statement, but it seems to indicate that the descendants have the same relationship to the lost object as their ancestor did, which would bear on your question.

However, over the course of a thousand years we can assume that the wall was sold. The Pilpula Charifta argues that this explanation of the Rosh indicates that even if the wall was sold, the purchaser did not acquire the hidden object. This shows that the reason subsequent owners did not acquire the lost object is not because of inheriting a forbearer's obligations, since that does not apply to subsequent purchasers of property who did not acquire the hidden object. Many commentators, including the Nesivos (262, 1), the Chazon Ish (*BK* 18, 4) and Shiurei Reb Shmuel (*BM* 2, 5), understand that the Rosh only ruled that the descendants did not acquire the lost object by virtue of the fact that it was in their wall (*kinyan* of *chotseir*). But if they had discovered the lost object and picked it up for themselves, they would have acquired the lost object, regardless of the fact that it was in their ancestor's wall prior to its owner's *ye'ush*.

We should note that even though we don't have any proof that you cannot take the lost object, we also do not have any proof that you can, since in the case of the Rosh the first owner of the wall never picked up the lost object and never had any responsibility to return it to the entire Jewish nation. Rather, it just sat in his wall. Therefore, it may be that only in this case his descendant can take the lost object. But in your case, where your father picked up the lost object and became obligated to return it, perhaps you cannot take the lost object even after his death. Moreover, we still have the proof from the analogy to theft that you cannot acquire the lost object.

In order to determine whether one can derive the law concerning inheriting lost objects from the law concerning stolen objects we must understand the rationale of the law concerning inheriting stolen

objects. The Nachal Yitzchok (39, *Anaf 1 vehanireh le'aneyus da'atei*), Levush Mordechai (*BK* 32) and Even Ho'ozel (*Geneivo* 5, 3 u'veikor) all explain that the reason that the Gemoro maintains that the inheritor does not acquire the stolen object is because the nature of inheritance is that the inheritor and his forbearer's ownership are considered as one continuum. If one follows this approach, the same is true when one inherits a lost object.

Following this approach, you too cannot take the money for yourself, since it is as if the *ye'ush* transpired after the lost object entered your possession. Not only can you not take the money for yourself, but you even assume your father's status of a shomeir, which is the reason why others may not take the lost object either.

The Chazon Ish (*BK* 16, 1-2) was also troubled why the inheritors cannot take possession of a stolen or lost object. He explains that the reason is because all the inherited possessions are collateral for the obligation to return the object to its owner. Therefore, they cannot take the lost object for themselves since they are obligated to pay for it. It would seem to follow that if the deceased did not leave any inheritance besides the stolen or lost object the inheritor could take the object for himself since the owner already gave up hope.

We should note that in the Zichron Shaul (3, page 114) the Chazon Ish's nephew wrote that he asked the Chazon Ish your question and the Chazon Ish ruled that the inheritors continue their father's status until Eliyohu comes and identifies the loser. What we wrote above would explain the Chazon Ish's ruling.

In conclusion: You may not keep the money for yourself and you have to continue what your father did.

74

Kept *Chametz* that he was supposed to burn

My neighbor who was going away for Pessach left me a box of *chametz* that he asked me to burn for him. The day before Erev Pessach I looked at the box and saw that besides cookies and bread, the box contained various bottles of vitamins that I also used and were worth a few hundred dollars. I figured that since I sell *chametz* anyway I could take the vitamins and they would be included in my sale of *chametz* since they would be mine at the time the rabbi sold my *chametz* and after Pessach when the rabbi buys back the *chametz* I would have free bottles of vitamins. All the vitamins were certified as kosher for non-Passover use by a reputable kashrus organization. After Pessach, I called the kashrus organization and asked if the vitamins were actually *chametz* and they told me that all save one were not *chametz* but since they were made with corn derivatives they cannot certify them as kosher for Passover use since Ashkenazim do not eat kitniyos on Pessach. My question is two-fold. Firstly, were my thoughts correct that since he wanted to burn his *chametz* I could take his *chametz* and so I can keep the bottle that is real *chametz*. Secondly, concerning the bottles that are only *kitniyos* may I keep them because one does not need to dispose of *kitniyos* since while Ashkenazim do not eat kitniyos on Pessach they may own them. Therefore, his desire to burn them was a total error. Perhaps, even if I may keep the *chametz* bottle I

would have to return the rest of the bottles because it was a mistake on his part?

Answer:

In order to answer your question we have to evaluate the legal status of the items your neighbor asked you to burn.

By telling you to burn these items your neighbor made a clear statement that he was no longer interested in using the contents of the box and did not expect them back. While he probably did not want to relinquish ownership on the entire contents of the box since the Ramo (OC 434, 2) rules that one should not declare, all of his *chametz*, ownerless (bitul *chametz*) before he burns his *chametz* since otherwise he will not be able to fulfill the *minhag* to burn **his** *chametz*, nevertheless it suffices to fulfill this *minhag* by burning one *kezayis*-a minimal amount of *chametz*. Therefore, it is quite certain that your neighbor would not mind if someone would take some of the items that were found in the box. This is even more certain in case someone could really use those items since it is *midas sedom*-Sodomite behavior for one to prevent others from using something that he himself does not need. Thus, we can safely assume that if anyone would have asked your neighbor for permission to consume some of his vitamins on Erev Pessach your neighbor would have granted him permission. Even more so this is true if you, his neighbor who was dong him the favor of ridding his *chametz* on his behalf, would have wanted to partake of his *chametz*.

We find in the Gemara and Shulchan Aruch various rulings concerning situations where an owner does not mind others taking his possession and from them we can derive the legal classification of the contents of the box. For example, the Gemara (Pessachim 6B) says that one who checked his house for *chametz* does not need to be concerned that perhaps he overlooked a few crumbs because even if he did overlook

them, these crumbs are considered ownerless, even if they are inside his house, since the owner is not interested in them.

Even where an item is of value to people but the owner does not mind if someone takes it we find that one is allowed to take the item. Thus, the Shulchan Aruch (CM 359, 1), based on the Yerushalmi, rules that one may break off a thin branch from another person's bush in order to clean his teeth since people don't mind. It just says that it is a *midas* c*hassidus* not to do so because (See Sema note 4) otherwise everyone will break off a little bit and the owner will eventually be harmed.

Another ruling concerning an object, whose owner doesn't mind if someone took it, concerns betrothing a wife. Even though one must give his bride something that he owns, the Rambam and Shulchan Aruch (EH 28, 17) rule that if someone took, without permission, an object like one or two dates from someone that we surmise doesn't mind that he took it, and gave it to his bride in order to betroth her it is a *sofeik*- a possibility that perhaps she is betrothed. The *meforshim* are divided why we are not certain that she is betrothed. Some (Presho) understand that it is because the object that he gave was worth less than a *peruto*-the minimum amount one needs to give his bride while others (Beis Shmuel) understand that it is because we aren't certain that the owner truly does not mind. In your situation, we have no reason to be concerned with these issues because it is not important how much the vitamins are worth and you can be quite certain that your neighbor would let you keep it. The Acharonim also have various opinions if the dates were ownerless-*hefkeir* (Teshuvo Me'ahavo 3, 440) before the groom took them or there was just *ye'ush*-the owner lost hope that they would be returned (Noda Behehudo EH 2, 77).

Your situation is far better than the dates because we can 1-safely assume that your neighbor did not mind if someone would take some

of the items in the box and 2-he expressed clearly that he did not want them returned-meaning that there certainly was *ye'ush* on his part.

We should note that certain conditions must be fulfilled in order for *ye'ush* to affect change of ownership. One condition is that that the object may not be in the possession of its owner or even someone who is a shomeir-guardian on his behalf. In your situation this condition was satisfied since the box was not in its owner's possession and since you were given the objects in order to destroy them, the Gemara (BK 93A) states that you never assumed the status of a shomeir. As a result, your neighbor's *ye'ush* was legally effective since it was neither in his hands nor in the hands of his legal shomeir. The other condition that is crucial for *ye'ush* to be legally effective is that it should have entered the possession of the one who wishes to keep it in a permissible manner. For example, a thief does not acquire an object that he stole even after the owner gave up hope of recovering his stolen property since it entered the possession of the thief in a prohibited manner. However, one who finds a lost object after the loser abandoned hope of having it returned may keep the lost object because it entered his possession in a permitted manner. In your case since it entered your possession in a permitted manner as we saw earlier, you may keep the items that your neighbor abandoned hope of having them returned. Therefore, we have established that your neighbor's *ye'ush* enabled you to take possession of his vitamins. Furthermore, perhaps they were even *hefkeir* which would certainly allow you to keep his vitamins.

Based on the above, we can answer your question concerning the bottle that was *chametz*. You may certainly keep it since your neighbor wanted to get rid of his *chametz* and this bottle contained real *chametz*.

However, concerning the bottles that did not contain *chametz*, your neighbor's desire to burn them was based on a mistake. Generally, when one acts based on a mistake his action is not legally effective because

in order for an action to be legally effective the parties have to intend for it to be effective and intent based on a mistake is not intention. For example, when one purchases an item based on false premises the buyer may render the acquisition null and void-a *mekach to'us* because the buyer never intended to buy the object in its actual state.

Since we saw that the means by which you are able to acquire your neighbor's vitamins are either *hefkeir* or *ye'ush*, where each one suffices, we have to investigate whether either *hefkeir* or *ye'ush* that is based on an error is legally effective.

Concerning *hefkeir* there are various sources that if the owner's declaration that an item is *hefkeir* is based on a mistaken assumption the item is not legally *hefkeir*. For example, Tosafos (Gittin 47A) and the Rash (*Peah* 6, 1) explain that the reason the Gemara rules that if a gentile picks up a Jew's forgotten grain-shikcho it is not his, is because the only reason the Jewish owner of the field rendered the forgotten grain as *hefkeir* is because he thought it would be picked up by a Jew. Since this turned out to be a mistake of judgment, the *hefkeir* was not effective.

Even where the mistake was not in circumstances but a legal error, Tosafos (Pessachim 57A) writes that the declaration of *hefkeir* is void. The case in the Gemara from which this is derived is where an owner of a vegetable patch left over *peah*-an act of *hefkeir*, which is unnecessary according to the *halachah*, and the Gemara ruled that the *peah* was not *hefkeir* because it was based on a mistake. Thus, if we would need to resort to *hefkeir* in order for you to acquire your neighbor's non-*chametz* vitamins, you would need to return them to your neighbor.

However, we saw earlier that your neighbor's *ye'ush*-lack of expectation that he would have the vitamins returned, suffices for you in order to acquire his vitamins. Therefore, we have to determine if perhaps *ye'ush* that is based on an error is valid.

The Gemara (Kresus 24A) rules that if witnesses testified that a person's animal needed to be killed because an *aveiro* was done with it and later those witness's testimony was declared invalid, nevertheless one who took possession of the animal in the interim may keep the animal even after the testimony was nullified. Many Acharonim explain that the reason the new owner may keep it is because the animal's owner gave up hope of keeping his animal when beis din first ruled that the animal needed to be killed. Thus we see that even though the owner's loss of hope was based on an error, nevertheless the *ye'ush* is valid. Thus we see that, in contrast to *hefkeir*, *ye'ush* that is based on an error is, nonetheless, legally effective. This is explicitly written by the Ketsos (siman 142) in a different context. The Ketsos proves his contention with the argument that the Gemoro states that when one gives up hope of recovering his lost object-*ye'ush* the finder may keep the lost object even though the only reason the owner gave up hope is because he didn't know where his lost object was. Thus, *ye'ush* that is based on an error is legally valid. The rationale for the difference between *ye'ush* and *hefkeir* is that *hefkeir* is a positive action-to render the object ownerless whereas *ye'ush* is negative-loss of hope and one does not require as much desire to affect change in a negative manner-loss of hope in this case, as he does to affect change in a positive manner.

Returning to your second question-since in order for you to keep the vitamins *ye'ush* is sufficient and we have seen that *ye'ush* that is based on an error is effective, you may even keep the vitamins that are not *chametz* and you need not even inform your neighbor that you kept his vitamins.

75

Suffered a Loss by helping recover Stolen Goods

I buy used silver objects, melt them down and make new silver products. Recently a person brought me quite a few silver products to sell. While I was looking over the various items I noticed a phone number on a piece of paper. Suspecting that the seller was a thief, I called the phone number and asked the person who answered if he was burglarized recently. When he answered affirmatively, I asked him if he would like me to trap the thief in my store and call the police. When he said yes I quickly called the police and locked the store. Realizing what was happening the thief wantonly broke many items in my store causing me ten thousand dollars' worth of damage. Can I ask the owner of the stolen goods to reimburse me for the damages I suffered in trying to help him recover his stolen goods? Was I required to do what I did? If I had bought the stolen goods would I have been entitled to reimbursement or would I have to surrender the goods to their owner without reimbursement?

Answer:

Obviously, you should try collect your damages from the thief who caused the damage. We assume from your question that this is not an option.

In order to determine the answer to your questions we first have to understand the relationship you had with the stolen items. The Ramo

(*CM* 348, 7), based on a ruling of the Mordechai, states clearly that your relationship was that of one who found a lost object. Even though the objects were stolen from their owner and not lost by him, nevertheless, since you did not steal the objects, your relationship is that of one who found a lost object. Thus, the laws that deal with some of your questions are the laws of returning lost objects.

This is also the approach of the Chavos Yo'eir (209, cited by *Pischei Teshuvo* 356, 2) who dealt with one of your questions. He was asked by a person who, similar to you, was offered a large silver item for half the regular price by a known thief. The potential buyer asked the Chavos Yo'eir whether he was allowed to buy it since the Shulchan Aruch (356, 1) rules that one is not allowed to buy stolen goods since if he does so, he will cause additional thefts. If burglars cannot sell what they steal they will be discouraged from stealing.

The Chavos Yo'eir ruled that, on the contrary, in his situation, he should buy the stolen silver in order to fulfill the mitzvah of *hashovas aveido*-returning a lost object to its owner. He said the SA only prohibited the purchase in case there were no other potential customers. However, in this particular situation, where there were others who would buy the stolen object and keep it for themselves, the questioner should buy it and return it to its owner in exchange for the money he spent in order to buy the stolen object. He will thereby fulfill the mitzvah of *hashovas* aveido.

Having established that, as far as you are concerned, the stolen objects had the status of a lost object we can first answer the question whether you were required to act as you did. The SA (264, 1) rules that one is not required to retrieve a lost object if he may suffer a loss as a result. The reason is that *hashovas aveido* is a command to monetarily assist another person, and one is not required to act in a way that may cause himself a loss in order to prevent another from suffering a loss.

The next question we can address is whether you would have been entitled to reimbursement if you had bought the goods from the thief. We have seen that the Chavos Yo'eir ruled that you were entitled, but he does not cite a source.

One can derive the answer from a Gemara (*BM* 93B) that rules that one who was paid to watch sheep (a *shomeir sochor*) must spend money, for which he will be reimbursed, up to and including the value of the endangered animals, if that is necessary in order to defend the sheep from an attack by lions. Moreover, if he fails to do so he is liable for the loss of the sheep.

However, if the watchman is unpaid (a *shomeir chinom*) he is not required to hire helpers. Tosafos (*BK* 58A) and the Rosh (*BK* 6, 6) rule that, nevertheless, if an unpaid watchman does spend money by hiring help even though he was not required to do so, he is entitled to reimbursement for his expenses. (These Rishonim comment that this is true only if the loss was virtually certain and not merely a nervous reaction.) The Shach (303, 8) cites this ruling and comments that it is clear from these Rishonim that this would be the case even if the person who spent money to save the animals was not a watchman at all but just someone who happened to be passing by.

Tosafos and the Rosh derive that one who bought stolen property from gentiles who stole it, in order to return it to its rightful owner, is entitled to reimbursement since the loss was otherwise certain. This is ruled by the Ramo (356, 2) in the case where someone bought stolen property from a known thief in order to return it to its owner. The Gra (356, 9) writes that the source is the Tosafos that we cited and it is derived from the law concerning one who spent money to hire help to save animals from being attacked by lions.

Similarly, in the specific case that you describe, spending money to save stolen goods was ruled in practical situations by the Divrei Rivos (292)

and Mahari ibn Lev (1, 105) and (2, 27) (both cited by *Be'eir Heitev* 128, 17)). The Divrei Rivos discussed an unpaid watchman who spent money to save boxes of merchandise that belonged to someone who was deceased. He requested reimbursement from the heirs who refused, arguing that no one asked the watchman to spend his money. The Divrei Rivos, based on this Gemoro, ruled that the heirs must reimburse their father's watchman. The Mahari ibn Lev specifically mentions also that the one who spent the money can even be a passerby.

Thus, we can answer your question that if you had bought the stolen goods in order to return them to their owner, you would be entitled to complete reimbursement since it seems certain that otherwise the victim would not have been able to recover his stolen property.

We can now discuss whether you are entitled to reimbursement for the damages you suffered when helping the victim recover his stolen goods. It is important to note that there are two differences between this case and what we learned that you would have been entitled to compensation had you spent money in order to help recover the stolen goods. One difference is that you did not spend money but lost money, and the second is that you did not decide to lose money but someone else caused you to lose money against your will.

We will now study whether there is a difference whether you spent money or willingly lost money in order to retrieve the stolen object. There are two cases in the SA that deal with this type of situation.

One ruling (*CM* 264, 3) concerns a flood which threatened to drown two donkeys. The SA rules that if the owner of the less valuable donkey saved the more expensive donkey while losing his own donkey, he is entitled to compensation for his loss in two situations. One is where the owner agreed that he would compensate the owner of the less expensive donkey for his loss if he will try to save his expensive

donkey. The other situation is where the owner of the more expensive donkey was not present.

Thus, we see that even if the owner of the saved object never agreed to compensate the finder for his losses the finder is entitled to compensation if the owner was not present.

The other case (*CM* 265, 1) concerns an employee who had to decide whether he should retrieve a lost object when in order to do so he would need to take off time from work thereby forfeiting his salary for that time. The SA rules that if the employee can stipulate – either with the owner of the lost object or with three strangers – that he wants to be reimbursed for his lost salary, then he is required to salvage the lost object since he will not suffer any loss. However, if he is unable to do either of these, he does not need to save the lost object since, as we mentioned earlier, one is not required to sustain a loss in order to fulfill the mitzvah of *hashovas aveido* and he would lose since he would not be reimbursed for his lost salary.

The Sema (265, 8) and Taz question why he is not fully reimbursed even in case he is unable to stipulate with either the owner or three people. Since the owner was not present it should be like the case of the donkeys when the owner of the more expensive donkey was not present in which he is entitled to be reimbursed.

The Sema answers that in the case of the donkeys, since it was equally difficult to save either donkey, he would not have saved the more expensive donkey if he would not be reimbursed for his loss. However, in the case of the employee perhaps he would have agreed to salvage the lost object even if he were not fully reimbursed, since it is possible that he preferred the less strenuous activity of salvaging the lost object over his regular job even if he would forfeit part of his salary as a result. Thus, he is certainly entitled to be paid for retrieving the lost object, but not for the additional amount he would have earned from his regular

job. We should note that the Taz (end 265) gives a slightly different answer but with regard to our situation there is no essential difference.

Tosafos (*BK* 58A) and others explain that the reason the owner of the cheaper donkey is not compensated in case the owner of the expensive donkey was present and wasn't consulted by the owner of the cheaper donkey before he forfeited his donkey, is because the owner of the expensive donkey could argue that he would have found someone who would have saved his donkey without losing a donkey (They also give another reason but Nesivos 264, 4 says this is the authoritative reason.). From this we can deduce that in case the owner is not present, he must compensate the one who suffered a loss and cannot claim that the expense was needless because perhaps someone else would have saved his object without having to spend any money. Thus, we see that the difference between one who spent money and one who voluntarily suffered a loss is not significant.

We still have to investigate if you are entitled to compensation for the losses you involuntarily suffered at the hands of the thief. We also have to consider whether the fact that the owner told you to call the police is significant since everything we discussed until now is true even if the owner did not tell you to do anything. We will consider these questions next time, be"H.

In conclusion: You did not have to call the police, exposing yourself to physical and monetary danger. If you had bought the stolen goods you would be entitled to complete reimbursement for the money you spent if the price you paid was reasonable.

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Suffered a Loss by helping recover Stolen Goods-Part 2

I buy used silver objects, melt them down and make new silver products. Recently a person brought me quite a few silver products to sell. While I was looking over the various items I noticed a phone number on a piece of paper. Suspecting that the seller was a thief, I called the phone number and asked the person who answered if he was burglarized recently. When he answered affirmatively, I asked him if he would like me to trap the thief in my store and call the police. When he said yes I quickly called the police and locked the store. Realizing what was happening the thief wantonly broke many items in my store causing me ten thousand dollars' worth of damage. Can I ask the owner of the stolen goods to reimburse me for the damages I suffered in trying to help him recover his stolen goods? Was I required to do what I did? If I had bought the stolen goods would I have been entitled to reimbursement or would I have to surrender the goods to their owner without reimbursement?

Answer:

In the previous article when answering your second and third questions we learned that when one willingly either spent money or lost money in order to help another person he is entitled to reimbursement. We left open the question whether in your situation you are entitled to reimbursement since the loss that you suffered happened against your will.

For example, the case in the Gemara where one was entitled to reimbursement for a loss that he suffered was where one willingly left his donkey to drown in order to save another person's donkey. However, here you didn't tell the thief to break your goods. Rather, it was done totally against your wishes. An additional difference is that breaking your goods did not help in any way to recover the stolen goods. Rather, it was an act of vengeance by the thief against you for having called the police on him and a means to pressure you to release him. We can only make the owner of the stolen goods pay you if we have legal justification for such a ruling.

In order to determine if the differences we described are significant, it is very important to understand the rationale why one who spent money or voluntarily lost money to save another person's property is entitled to reimbursement.

The basis for the benefactor's right to reimbursement is the general principle that one who was a beneficiary of another person's benevolence owes money to his benefactor for the benefit that he received if the benefactor suffered a loss thereby. Of course, if the benefactor wanted to give a present, the beneficiary does not owe anything. However, if he did not intend to give a present he is entitled to reimbursement and the benefactor is known as a *yoreid*.

The classic case in the Gemoro (*BM* 101A) of a *yoreid* is where a person, who was not hired to do so, planted a tree on another person's property. If the owner of the property does not demand that the one who planted it should remove the tree, the owner must pay for the benefit that he received. A common application of this principle is that it is the basis for requiring a landlord to pay his tenant for the home improvements that the tenant left in the rental upon vacating.

In order to be classified as a *yoreid* one does not need to do a positive act. Even one who voluntarily loses his property in order to benefit

another is also considered to be a *yoreid.* (This is the opinion of Tosafos in BK 58A but not Tosafos in Kesubos 107B. However, the opinion of Tosafos in BK is authoritative as it is ruled by SA in CM. 264.) That is the reason for the ruling we mentioned last time that one who forfeits his donkey in order to save another person's donkey is entitled to reimbursement.

This concept is also the rationale for a ruling of the SA in a case which is very similar to yours. The SA (*CM* 128, 2), based on the Yerushalmi, rules that if a thief took money from one Jew (since it was, for example, more convenient) when he really wanted to steal money from a different Jew, the Jew whose money was saved does not owe any money to the Jew whose money was taken by the thief. Even though money of one Jew saved the money of another Jew, nevertheless, here the beneficiary is not obligated to compensate the victim, whose money saved him money. The Nesivos (128, 5) explains that this ruling is in conformance with the rules of *yoreid* since he proves from the Shach that in order to be a *yoreid* the benefactor must himself be the one who caused the beneficiary to benefit. However, if A takes B's property instead of C's property, C does not owe anything to B since B did nothing to benefit C. Rather A just used B's property in a way that benefited C. Similarly, in the case of the SA it was the thief who brought benefit to one Jew at another Jew's expense and therefore the Jew whose property benefited the other Jew is not entitled to reimbursement

By analogy, it would seem that the owner of the stolen property does not owe you anything since you didn't voluntarily bring any benefit him.

However, there is another case that bears on your case. The Mordechai (*BB* 660) cites the Ri (*Ba'al Hatosefos*) who ruled that if A was watching B's object and a thief who really wanted to take B's object, took A's object instead, A can keep B's object as payment for his lost object. The Beis Yosef (*siman* 72) disagrees with this ruling since this seems to

contradict the ruling of the SA that we just cited. However, the Ramo (126, 22) ignores the objection of the Beis Yosef and rules like the Ri without offering any explanation.

The Shach (126, 102) defends the Ramo's ruling by differentiating between this case and the usual case where a thief took one Jew's money in lieu of another Jew's property. The important feature of this particular case is that A could have given B's object to the thief. It was both halachically permitted since that is what the thief really was trying to take and also A was physically able to do so since he was watching B's object. This would have saved his own object. By allowing the thief to take his own object and thereby saving B's object he was acting in a manner similar to the one who allowed his donkey to drown in order to save someone else's donkey.

Your case is similar since you could have unlocked the door and released the thief, thereby avoiding loss of your possessions. By keeping the door locked and not saving your possessions in order to help the owner recover his stolen goods you benefited the owner of the stolen goods. This is the difference between this case and the usual case where the thief benefited the beneficiary. Therefore, you are entitled to recover your loss but only up to the value of the stolen goods since that is the benefit you brought to the owner of the stolen goods.

We should note that you should hold onto the stolen goods until their owner agrees to pay you for your loss. The reason is because the Shach (126, 104) is unsure whether all the Rishonim agree with the Ri's ruling. You may hold onto the stolen goods until you are paid, but if you return them to their owner you would need to negotiate with the owner of the stolen goods on the amount that he needs to pay you for your loss.

In the previous article we mentioned that a second reason why you might be entitled to reimbursement is that you were acting at the

owner's behest. Perhaps, since he asked you to trap the thief he thereby took responsibility for the repercussions.

We showed in the previous article that your role in this entire scenario was that of a watchman who served as a watchman over a lost object at its owner's behest. Therefore, your issue is a particular case of the issue whether an employer is liable for losses that were sustained by his employee while working on his behalf.

The Rashbo (*Res.* that were attributed to the Ramban, 20) was asked exactly this question and he ruled that there are no grounds for making the employer liable since he didn't damage his employee in any manner. His ruling is brought by the SA (*CM* 188, 6). We should note that this is even more pronounced in your case since it was within your power to avoid the loss. Therefore, this reason would not entitle you to reimbursement for your loss.

In conclusion: You may hold on to the stolen goods until their owner compensates you for your loss. If you already returned them to their owner you should come to an agreement with him how much he should pay you for your loss.

Stealing

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Paying for the use of a Wall Built on my Property

About ten years ago my neighbor and I added a floor to our one story house. We built independently. He built an outside wall on all four sides of his addition and I did the same. Thus each one of us owns all of his walls by himself.

This year we are both adding another floor. When we looked into building this year, we discovered that my neighbor's wall on the second floor was built totally on my property. It turns out that it was in a sense a blessing in disguise because in order to get a permit to build this time, I was required to build a reinforced wall, which requires the support of a strong wall which has beams all the way down to the ground. Had he built his wall where it should have been built I would not have had the support of his wall. It is only because he built on my property that I have his very strong wall to rest my new reinforced wall on. Do I have to pay my neighbor anything for using his wall?

Answer:

As we mentioned in the past, we have a rule of *zeh nehene vezeh lo chosier potur,* that one who benefits from another person who loses nothing thereby does not have to pay anything. Thus it would seem that you should have no liability at all.

However, we find in the Gemara a similar situation where one does have to pay. Once we understand why one has to pay in the Gemara's situation we will be able to address your question.

The case in the Gemara (*Bava Basra* 5A) concerns a wall built between the yards of two neighbors. The din is that each neighbor can force the other to share in the cost of a four amo (about two meters) high wall which is to be built half on each neighbor's property. The reason they can force each other is because it is proper to build such a wall in order to prevent each one from violating the other's privacy.

The Mishna continues that if one wishes to build a higher wall he cannot force his neighbor to share in the additional cost because it is not mandatory. However, if at some later time the neighbor acts in a manner that indicates that he too wishes to use the added height of the wall, he is required to share in the cost of the construction. The Rishonim question why he must share in the cost since the wall was there anyway so it would seem that this is an application of the rule that *zeh nehene vezeh lo chosier potur*.

The Rishonim suggest two approaches. The approach of the Magid Mishne (*Shechainim* 3, 4) and the Nemukei Yosef (*Bava Basra* 3A) is that when the first neighbor added to the height of the wall, he wanted to share the wall with his neighbor. Therefore, at the outset, he placed half of the added height in the neighbor's property (since half of the original lower four amos stood on the neighbor's property) with the intention that if at some future time the neighbor will desire to use the wall, the neighbor can pay for half and acquire the half that stands on his property. Even though at the outset the second neighbor refused to participate in the construction, once he indicates that he wishes to use the added height of the wall we say that automatically he is taking up his neighbor's offer to purchase half of the wall and therefore, he is required to pay half of the cost since he is buying ownership of the added height of the wall.

The approach of Tosafos (*Bava Kama* 20B and *Bava Basra* 5A) is very different. Tosafos does not view the neighbor as buying ownership of

the wall but rather suggest that this is an exception to the rule that *zeh nehene vezeh lo chosier potur,* since the second neighbor indicated that he is willing to spend money on a project which includes use of the added height of the wall.

These seem to be two totally different approaches to explain why the second neighbor must share in the cost: the first approach is that it is a sale and the second that he is paying for benefiting from the neighbor's wall. This is how many Acharonim including the Ketsos (158, 6) understood. Furthermore, there are Acharonim such as the Yam Shel Shlomo (*Bava Kama* 2, 16) who don't accept the approach of Tosafos because it is a chiddush that has no inherent support in the Gemoro. It is only suggested because it is way to answer a difficult question. However, if there is an approach that does not require such chiddushim we should rather follow that approach.

However, each approach is difficult. The approach of the Magid Mishne is difficult because the Gemara (*Bava Kama* 20B) discusses an equivalent case (where the outside neighbor rather than the side-by-side neighbor built the wall) and the Gemara understood that the payment is for benefit and not for purchasing ownership. Other Acharonim question the approach of Tosafos because the Gemara says that the second neighbor must pay half of the cost. If he is only paying for use of his neighbor's wall he should pay the value of using someone else's wall and not half of the cost of the wall since he does not attain ownership.

Rabbi Akiva Eiger (printed in *Zichron Yehuda*) and Rav Shimon Shkop (*Bava Basra* 4, 3) both suggest that the two approaches complement each other and we accept both approaches. If the second neighbor would not be required to pay for using his neighbor's wall he would never be interested in purchasing ownership of the wall. It is only because he

anyway would have to pay for use of the wall that he is encouraged to already buy ownership of half of the wall.

It would seem that in your situation if we follow the approach of the Magid Mishna and Nemukei Yosef you do not need to pay at all since your neighbor did not build with any intention to share the wall with you. Ten years ago he built his own wall and you built your own wall. Therefore it would follow that you shouldn't have to pay at all for using his wall since he is losing nothing.

It is only according to the approach of Tosafos that you would have to pay. According to the approach of Rabbi Akiva Eiger and Rav Shimon you would not need to pay half, but an amount for use that beis din would have to determine.

However, in your situation there is another very important fact to consider.

The Ramo (360, 1) rules, based upon several Rishonim including the Rashba, that you have the right to ask your neighbor to tear down his wall completely since he built it on your property. There are Acharonim (See *Pischei Teshuva* 360, 1) who say that this is a matter of dispute. However, even according to the lenient opinion you can ask your neighbor to pay you for your land which he (mistakenly) stole by building his wall on your property. Therefore, it would seem proper for you to make a deal with your neighbor that you will allow him to leave his wall without paying, in exchange for him allowing you to use his wall without paying him for its use.

78

Inadvertently Used Extra Power from the Shabbos Generator

About ten years ago, I joined the local generator and bought the right to use four amperes a week. After a year, my wife said she'd prefer using a hotplate (a Shabbos "plata") instead of using the gas. We tried one out and saw that the plata didn't cause the circuit breaker to fall. Therefore, we assumed that we were within the four amps that we purchased and we continued to pay the monthly charge for the use of four amps assuming that was the amount we were using. Recently, we moved to a new apartment and again bought four amps. However, the circuit breaker fell. We spoke with the organizer of the generator and told him what we were using. He told us that for what we were using we required six amps. We checked with the organizer of our previous generator and he agreed that because of our hotplate we required six amps. He explained that the reason the circuit breaker never fell is that I had a six amp circuit breaker. Even though I only bought four amps, since at the time they only had six amp circuit breakers in stock, that is what they installed. I am an avreich and can't afford the extra two amps and would have continued using gas had I known that I would need to pay an extra fifty percent each week. Do I owe anything to the organizer in my previous neighborhood?

Answer:

Before we answer your question, we should analyze your situation so that we can compare it with analogous situations. In your situation,

you inadvertently enjoyed the benefit of six amps. Moreover, had you known that you would be charged for them, you would not have used the extra two amps. There are various cases in the Gemara and poskim which are similar to yours, where someone inadvertently used something which he would not have used had he known the true facts.

One case in the Gemara (*Kesubos* 34B, *Bava Kama* 112A) is orphans whose father had borrowed a cow. When the father passed away he did not alert the orphans to the fact that the cow was borrowed. The orphans slaughtered the cow and ate the meat thinking that the cow was theirs. The Gemara rules that they have to pay the true owner only two thirds of the value of the cow. Rashi (*Bava Kama*) explains that the reason they pay only two thirds is because if the orphans had known that the cow wasn't theirs they wouldn't have slaughtered it and would have eaten something cheaper.

The Rashbam (*Bava Basra* 146B) explains that the reason they pay two thirds is that we assume that even one who normally does not eat the better and more expensive product would eat it and spend the money if he could buy it for two thirds of the normal price.

It is important to understand what they are paying for. Tosafos (*Bava Kama* 27B) writes that the orphans do not have to pay damages to the owner of the cow since their mistake is excusable. Therefore, as far as damages are concerned their damages are classified as an *oness* for which Tosafos maintain that a person is not liable and we don't say *odom mu'ad le'olam*.

According to the version of Tosafos of the Rashash, Tosafos say they have to pay for the benefit they derive. Even if one does not have this version of Tosafos we see from the Gemara (*Bava Kama* 20A) that paying two thirds of the full price is the amount one who is not liable for damages pays for the benefit he derived. The Gemara says this in reference to an animal that ate another person's food that was located

in the public thoroughfare. The Torah says the animal's owner is not liable for damages. However, the Gemara writes that the owner has to pay for the benefit he derived and the Gemara says the amount he must pay is two thirds of the full-price.

Thus, we have established a very important principle: that when one damages and at the same time benefits from the damage that he did, if the damage is excusable he does not pay for the damages but he must pay for the benefit that he derived.

Another case that is discussed in Shulchan Aruch (246, 17) is where a person invited someone and later on asked to be paid for the food that his guest ate. The Rama writes that if it is clear that originally the host meant to give a present and only later due to a souring of relations he asked to be paid, then he is entitled to nothing. However, if that was not the case he is entitled to payment. The Ketsos (246, 1) explains that the guest does not have to pay for damages since he was given permission to eat. The amount that he must pay is only for the benefit he derived from eating the meal.

There is another case that is discussed in Shulchan Aruch (363, 10) from where we can derive another important principle. The Shulchan Aruch rules that one who rented a property at a cheap price from someone who pretended the property was his, must pay the full price, which the owner normally charged, to the true owner. The Ketsos (363, 7) asks why he is required to pay the full price since he thought he had to pay less. It should be equivalent to the orphans who slaughtered the animal their father left them. The Ulam Hamishpot answers that when one rents a house he should find out who the owner is. Therefore, it is not an *oness*, like orphans who blamelessly assumed the cow belonged to their father.

While there are many who do not agree in this case with the Ulam Hamishpot, nevertheless, the principle is correct. It is only where the

damage is totally excusable that one has to pay only for the benefit he derived.

It would seem that your situation is comparable to the cow of the orphans since you had no reason to suspect that you were given a six ampere fuse when you only ordered four amps.

Having established that you do not have to pay the full price of the extra two amperes, we have to determine how much you are required to pay.

We have seen that you have to pay for all the benefits you derived from use of the generator. One benefit is that you saved on your gas bill. The second benefit is, as you wrote, that your wife preferred a hotplate to gas. We saw that concerning food Chazal estimated that normally one who does not eat the more expensive food, would eat and pay for the more expensive food if he could purchase it at a one third discount. Therefore, you have to estimate how much extra you would have paid the generator each month in order to use a hotplate instead of gas and pay that, in addition to the cost of gas, to the generator organizer. Of course, you needn't pay more than the cost of two amps.

We should note that it is clear from the Gemara (*Bava Basra* 4B) that this has to be determined on an individual basis. We see this because there is a case where the Gemara states that one who derived benefit can say, "I would have been satisfied with a flimsy low-cost wall."

In conclusion: You are obligated to pay for all the benefits you derived from having used the generator for your hotplate, but in no case should it be more than the original cost of an additional two amperes.

79

Unaware if Money Discovered is Personal or Ma'aseir

When I have money that I don't need for a while, I deposit it with a gemach. About a year ago, I deposited twenty-five thousand dollars, twenty of which was mine and five were my ma'aseir money. At various times I withdrew money. Recently, I withdrew money and, according to my records, I no longer had any money left in the gemach. However, the manager of the gemach said that according to his records I have a balance of three thousand dollars. I should note that the manager is very careful. He writes down every transaction immediately, whereas I record transactions when I remember to do so, which can sometimes be a day or two later. I have two questions: May I accept the three thousand dollars since, according to my records, my balance is zero? If I may accept the money, may I use it for personal needs or must I consider it ma'aseir?

Answer:

Since you don't record your transactions immediately and the manager of the gemach does, you may rely on his records and accept the money. The source is the Shach (91, 25) who cites a Rosh that when one records his transactions immediately he may even swear based on what is recorded in his ledger since it is reliable. However, records that are not recorded immediately (like yours) are considered legally to be unreliable. Therefore, since the gemach's records are reliable and yours are not, you may rely on the manager of the gemach and accept the money.

Since we have established that you may accept the money, we must consider your second question i.e. whether the money is yours or it belongs to ma'aseir. If we were dealing with ordinary money and the question was only whether the money is yours or it belongs to another person who left money with you, then you may consider the money as yours. This is similar to the Gemara (*Bechoros* 18B) which states that if a person asked someone to watch his lamb and that person kept the lamb together with his own lambs and one lamb died, he can assume that the lamb that died belonged to the other party. The reason is because of the rule *hamotsei meichaveiro olov horayo:* one who wants to retrieve something from someone else must prove his claim. Since the money is by you or by someone to whom you have entrusted it, and it is not certain that the money belongs to someone else, you may keep the money.

However, since in your case the "other party" is ma'aseir money, we must discuss the laws of ma'aseir. Normally, when one sets aside ma'aseir money he is effectively setting aside the money to be used exclusively for paying for mitzvos for which he was not previously liable. The reason is because that is what people generally do with their ma'aseir money. Therefore, we say that that was the meaning of his words or actions.

What is important for us is that by doing so, one is effectively pronouncing a *neder* to use the money for this purpose. The source for this is two statements of the Gemoro. In the case of money that is set aside to be used for poor people, the source is a Gemoro (*Rosh Hashana* 6A) that derives from the word "*beficho*" that one who says he will give money to the poor is pronouncing a *neder*, a vow. Even if ma'aseir money may be used for other mitzvah purposes, many maintain that it is a vow since the Gemoro (*Nedarim* 8A) states that one who says, "I will get up in the morning and study this chapter (of Torah)," has pronounced a vow to carry out what he said. The Ran (commentary thereon) explains that all mitzvos are equivalent to tsedokoh and the word *beficho* refers to them

as well. This is also the opinion of the Rambam (*Negative Precepts* 157). The Radvaz (2, 698) disagrees and maintains that it is not a full-fledged vow. However, the Chazon Ish (*Yoreh Deah* 153, 5) indicates that one should follow the stringent opinion.

Therefore, if one sets aside money for use as tsedokoh he has pronounced a vow and if he does not use it as tsedokoh but for his own personal use he will violate two negative commandments of the Torah: *lo yacheil,* do not profane your speech, and *lo se'acheir,* do not tarry to fulfill your vows.

We find in the Gemara (*Chulin* 134A) that if one has a doubt that pertains to *issurim* he must be stringent. Thus, in your situation since, if you will use money that was designated as ma'aseir for your own use and not for mitzvah use, you will violate two Biblical laws, you must be stringent and treat the money as if it were full-fledged ma'aseir money and use it for mitzvah purposes.

Normally, the halacha (*Rambam*, *Nedarim* 13, 25) is that one is not supposed to undo *nedarim* for mitzvah use by means of *hatoras nedarim* since it is a mitzvah to carry out one's vow. Moreover, the Radvaz (4, 134) rules that one who frees a person from fulfilling a vow to do a mitzvo is excommunicated. However, in your situation, it would seem that you may have your vow annulled since you never would have made a vow if you had known that the money would be mixed together with your personal money.

The Chazon Ish (cited in *Derech Emuno Matnas Aniyim* 8, 8) advised people to state that any money which they set aside for ma'aseir should not become tsedokoh money until the time it is given to a poor person or to the gabbai of a tsedokoh. The reason is that if one sets it aside for tsedokoh use he must give it immediately if a worthy cause presents itself because the pasuk (*Devorim* 23, 22) writes that one who tarries to fulfill his vow violates a negative command of the Torah. If you did

that, then you would have no problem keeping the money for yourself because the issue is purely monetary and not issur, and as we wrote above the rule is *hamotsei mechaveiro olov horayo*, so that if one is in doubt he may keep the money for his own use.

It should be noted further that while it is a big mitzvah to give ma'aseir one should perform the mitzvah without involving himself with vows. Therefore, the Chafetz Chaim (*Ahavas Chessed* 2, 18) writes that one should state at the outset that he is accepting upon himself to always give ma'aseir *bli neder*–without it becoming a *neder*.

In conclusion: If you followed the Chazon Ish's advice then you may keep the money for yourself. However, if you did not, you must first perform *hatoras nedarim* and then you may use the money for personal needs.

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Moving to a Better Seat when a Flight is in Transit-Part 1

I recently flew with El-Al from England to Israel. I am tall and the flight was not full so I moved to a seat that has more leg room. If I would have requested this seat when I booked my flight I would have had to pay a higher price for this seat. However, since it is not such a long trip, I didn't ask for a special seat in order to save money. However, I figured if no one is sitting there anyway I might as well sit there and be more comfortable. Do I owe the airline anything and even if not, was my action proper?

Answer:

At first glance it would seem that everything you did was fine and you do not owe anything since the rule is that *ze nehene veze lo choseir potur* – if the owner did not bear any loss, the one who derived benefit from his possessions does not need to pay for the benefit he derived. The P'nei Yehoshua (*Bava Kama* 20A) explains that the reason he doesn't need to pay is because it is an attribute of Sodomites to prevent others from benefiting from their possessions even when they bear no loss. Since we are supposed to shun their behavior and to allow others to use our possessions if we do not suffer a loss, the one who used them without permission is not liable. However we will see that there are a number of reasons why this does not apply to your case.

The first reason is that it is only if the owner suffers absolutely no loss the one who benefited is not liable. However, if the owner suffers even

a slight loss, according to most poskim including the Shulchan Aruch (*CM* 363, 7) (the exception is the Rama) the one who benefited must pay for the entire value of the benefit that was derived. The reason is that in principle one should always have to pay for the entire benefit he derived from another person's possessions. It is only if there is absolutely no loss that since it is *midas Sodom* the payment is waived.

An example brought in the Gemara (*BK* 20B) where one is liable is if someone lived in another person's vacant house which was never rented to anyone. The Gemara rules that even if the entire loss that was suffered by the owner was just that his walls were slightly blackened the resident must pay the full price that the house was worth as a rental because the owner sustained this minor loss.

Moreover, we see from the Gemara that the one who benefited must pay must pay for his benefit even if he only caused a loss to the owner in a passive manner. This can be seen from the Gemara's (*BK* 20B) ruling, as it was understood by Tosafos and many other Rishonim, in a situation where one person has a field that completely surrounds another person's field. These Rishonim rule that if the owner of the outer field builds a wall that surrounds his field and, consequentially, also the inner field, the owner of the inner field must pay a percentage of the cost of the wall even if he never asked for it. The reason is because the presence of the inner field caused the fence that enclosed the outer field to be more expensive because it had to be longer to enclose also the area of the inner field. Thus even though the owner of the inner field did nothing active to raise the cost, since his mere presence causes a loss it obligates him to pay for his entire benefit. Some poskim (*Chochmas Shlomo siman* 363) derive from Tosafos (*Kesubos* 30B) that even if the loss to the owner is not even the value of a *perut*o it suffices to require the one who derived benefit to pay in full for his benefit.

The Noda Biyehuda (*Tinyono CM* 24) was asked about a publisher who, after he set type to publish a customer's *sefer* which was a Gemoro with

Rashi and Tosafos and his customer's commentary, did not dismantle the type. Instead he used the type (which had been set at the expense of his customer) to publish a Gemoro with Rashi and Tosafos without his customer's commentary. The Noda Biyehuda ruled that the publisher must pay his customer for the savings he had from not having to reset type since publication of his Gemoro would cause a decline in his customer's profits. He reasoned that some people who would otherwise have bought his customer's sefer would no longer do so since they would have bought the customer's sefer since it contained the Gemoro with Rashi and Tosafos and now they would no longer do so. Thus, we see that even causing a loss in profits suffices to require the one who derived benefit to pay for his benefit.

Having established the broad sense of the loss that suffices in order to require one to pay for the benefit that he derives, we can consider your situation. Modern day poskim (see *Chukas Mishpot* of Rav Peretz, for example, who discusses riding for free on a partially empty bus) note two losses that are suffered by the carrier as a result of your use of the vacant seat.

One loss is that if other people act in the same manner as you did, many people will not pay the higher price for these seats since they will take into account the fact that they may be able to get the seat for free. As we saw, the Noda Biyehuda ruled that even loss of potential income is treated as a loss. The loss you are causing is a slightly additional *chiddush* because your action alone will not directly cause a loss of income but if it is prevalent it will definitely cause a decline in income. This is one reason why the poskim classify your benefit as a benefit that entails a loss.

A second loss to the airline is that in order to fly, the airline spends money on fuel, salaries and much else. Without these expenses the flight could not take place. Since the airline spends in order to benefit everyone who flies with them, this expense is necessary in order to enable all those who fly to benefit. Therefore, all those who benefit

from the flight must pay for the flight, at least as one who benefited from another person's loss.

The halocho (*CM* 264, 4) is that even if a person spends money in order to benefit himself and another person the second person must pay for his benefit because halocho views the expense as having been made in order to benefit both individuals. The example discussed by the Ramo is of someone who was imprisoned and spent money (lawyers, bribes) in order to be released. The Ramo rules that if at the time of the expenditure he had in mind a fellow prisoner, the fellow prisoner must share in his expenses. Therefore, since the airline spent money in order to benefit all the passengers on the flight, they must all pay the fees charged by the airline.

In your situation, some might argue that you already paid for a seat on the flight and the extra benefit you derived was not related to the airlines' expenses since as far as expenses are concerned they are the same for a more comfortable seat as for a less comfortable seat. However, this argument is faulty because the higher prices that are charged for these seats are part of the airline's way of covering expenses and making a profit. What the airline is really doing is that it is dividing its expenses among the passengers based partially on the comfort of its passengers.

This is similar to the ruling of the Shulchan Aruch (*CM* 272, 15) (based on the Gemara (*BK* 116B) that if a guard was hired to protect a convoy from bandits the expense is divided based on the value of the goods that each individual is transporting.

In conclusion, in the future you should ask for permission to move to a more comfortable seat. As for this time, unless you can find out that the airline has a policy not to charge it would seem you are liable. We will continue next time with an additional reason and also discuss whether you were allowed to move.

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Moving to a Better Seat when a Flight is in Transit-Part 2

I recently flew with El-Al from England to Israel. I am tall and the flight was not full so I moved to a seat that has more leg room. If I would have requested this seat when I booked my flight I would have had to pay a higher price for this seat. However, since it is not such a long trip, I didn't ask for a special seat in order to save money. However, I figured if no one is sitting there anyway I might as well sit there and be more comfortable. Do I owe the airline anything and even if not, was my action proper?

Answer:

Last week we learned that the rule is that one who benefits from another person's property in a manner that the owner suffers no loss is not liable for his monetary benefit. However, we explained that the situation in question cannot be classified as one where the owner suffers no loss, because there are two ways that the airline does suffer what the *halacha* considers a loss. One is that if people know that they can occupy the vacant more expensive seats fewer people will buy the more expensive seats and the loss of potential profit is viewed halachically as a loss. The second loss is because the higher price the airlines charge for these seats is just the way that the airline divides up its costs and its profit margin. The airline's costs are halachically considered as its loss.

Today we will study a different reason why you are liable, a reason that applies even if we would classify this as a situation where the airline does not suffer any loss.

The Tur (*siman* 363) and consequently the Shulchan Aruch (363, 6) rule that one who lives on another person's vacant property that was not being offered for rental is liable if the owner ordered him to leave. The Tur does not give a source or a reason for his ruling. Many commentaries including the Machane Efraim (*Gezeilo* 10) and Gra (363, 13) write that the source is a ruling of the Gemoro (*Bava Kama* 21A) where the owner of the property was not a private person but *hekdesh*. It was the property of the *Beis Hamikdash*.

The Gemoro rules that even if *hekdesh* had no intention to rent out or otherwise make use of its property, nevertheless, one who used it must pay for the benefit he derived from his use. Tosafos explains that the reason is because it is the known intent (based on the Torah's rules of *me'iloh*) of *hekdesh* not to allow anyone to use its property without paying for it.

Thus we see that the proper way to understand the basis for the rule that one who benefits from use of another person's property where the owner suffers no loss is not that the owner was not allowed to charge for the benefit but that the owner did not want to charge for the benefit. Therefore, if the owner makes it clear that he is not willing to allow others to use the property unless they pay for it, they must pay even though the owner did not suffer the slightest loss.

The Machane Efraim derives from this the opinion of Tosafos in a dispute between the Ohr Zorua (*Bava Kama* 123-4) and the Ra'avyo (also cited in *Hago'os Ma'amonei Gezeilo* 3). The dispute concerned a person who normally rented out his property but due to pressing circumstances was forced to leave town before he had a chance to find a renter or a rental agent. The Ra'avyo ruled that one who lived on the property is not liable for his use because the owner did not suffer any actual monetary loss since the property was anyway not available for rent. However, the Ohr Zorua (also cited and agreed to by the *Yam Shel*

Shlomo (*BK* 2, 16)) ruled that he is liable if the property was rented out at other times when an agent or the owner was present. The Machane Efraim explains that the rationale is that the owner has the right to forbid use of his property by anyone who does not pay for its use since that is not *midas sedom*. Therefore, we understand that it is the owner's intention to condition permission to use his property on payment for its use. As a result, anyone who wishes to avoid being classified as a thief for using the property must pay for its use. The Machane Efraim derives support for this opinion from other sections of Gemara and consequently rules that this is the correct approach.

The Ramo (363, 10) rules in the case of the above dispute that one who lives on a vacant property is not liable if the owner of the property was not present and he did not leave an agent to manage his property since the owner did not suffer a monetary loss. However, this is consistent with his approach (363, 6) that if anyway the owner cannot earn money from his asset we can force him to make it available to others for free since otherwise it is considered to be *midas sedom*. However, many disagree with the Ramo (see *Pischei Teshuvo* (363, 3) and prove that such behavior is not considered *midas sedom*.

Moreover, there are others (*Ulam Hamishpot* 363, 6) who explain that even the Ramo only ruled that one does not have to pay when the owner was not present because we assume that the owner is happy that he is living there because otherwise undesirables may occupy his vacant property. Support for this approach can be brought from the fact that in another place (174, 1) the Ramo himself maintains that one who prevents others from gaining where he does not have a loss is not considered as behaving like *midas sedom*.

In conclusion concerning the question of whether you would have to pay even if the airline did not suffer a loss, we have seen that the explicit ruling of the Shulchan Aruch is that if the airline would inform

you or have a known policy (this is similar to *hekdesh*) that one may not sit on a more expensive vacant seat without paying its price then you would have to pay the airline the price it charges one who orders this seat. We have seen further that there is an opinion that even then you are not liable and from one place it would seem that the Ramo would side with this opinion but this is not certain and also it would then be contradicted by another ruling of the Ramo. Furthermore, we can say with certainty that in this situation even if you would not be liable, you were certainly not allowed *lekatchelo* to occupy this seat, even in the hypothetical situation where the airline did not suffer a loss.

Moreover, even if you weren't told anything, in general there is a slight issue whether you are allowed *lekatchelo* to benefit from another person's property without permission if the owner does not lose (*ze nehene vezeh lo choseir*) . The Chassam Sofer (*CM* 79 c.v. *venereh li*) writes explicitly that it is permitted even *lekatchelo* and this is the explicit opinion of others (including *Beis Efraim CM* 49 c.v. *veroesey* and the *Nesivos* 250 16) but it seems that there are others (e.g. *Shitto BK* 20A in the name of R *Yeshayo*) who disagree. However, on this matter one can rely on the *poskim* who permit it, again, in a situation where the owner has no loss.

Based on the considerations from last week, that in your situation the airline is considered to have a loss, you have to pay the extra fare.

However in this situation, of a commercial airline that runs many flights daily, the critical question is what its policy is in such situations. If it does not allow passengers to move then you will have to pay for the difference in price between the seat you paid for and the seat you occupied because of its loss as we discussed last week, and according to many because of the reason we discussed in this article. However, if you ask and are given permission to move or know that the airline's policy is to allow your behavior then you may move without liability.

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Deceiving in order to perform a Mitzvah-Part 1

When I was studying the parsha this week I was troubled by Leah's actions when marrying Ya'acov. It would seem that she was an accomplice to her father's plan to fool Ya'acov. Wouldn't even her passive role in Lavan's chicanery constitute *geneivas da'as*-deceiving someone, and therefore be forbidden?

Answer:

Your question is well-taken and it would seem that a comment of the Ramban would both support your question and at the same time lead us to a possible answer.

The Ramban (29, 31) is troubled by the word 'hated' that is used in the *pasuk*, "Hashem saw that Leah was hated," and he offers two explanations. His first explanation is that Ya'acov at first really hated Leah because he felt that she should have done something to at least hint to Ya'acov that she was Leah, and thereby thwart Lavan's chicanery. The Ramban says that Hashem had mercy on her because He knew that she only acted that way because she craved to marry Ya'acov since he was a *tsaddik*. Therefore, Hashem arranged for her to become pregnant and then Ya'acov dropped his plan to divorce her.

Thus, we see that your criticism of Leah was shared by Ya'acov according to the Ramban. However, we also see that Hashem in a sense endorsed her behavior and He ensured that she would not suffer as a result of her action. The Ramban explains that Hashem's behavior resulted from the fact that she had good intentions.

It is problematic to derive *halachas* from the actions of even great people. As the Gemara (*BB* 130, B) states, "One cannot drive *halachas* from his rebbe's actions," unless the rebbe specifically says that this is the *halacha*. This is especially true of actions before the giving of the Torah (Matan Torah) as the Yerushalmi (cited by *Tosafos* (*Mo'eid Katan* 20A)) states (*Mo'eid Katan* 3, 7): "One cannot derive *halachas* from what transpired before *Matan Torah*." Nonetheless, we can analyze the actions and see how the principles apply to us.

Therefore, we will consider the following three points. We will first clarify the source for the prohibition of *geneivas da'as*. Second, we will ascertain whether Leah's passive behavior is included in the prohibition of *geneivas da'as*. Finally, we will discuss whether good intentions affect the prohibition.

That deceiving is forbidden is clearly written in the Gemara (*Chulin* 94A). The Gemara cites various actions that people do that give a false impression of friendship, and the Gemara writes that they are prohibited. Many Rishonim (*Yeraim* 124, *Ritva Chulin* 94A in the name of *Tosafos* and others) maintain that this is included in the Biblical injunction (*Vayikro* 19, 11) against stealing, since this is a form of stealing. It is stealing someone's mind. There are other Rishonim (*Smak* 262) who, while agreeing that the prohibition exists, maintain that the source for the prohibition is Rabbinic.

We note that R. Eliashev (*Kovetz Teshuvos* 1, 159) ruled in accordance with those who maintain that the source of the prohibition is from the Torah even when the deception is carried out in a passive manner.

Rashi and Tosafos (*Chulin* 94B) dispute whether one who causes someone to fool himself without saying anything violates the prohibition as well. One situation that is the subject of this dispute is where a host opened a new barrel of wine for a guest when he knew that he had a customer who wished to purchase the remaining wine. Tosafos, whose

opinion is authoritative, maintains that in order to avoid violating the prohibition, the host must inform his guest that he has a customer for the remaining wine, since otherwise the guest will mistakenly think that the host went out of his way and opened the new barrel especially for him even though he was at risk that the wine that remained in the barrel would sour.

Thus, we have established that even though Leah did not say anything, nevertheless, since she was aware that Ya'acov had the impression that she was Rochel, her behavior constituted deception and would be classified as *geneivas da'as*.

Thus, we have to consider our third issue: whether a good intention justifies deception. The impression that one gets from the Ramban's explanation is that Hashem condoned her behavior, and that the reason is because she desired to marry a *tzaddik*. This implies that her good intention justified deception even at the expense of a victim, in this case Ya'acov.

We do find a specific goal that indeed justifies deception. When the goal is to attain Torah knowledge we find two types of actions that are permitted even when they involve deception. One is where someone's goal is to acquire Torah knowledge for himself, and the second is where someone's goal is to convey Torah knowledge to another individual.

While there are cases in the Gemoro that show that the prohibition is waived if the goal is to acquire Torah knowledge, nevertheless the Gemoro never states the principle and certainly makes no mention of a source. However, the Zohar (*Yisro* 31) does provide an interesting source.

The Zohar states that the source is the cantillation notes (*ta'amim*) on the commandment in the Torah that forbids stealing. When one reads the Ten Commandments there are actually two sets of notes. One is known as *ta'am elyon*, which is the way the Ten Commandments are read

on Shavu'os. The other is known as *ta'am tachton*, which is the way we read the Ten Commandments on Shabbos as part of the weekly Torah reading. In *ta'am elyon* when it comes to the words *lo tignov (*you must not steal) there is a *tipcho*, which is a separating note, under the word *lo*. Thus, when one hears the Torah reading it sounds like we are being told two things: 1-You must not and, 2-Steal. The Zohar says that of course in general we must not steal but the Torah wishes to teach us that there are situations where certain aspects of stealing are permitted. One situation, says the Zohar, is when one must resort to deception in order to gain Torah knowledge.

We should note that the reason one can derive laws from the Torah cantillation notes is because the Gemara (*Nedarim* 37B) derives from a pasuk that even these were taught by Hashem to Moshe on Mt Sinai.

Now that we have a source, we must examine the applications of this exception. It is very important to stress that the exception only applies to actual Torah learning and not to preliminaries that eventually lead to Torah study. For example, Rav Moshe Feinstein (*CM* 2, 29) writes that for many reasons – including *geneivas da'as* – it is forbidden for a yeshiva to inflate the number of its students in order to receive a higher allocation from the government. Similarly, it is forbidden to relate false information to potential donors. Even though, by means of the funds received, the Yeshiva will be able to teach more people Torah, nevertheless, they must not use deception to acquire the funds since obtaining the money is only a preliminary and does not constitute Torah study itself.

One situation where the Yerushalmi (*Sanhedrin* 3, 9) permits one to deceive in order to acquire Torah is where someone knows that he will not obtain an answer to his question unless he pretends that he is in a practical situation where he needs to know the answer in order to

know how to proceed. The Yerushalmi actually criticizes an Amora for failing to untruthfully state that he needed to apply the knowledge for a practical situation and, therefore, he remained with an unanswered question i.e. with a gap in his Torah knowledge.

The Sha'arei Zohar uses this Zohar to explain an apparently strange anecdote in the Gemara (*Chagiga* 13A). The Gemara relates that R Yosef desired to understand what is written in the Torah about *ma'asei Bereishis (the secrets of creation)*, and so he implied to the other amoraim who knew this that if they first teach this to him, he would teach them parts of the hidden Torah that he knew and they did not know. (According to the Rambam (Introduction to *Mishnayos Zeraim*) he explicitly told them that he would teach them this part.) The Gemara relates that after they taught him *ma'asei Bereishis*, they asked him to teach them what he knew. R. Yosef replied by citing a pasuk that forbade him from teaching them what he had originally agreed to teach them. The Sha'arei Zohar says that based on this Zohar, R. Yosef's deceptive behavior was justified since his goal was to acquire Torah knowledge.

The second class of actions where deception is permitted for the sake of acquiring Torah knowledge is ruled by the Rambam (*Talmud Torah* 4, 6). He rules that a teacher of Torah may use deception in order to cause his students to learn better or more. The Kesef Mishna writes that the source for the Rambam is several episodes in the Gemara where the Gemara justifies the deceptive behavior of the Torah teacher with the explanation, "He did it in order to sharpen his students."

For example, the Gemara (*Brachos* 33B) relates that Rabba praised a person who acted incorrectly, in the presence of his student, Abaye. The Gemara justifies Rabba's action with the comment that Rabba wanted to sharpen Abaye by seeing if Abaye would pick up the person's mistake. Thus, we see that he was permitted to employ deception in order to better educate his student.

In conclusion: Misleading someone for personal gain (monetary or friendship) is strictly forbidden and according to many the source is a *pasuk* in the Torah. However, misleading someone in order to acquire Torah knowledge either for himself or for someone else is permitted and even laudable. In the coming article, we will study whether it is permitted to deceive someone in order to perform a mitzvah, which is what Leah did.

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Deceiving in order to perform a Mitzvah-Part 2

When I was studying the *parsha* this week I was troubled by Leah's actions when marrying Yaacov. It would seem that she was an accomplice to her father's plan to fool Yaacov. Wouldn't even her passive role in Lavan's chicanery constitute *geneivas da'as*-deceiving someone, and therefore be forbidden?

Answer:

Before we answer the actual question it is important to clarify whether Leah's behavior is classified as *geneivas da'as*. Actually she didn't say anything. Rather she allowed Yaacov to be misled by being silent. The question is whether failure to inform is *geneivas da'as*.

This is a dispute between Rashi, who rules that one only violates the prohibition of *geneivas da'as* if he says something, and Tosafos who rule that one violates the prohibition of *geneivas da'as* even if he just acts in a manner that causes a normal person to err and he does not prevent the error.

Tosafos proves his position that this is *geneivas da'as* from the beraiso (*Chulin* 94A) that rules that a host who opens a barrel in order to serve wine to his guest, must inform the guest if he already has a customer for the rest of the barrel. Even though the host does not say that he opened the barrel especially for his guest, nevertheless he must explicitly inform his guest that he has a customer since a normal person would think that he has no customer. In the time of the Gemoro, wine spoiled

shortly after the barrel was opened. Thus, since a normal guest would think that the host was risking the loss of a barrel of wine in order to serve him, when actually he was not doing such a thing, the host must inform his guest. Similarly Leah, who knew that Yaacov thought she was Rochel, was guilty of *geneivas da'as* according to Tosafos – whose opinion is authoritative.

Having clarified that you are correct that Leah's behavior would be prohibited as *geneivas da'as*, we must consider whether her goal justified her behavior. We saw in the previous article that if the immediate goal is to acquire Torah knowledge or to convey Torah knowledge to others, deceiving is permitted. In this article, we will clarify whether this leniency is limited to Torah knowledge or extends to fulfilling other mitzvahs as well.

Before addressing this issue it is important to understand the background for the leniency to deceive in order to acquire Torah knowledge. We saw in the previous article that the Zohar derives the leniency from the implication of the cantillation notes on the Torah prohibition to steal, that there is some exception to the prohibition to steal. Note that there is nothing in this derivation that indicates that the leniency is limited to Torah knowledge. Nonetheless the Zohar applies the Torah's exception to cases where the immediate goal is to acquire Torah. Our question is whether the reason the Zohar mentions acquiring Torah knowledge is just because it is a mitzvah like other mitzvahs or is there something special about acquiring Torah knowledge that is not present in other mitzvahs.

We do find in the *halachah* another leniency related to theft when the objective is acquiring Torah knowledge, and this leniency is limited to the effort to acquire Torah knowledge.

Normally, one who is charged with watching another person's object may not use the object for personal use without permission from the

owner. If he does use it, the Torah (*Shemos* 22, 7) considers it as if he stole the object. However, the Shach (292, 35) understands that the Rama grants some leniency when the object is a *sefer* and the one who is entrusted to watch the object wishes to use the *sefer* to acquire Torah knowledge.

There are various opinions about what exactly the Shach permits. The Magen Avrohom (14, 10) understands that the Shach permits one who wishes to learn and doesn't otherwise have access to this *sefer* to use the *sefer* even though its owner did not permit him to use the *sefer*. The source is the Midrash that explains the verse in Mishlei (6, 30) that says, "Do not despise the thief for stealing for he is satiating his hungry heart," as referring to one who deceives someone in order to acquire Torah knowledge.

The Shach's explanation as understood by the Magen Avrohom is also the interpretation of the Gra (292, 46) who writes that one may use another person's *sefer* if otherwise he will be idled from Torah study. This is supported by a ruling of the Rosh (*res*. 93, 3), that is cited by the Rama (292, 20), that if someone needs a *sefer* to learn and someone else has the *sefer,* beis din forces the owner to lend it to the one who needs it. Thus we see that there is a special leniency that is limited to Torah study and we do not have a basis to generalize to all mitzvahs.

However, even though one cannot infer a leniency when the goal is general mitzvah performance from the leniency to acquire Torah knowledge, nevertheless there is another independent source for such a leniency. This is found in the commentary of the Iggeres Shmuel on Rus. He notes two statements that were made by Boaz when he offered Rus to Tov who had precedence over Boaz to wed Rus. One is that Boaz seemingly unnecessarily underscored the fact that Rus's previous husband died. The second is that Boaz only informed Tov that when he marries Rus he must also redeem the fields that she had sold. However

later, after Tov waived his opportunity to wed Rus and Boaz seized the opportunity, Boaz mentions that besides marrying Rus he is also redeeming all the fields that once belonged to Rus's father-in-law and brother-in-law as well.

The Iggeres Shmuel says that both of Boaz's statements had one purpose. Boaz was a prophet and he knew that from Rus will emanate the Davidic dynasty and he felt that he was more qualified to do this. He compares this with Yaacov's efforts to acquire the status of the firstborn from Esau. In both cases someone wished to fulfill a mitzvah and he also felt that the person who had precedence was less suited.

The explanation of the Iggeres Shmuel is cited by the Sha'arei Teshuva (*OC* 482) who derives from it a general rule that even though one is not allowed to fulfill a mitzvah that belongs to someone else, however, one may employ deception to cause the owner to willingly part with the mitzvah.

For example, the ruling of the Torah is that one who slaughters a bird automatically has the right to perform the mitzvah to cover its blood. Another person may not cover the blood without permission from the one who slaughtered the bird, but, according to the Sha'arei Teshuva he may use deception to cause the one who slaughtered the bird to willingly part with the opportunity to perform the mitzvah.

This ruling of the Sha'arei Teshuvo is the source for various leniencies when it comes to the opportunity to perform a mitzvah. For example, the Bris Ovos (cited in *Sefer Habris* page 170) rules that one may attempt to persuade the father of a child to choose him to be the *mohel* or *sandek* at the *bris* of his son even though the father was already talking to someone else to perform the mitzvah. If the goal was to acquire a monetary possession such an action would have been forbidden since it constitutes *oni hamehapeich becharoro.* But where the goal is to perform a mitzvah the Bris Ovos permits the action. While others do not agree

(See our *sefer, Mishpatei Yosher* pages 145-150) that the prohibition of *oni hamehapeich becharo* is waived when one wishes to perform a mitzvah, nevertheless, this illustrates the fact that there are leniencies when the goal is to perform a mitzvah.

An interesting illustration is a ruling of the Chashukei Chemed. A few years ago there was a huge Tefillah demonstration at the entrance of Jerusalem in which over six-hundred-thousand people participated. A volunteer for Hatzalah was slated to be assigned to a place that was near, but not at, the actual demonstration. He asked if he was allowed to arrange with the one who assigned positions to switch him with someone else who was slated to be positioned at the actual demonstration, since he wanted to be able to say the *brocho*, *chacham harozim* that one can only recite if he sees six-hundred-thousand Jews in one location. The Chashukei Chemed writes that he asked his brother-in-law, R. Chaim Kaniefsky who, based on this ruling of the Sha'arei Teshuvo, ruled that he was permitted to do so.

However, not everything is permitted. Titein Emess Leya'acov (page 78) wanted to apply the ruling of the Sha'ari Teshuvo to three students who wished to fulfill the mitzvah of hosting their Rebbi, who planned to spend Shabbos in their community and needed a place to stay. One student invited the rebbi but the rebbi turned down his invitation. One of the remaining two asked if he could tell the other remaining student misleadingly that the rebbi was already invited by the first student so that the other remaining student would not invite the rebbi since he would think that the rebbi accepted the first student's invitation and, as a result, he would ensure that the rebbi would accept his invitation. Rav Eliashev replied that it was not permitted since this statement constituted a lie and one may not lie in order to perform a mitzvah. We should recall that when the goal was to acquire Torah knowledge the Yerushalmi explicitly permitted a questioner to lie and say that he

needed to know the answer to his question because he had a practical application when in fact he did not.

Thus, we see that there is a leniency according to the poskim in order to fulfill mitzvahs but it is not as broad as the leniency where the goal is to acquire Torah knowledge.

We recall from the previous article that the Ramban says Hashem had mercy on Leah because she craved to marry Yaacov because he was a *tzaddik*. Based upon what we have learned now it could very well be that the Ramban means that her goal justified her behavior and she did not violate any prohibition at all. This is especially true in light of the fact that the alternative, according to Rashi, is that she would have to wed Essau, a nightmare that had caused her to cry her heart out for many years.

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Copying Successful Styles

I am a seamstress. In order to save the cost of paying someone to design clothing and to avoid the risk that the design will not be successful I visit popular women's clothing stores in Geula and photograph the items that are popular and then sew and sell the identical item. My husband recently told me that perhaps what I am doing is improper. Must I cease my practice?

Answer:

Your question involves two issues that we previously discussed briefly in different contexts (See the articles from Parshas Shelach and Pinchas 5781 that are posted on our website www.dinonline.org). Since what you are doing is an application of a very common issue we will elaborate further.

We will see that even if you were to buy the clothing and then copy it, your behavior would be problematic. All the more so since you don't even buy the clothing.

In order to understand the first issue we must make an introductory remark. Under Torah law there are various causes for requiring a person to pay money to someone else. There are the obvious reasons. If one steals from or damages someone he must pay because he took something away from his victim. If one hires someone to work he must pay the other party because he obligated himself to do so. However, in Torah law under certain circumstances one must even pay for a benefit he derives from someone else. It is this issue that this article will concentrate upon.

An example is where one's animal eats someone else's food that was on public property. The Torah rules that the animal's owner is not liable for the damages that his animal caused to the owner of the food since the food was on public property. However, the Gemara (*BK* 20A) says the animal's owner still must pay the owner of the food the value of the benefit that he derived from his animal's having eaten the food. This usually is less than the full value of the food since the food typically costs more than what he would have otherwise spent to feed his animal.

The Gemara (*BK* 20B-21A) discusses whether one is liable if he derives benefit without causing any loss to the one from whom he benefited. The conclusion is that one is generally not liable unless the owner suffered a loss. However, it is important to note that even when the person from whom he benefited suffered a loss, the payment is still for the benefit he derived and not for the loss suffered. Thus, even if the loss is small nevertheless the one who benefited must pay for the entire benefit.

For example, if someone squatted on vacant property he is not liable if the owner did not suffer any loss. However, if he dirtied the walls of the property even slightly he must pay the entire benefit he derived from occupying the vacant property (i.e. rent) even when the cost to clean the walls is minimal. The P'nei Yehoshua (*BK* 20B) explains that the logic is that, as we mentioned, one is obligated to pay for a benefit he derives from someone else. However, if the one from whom the benefit is derived does not suffer any loss whatsoever, the one who benefited does not have to pay since it is *midas sedom* to prevent someone else from deriving benefit when there is no loss. However, if there is a loss, since *midas sedom* is no longer a factor, the one who benefits must pay in full for the benefit that he gained.

The case of a squatter is discussed in the Gemara and it represents the classical case where one who benefits must pay for the benefit he

derived because he caused a loss to the one from whom he benefited. It is very important to note that in this case the benefit that the squatter derived came from the house that belonged to someone else, who we call the victim.

In a controversial ruling, the Noda Biyehuda (*Tinyono CM* 24) extended this principle further. He was asked to decide a dispute between a rov who published a Gemoro, with Rashi and Tosafos and his own commentary, and the rov's printer. The basis for the dispute was that the rov had paid the printer for typesetting his sefer. However the printer, instead of just dismantling the type, as was common practice, used the type to publish a Gemoro with Rashi and Tosafos but without the rov's commentary. The rov claimed the printer should pay him since he benefited from the typesetting that the rov had paid for.

The Noda Biyehuda sided with the rov reasoning that the printer's reuse of the typesetting the rov had paid for, caused the rov to suffer a loss. The loss was that the rov would sell fewer copies of his *sefer* since some of his potential customers would now opt for the Gemoro that didn't have his commentary.

For two reasons this is a landmark ruling. First, in the cases that were discussed by the Gemoro the one who benefited has to pay the owner of the object he benefited from. For example, the squatter pays the owner of the house. The owner of the animal pays the owner of the food. However, in this case the printer was the owner of the type. The rov had just paid the cost of typesetting and he got what he paid for. He did not own the type. It was the printer's property and the printer could have dismantled the type. This objection was raised by both the Boruch Ta'am and the Yeshuas Malko (res. *CM* 22) who disagreed with the ruling of the Noda Biyehuda. However, we will see that many later poskim followed the Noda Biyehuda's ruling.

The second novelty concerns the Noda Biyehuda's extension of the concept of what constitutes a loss. In the cases discussed in the Gemoro there was an actual out-of-pocket loss. Perhaps it was small but there was a real loss. In the Noda Biyehuda's case the loss was only a loss of potential profit.

However, the Amudei Eish (Page 67A-B) ruled exactly like the Noda Biyehuda in a situation which is almost identical to yours. One person took an elaborate course to learn the entire painting profession (including manufacturing the paint) and he took detailed notes which enabled him to work as a painter. Another person, without his permission, came and copied his notes and used them to learn the painting trade and compete with the first painter. The Amudei Eish ruled that the second painter had to pay the first painter because he gained by using the first painter's notes, while causing a loss to the first painter because he took away potential customers.

Another authority who ruled like the Noda Biyehuda is the Divrei Malkiel (3, 157). The plaintiff in the dispute that was brought to him was a person who developed a product and obtained approval from the Polish Health Ministry to market his product, all of which entailed an outlay of money. The defendant had copied the first person's product and marketed it using the identical stickers as the first person indicating that the product had the approval of the health ministry. The Divrei Malkiel ruled that the defendant had to pay the plaintiff because he profited from the plaintiff's outlays in a manner that caused the plaintiff to lose potential customers (as well as other potential losses). He also ruled that the plaintiff has the right to force the defendant to cease marketing the product.

This was also the ruling of the Birkas Shlomo (*CM* 24). His ruling (post World War 2) was really a further extension of the previous rulings because in his case the plaintiff – who was the owner of the rights to

print the Vilna Shas – no longer printed the Shas at all since the Nazis ym"sh had destroyed his press. Thus, he did not lose customers from the defendant's reprinting and sale of the Vilna Shas. His loss was that by printing the Shas without paying for the right to print the Shas the defendant prevented the plaintiff from selling the rights to print the Shas to other publishers who would have otherwise paid for the rights.

Rav Zalman Nechemia Goldberg (*Techumin* Volume 6) discussed the same issue in the context of copying tapes. He claims that the extension of the Noda Biyehuda to the case where the printer derived benefit from his own letters is actually a dispute among the Rishonim and Acharonim. He writes that according to the Noda Biyehuda one who copies and sells tapes owes money to the one who made the original tape.

We should note that your practice of just taking pictures and not even buying the product that you copy is even worse since you are deriving benefit from the storeowner who owns the clothing and you are damaging him as well since he loses customers too. Therefore, even the Baruch Ta'am and Yeshuas Malko would agree that you are liable for the benefit you derive from your practice.

We should note that there are two other prohibitions that you may very well be violating-one is Rabbinic theft known as *oni hemenakeif* and the second is causing a person a loss of livelihood *yoreid le'umnos chaveiro* since you are engaged in an unfair practice in a manner that curtails your competition's income. However, each of these requires an independent article.

In conclusion: You must cease your practice.

Note: This ruling applies only where the ones who suffer the loss are Torah observant. Since legally one is allowed to copy the design of clothing, the ruling would be different if the parties are not Torah observant Jews.

Renting Objects

85

Is a Bus Company Required to Refund Money it collected for Travel to Meron on Lag Bo'omer

I own a private bus company and, as I do every year, I sold tickets to travel from Yerushalayim to Meron and return on Lag Bo'omer. Travelers must book in advance and pay at the time of booking. After the tragedy, the authorities immediately closed the site and all the buses that had not yet departed did not go. Afterwards various passengers requested that I return their money since we did not provide the service they paid for. Obviously, this is not the typical case since we didn't cancel the trips ourselves – just the authorities forbade them. Am I required to refund their money?

Answer:

As always, to reach a decision we must first analyze how each aspect of this situation is classified by the *halachah*.

The first issue to consider is your relationship with your passengers. Since the passengers paid you money in order to transport them we view you as their employee. The *halachah* has two types of employee: those that are paid for their time and those that are paid to perform a job, known in the Gemara as a *kablan*. Since you were paid to perform a task, you are a *kablan*. While it is true that you contracted to give the passengers a place on your buses, nevertheless, we don't view the passengers as renters of the bus. Rather, you brought the buses in order

to perform your job, just like any worker may bring tools with him to perform his job.

The next issue to examine is how the *halachah* views your cancellation. *Halachah* differentiates between cancellations which result from unforeseen circumstances (known as an *oness*) and those that could have been foreseen. Cancellations that are from circumstances that could have been foreseen are a violation of the original commitment, whereas those that could not have been foreseen do not constitute a violation of the original agreement. They simply were not dealt with in your contract. Since the reason you did not transport them to Meron was due to unforeseen circumstances that were beyond your control, we view your cancellation as resulting from an *oness*.

The third issue is how to view this *oness*. *Halachah* divides the class of *oness* into two types: those which are a personal *oness* and those which are a general *oness*, known as a *makkas medino*. The Gemara (*BM* 105 B) discusses a situation where grasshoppers came and ate a significant portion of the crops. The Gemara says that in order to qualify as a *makkas medino* the grasshoppers must have damaged most of the fields in the particular valley where the field in question was situated.

Even though the Gemara requires that the *oness* affect a majority of those who are located in a particular geographical location, nevertheless geography is not the critical factor. What is crucial is that the *oness* should affect the majority of those who belong to the particular group that the particular *oness* affected. For example, the *makkas medino* that the Maharam Padua (res 39) discussed was one that affected the Jewish money lenders in Mantova, Italy. While money lenders were not the majority of the Jewish population in Mantova, nevertheless their *oness* was classified as a *makkas medino* since the majority of the class of Jewish money lenders suffered from the government's unforeseen decree.

The rationale for this differentiation is that when an *oness* befalls an individual or a minority of the group, *halachah* views the victim(s) as being the one(s) whom Hashem wishes to punish and in that sense he is at fault. However, if the *oness* befalls a majority of a group, *halacha* does not view the individual as being blameworthy in any sense, rather he just had the misfortune to belong to the group that Hashem wished to punish. Since the individual is blameless he does not deserve to suffer on account of the *oness*.

Since the cancellation of buses on Lag Bo'omer affected all of those who transported passengers and all those who wished to travel to Meron on Lag Bo'omer, we view this as a *makkas medino*.

Thus, we conclude that what you and the passengers did was to cancel an employment agreement because of unforeseen circumstances that affected an entire group and the question is how much money, if any, are you required to refund to your passengers who are your employers due to the cancellation.

The basis for the *halacha* in this case is a Mordechai (*BM* 343) who discusses a situation where people had hired private tutors to teach their sons Torah subjects and the local ruler suddenly outlawed teaching Torah to children. The issue was whether the teachers were entitled to be paid their salaries since they could not teach due to the decree which affected all parents and all Torah teachers in town. Based on the above analysis, this case is effectively the same as your situation.

It seems that the ruling of the Mordechai is that the teachers needed to be paid in full. Even if the parents did not pay the teachers before the decree they were still required to pay them and certainly the teachers did not need to return any money they had been paid even though they did not perform any work.

Many poskim found this ruling very difficult because in the case of *makkas medino* that is discussed by the Gemara where grasshoppers ate

part of the crop, the Gemara rules that the renters of the fields were entitled to a reduction in rent due to the *makkas medino*. Therefore, they question why the Mordechai didn't rule that the parents, those who "rented" the teachers, are entitled to a reduction in tuition, the parallel to rental payment. This is especially problematic since the Gemoro (*BM* 77A) rules that if an individual who hired a worker is forced to cancel the work agreement due to an unforeseen *oness* the employer does not have to pay anything. The example in the Gemara is a field owner who hired someone to plow his field the next day and at night there was an unexpected downpour that prevented the employee from plowing the next day. The ruling of the Gemara is that the workers receive nothing.

The poskim have diverse ways to deal with this ruling of the Mordechai. The Rama (321, 1 and 334, 1 and *Darkei Moshe* 321) follows the ruling of the Mordechai without addressing the question. The Taz (321, 1) and Maharam Padua (86) also agree with the Mordechai and say the reason is because the employer is the one who is the cause, in the heavenly sense, for the unforeseen circumstance. The Shach (321, 1) also rules that the employees are entitled to full payment but does not address the question.

A second opinion is the Sema (321, 6) who claims that the Mordechai did not rule that the employees must be paid in full but ruled that they must be paid only half. The logic of the Sema is that since the ruler's decree adversely affected both the employer and the employee, they must share in the loss. The opinion of the Sema is found in the Ra'avan, an early Rishon, but it is clear from the Hagohos Hoshrei (*Rosh BM* 6, 6) that he understood that the ruling was that the teachers must be paid in full.

The third opinion is of those who either totally reject the ruling of the Mordechai or explain it in a way that it is not relevant to your situation. For example, the Gra (321, 7) rejects the ruling and says he cannot

understand it. The Nesivos (334, 1) and the Chinuch Beis Yehudah (res 100) give reasons why the case of the tutors is unique. They agree with the Gra that in general the employer does not need to pay anything.

Summarizing, we learned that your situation is the subject of a major dispute whether you were entitled to receive money from the passengers. Furthermore, the better understood approach is that you were not entitled to any payment whatsoever.

Therefore, on the one hand if there are people who did not pay in advance you certainly will not be able to force them to pay. However, on the other hand it is difficult to force you to return money since there are major poskim who maintain that you need not return any money.

However, we should note that the Chasam Sofer advised employees to return half of the money to those who did not receive any service from them. Furthermore, we should note that this was the situation last year when, due to Covid 19, kindergartens were closed and the consensus of the Rabbonim was that the kindergartens should return half of the amount that they had collected in advance.

Therefore, it would be proper for you to return half the amount you received from passengers who prepaid and in the end received no service from you. Nonetheless, whoever did not pay, need not pay anything.

86

Temporary Losses from a Car Accident

I am the guilty party in a car accident and paid for the repair of the other party's car. However it took the garage two days to repair the car and since the other party needed the car for his job he rented a car for the two days. Am I obligated to pay for the rental?

Answer:

If we set your question in general halachic terms, your question is whether one who damages another person's object is liable for temporary damages.

The Torah states that one who damages is obligated to pay for temporary damage where a person damaged another person. One who injures another person must pay for five types of damage that may result from the injury. One type is permanent damage known as *nezek* e.g. if one cuts off another's arm he must pay for the loss in value of the victim that results from the fact that he no longer has an arm. Additionally, the one who damaged must compensate his victim for temporary loss of income when he is unable to work due to his injury, which is known as *sheves*.

The Rishonim discuss if payment for temporary damage is limited to the case where one person damaged another person or applies to other damages as well. The particular case that is discussed by the Ba'alei Tosafos is where a human damaged another person's animal, thereby

causing the animal to be unavailable for work for a limited time. The Ba'alei Tosafos (See *Tosafos* in *Gittin* 42B) dispute whether the one who damaged is liable for the owner's loss of income or not.

The issue essentially is how to classify temporary damages since there are in general two types of damage: inherent damage where the victim or his property was damaged, and causative damage where the victim suffers a loss but nothing concrete of his was actually damaged. In the latter case the one who caused the loss is not necessarily liable.

For example, the Gemara (*BK* 98) writes that if someone knocks someone's coin into water he is not liable even though in order to retrieve the coin the coin's owner must hire a diver. The reason is that the coin was not damaged. It just became inaccessible. Since there is no damage to the coin, the one who knocked the coin is not liable in beis din. The issue is thus if damage that is temporary is viewed as being inherent or causative.

Several Ba'alei Tosafos ruled that if one borrowed or rented a horse and because of negligent misuse the horse became temporarily lame (i.e. unusable) even after he returned it, the borrower or renter is not liable because the lameness was only temporary and one is not liable for *sheves* if the victim is not a human being. Essentially, their argument is that from the fact that the Torah split liability for a human who damaged a human into two payments: *nezek* for the permanent damage and *sheves* for the temporary damage, the Torah taught us that only permanent damage is viewed as inherent.

Tosafos, however cite R. Chaim Cohen who disagreed and ruled that the borrower is liable. His argument is that even though it is correct that, when the injured is not a human, one is not liable for temporary damage *per se*, nevertheless since when one damages an animal, the temporary loss from being unable to work lowers the animal's sale value immediately following the damage, therefore, he argues, the temporary

damage is included in *nezek* for which the borrower is liable. His position really is that whenever the sale value of the damaged object goes down, the damage is inherent.

We should note there still is a difference between damages to a human and damages to an animal since when one damages a human he pays the victim's full loss of income, but by an animal he pays the temporary damage only to the extent that it affects the animal's sale value. Nonetheless, the victim is compensated to a certain extent for his temporary loss.

The Tosafos Horosh explains slightly differently. He says that R. Chaim maintained that one is always liable for temporary damage just as one is liable for permanent damage because even temporary damage is inherent. He rebuts the proof that the first opinion brought from *sheves* with the argument that the only reason the Torah separated *sheves* from *nezek* when the victim is a human is because the victim's temporary incapacity may not affect the human's sale value. Therefore, it was necessary to separate *sheves* from *nezek* and compute it directly based on lost wages. However, where the object that was damaged is an animal or an object, since its temporary incapacity affects its present sale value, it is not necessary to separate *sheves* from *nezek* in order to impose liability for temporary damage.

The Acharonim dispute how to understand the opinion that one is not liable for a victim's loss due to temporary damage. One approach is that of the Nesivos (340, 3). He was very troubled with the lenient opinion because at the end of the day the victim suffers a monetary loss that is uncompensated and he found it difficult to call the damage causative. Therefore, he claims that the only time some are lenient is where the animal was damaged in a manner that the damage will totally repair itself even without human intervention. However, if even after repair the object will remain even slightly damaged (he cites as an example where

the self-healing wound will leave a scar) even the lenient opinion agrees that the one who damaged is liable for the victim's temporary loss. Additionally, if in order to heal a wound the services of a veterinarian are required, the victim is entitled to compensation even for his full temporary losses.

Thus, if one follows the approach of the Nesivos you would be liable for the car rental since cars do not self-heal.

However, the other *meforshim* (e.g. *Chazon Ish BK* 13, 2-3) do not agree with the Nesivos and they understand the lenient opinion to be that one is just not liable for all temporary damage. (It is also clear from the questions of others who maintain that one is liable (See *Ohr Zorua BM* 262-3) that they did not understand the lenient opinion in the way the Nesivos did.)

Moreover, it would seem from what we have written so far that even the stringent opinion would rule that you do not have to pay for the cost of the car rental since the sale value of a car is not affected by the fact that the car will not be available for two days.

However, this requires careful scrutiny since there is a general dispute among the poskim how to evaluate damages that do not affect the overall sale value of the damaged object. The opinion of the Chafetz Chaim and Rav Chaim of Brisk was that one need not pay for such damages since one values a house, for example, as a single entity. Thus, if one broke the window of a house, according to these opinions, he is not liable for the damage since the sale value of the house is unaffected by a broken window.

The Chazon Ish (*BK* 6, 3) however, disagrees and his position is followed by *batei dinim*, nowadays. He proves that damages are assessed according to the individual who was damaged, so that one is even liable for damages that would not bother most people but affected the individual whom (or whose property) he damaged. Furthermore, he

argues that one cannot apply the rule that we evaluate damages by their resale value if the owner does not intend to sell it now but rather to repair the damage. Since people repair broken windows he says that the one who broke a window is liable.

It would seem, therefore, that according to the strict opinion you could be liable for the cost of the car rental since the owner of the car suffered a monetary loss from the fact that he was unable to use the car for two days and people who need a car, rent cars when their car is temporarily unavailable.

However, whether we can apply the Chazon Ish's position to temporary damage depends on the way we understand the opinion of R. Chaim Cohen. If one understands, as Tosafos did, that he agrees that one is not liable for temporary damages beyond their effect on the sale value, then where they have no effect on the sale value one is not liable because temporary damages are not damages on their own.

However, if we understand his position, as the Rosh did, that even temporary damages are damages, just that normally they are incorporated into *nezek*, here where they can't be incorporated into *nezek* it would be similar to damage to a human where one must compute the temporary loss by itself and you would have to pay for the cost of the rental.

The Mishpat Hamazik (2, 42) raises another issue that is critical to your situation. You write that it took the garage two days to repair the car. If it took two days of work to repair the damage then everything we wrote above is correct. However, if the only reason the garage took two days is because they had other jobs it is not certain that anyone would maintain that you are liable, because time spent waiting is probably not an inherent damage, according to anyone.

Thus, we have seen that there is a dispute whether the stringent opinion would maintain that you are liable for the car rental. However, in

either case according to the lenient opinion if one does not follow the approach of the Nesivos you would not be liable.

We must thus clarify which opinion is authoritative. This is the subject of a dispute as well. The Ramo (307, 6) rules that one is not liable for temporary damage. The Shach (307, 5) however maintains that it is undecided and the Chazon Ish (BK 13, 4) rules that one is liable for temporary damage. However, since according to one approach, even the stringent opinion maintains that you are not liable, beis din would not make you compensate the victim for the cost of the car rental.

In the next article we will discuss whether you should pay either to avoid heavenly punishment or to go beyond the strict letter of the law.

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Temporary Losses that Ensue from a Car Accident-2

I was the guilty party in a recent car accident and paid for the repair of the other party's car. However it took the garage two days to repair the car and since the other party needed the car for his job he rented a car for the two days. Am I obligated to pay for the cost of the rental?

Answer:

We learned in the previous article that beis din would not rule that you are liable because of three factors. First, there is a major dispute if one is liable for temporary damages because they are not damages to the object itself. They just make the object temporarily unavailable for use by its owner, and are thus a kind of causative damage. Second, even those who maintain that one does have to pay for temporary damages only require payment for temporary damages to the extent that they lowered the object's sale value, which in this case is negligible or nonexistent. Third, perhaps even the temporary damage here was only due to the line at the repair shop and not because the damage really required so much time to repair, so you were not the real cause of this damage.

However, if you are liable for causative damages then these reasons would not apply and you would be liable. Perhaps the third reason still applies, however.

We find in the Gemara (*BK* 55B) that even for causative damages for which one is not liable in beis din (*gromo* as opposed to *garmi* for which

one is liable in beis din), one nevertheless may be liable in *dinei shomayim,* in the din of Hashem. This means that he will be punished eventually when he faces the Heavenly court. The question we must consider is how negligent one must be in order to be liable for causative damages in *dinei shomayim*.

The rule governing actions of direct damage for which one is liable in beis din, is stated by the Gemora in many places. The rule is: *odom muad leolom.* One is always liable, even if he did not act in a negligent manner.

Tosafos (*BK* 27B), whose opinion is authoritative, write that even though the Gemara says that the one who damaged is always liable even if he was not negligent, it does not include all cases but depends on the degree of negligence. Tosafos cites: 1 – the Yerushalmi that rules that one is not liable for damaging in his sleep an object that was placed near him after he fell asleep, and 2 – the Gemoro that rules that orphans are not liable for damages if they slaughtered a cow that they thought they inherited from their father only to learn later that their father actually only rented it from someone else.

Tosafos states that the precise rule is that a person who damages is liable for his actions if the level of his negligence is equivalent to the negligence of one who lost an object he was entrusted to watch. However he is not liable if the level of his negligence is only equivalent to the negligence of one from whom an object was stolen which is a lower level of negligence and thus lesser responsibility.

We must investigate what the rule is for causative damages for which one is only liable in *dinei shomayim*. Do we also say that *odom muad leolom* applies to such causative damages, or perhaps the rule is different and one is only liable if he was totally careless or perhaps only if he intended to damage.

The previously cited Gemara records a beraiso that states that there are four acts of damage for which one is not liable in beis din but is liable in

dinei shomayim. The Gemara questions why the beraiso only cites these four actions when actually there are many other damaging actions for which one is only liable in *dinei shomayim*. The Gemoro answers that the beraiso singles out these four because one would have otherwise thought that the one who damaged in these ways is not even liable in *dinei shomayim*. It should be noted that in all of the four cases the one who damaged did so intentionally.

One of the four cases is where a person intentionally bent another person's crop into the path of a raging fire and as a result the crop was consumed by the fire. The Gemara explains that the reason one would have thought that the one who bent the crop is not liable even in *dinei shomayim* is because it was only because an unusually strong wind began blowing that the fire consumed the crop, but otherwise the crop would have been spared. The Gemara says that the reason why one would have thought that he is not liable in *dinei shomayim* is because he can claim that he didn't know that a strong wind would come.

The Chazon Ish (*BK* 5, 4) says that we can deduce from this that if someone erred he is normally not liable since otherwise his lack of knowledge of the wind could never have been an excuse. Thus we see that indirect damages differ from direct damages since in the case of the latter one is liable even if he erred. Thus we have derived also that in general the rule that *odom muad leolom* does not apply to indirect damages.

The Rishonim dispute how different indirect damages are. Another example of indirect damage that is brought in the Gemoro where one is liable in *dinei shomayim* is where a person covered over someone's crop that was threatened by an approaching fire and, as a result, the owner of the crop was not entitled to indemnification for his loss since one who starts a fire is not liable for damages done to hidden objects (called *tomun*). The Gemoro says that the reason one would have thought the

one who covered the crop is not liable is because he can claim that he really had good intentions: to prevent he fire from consuming the crop.

The Rishonim dispute why he is liable in fact. Tosafos says he is liable because even if what he claims is true and he really had good intentions, he is liable because he acted carelessly in failing to carefully consider the possibility that he could cause a loss to the crop's owner. Thus, we see that Tosafos maintains that one who acted carelessly (a *peshiyo*) is liable in *dinei shomayim* for indirect damages. This is also the opinion of others (*Tosafos R Peretz*, *Nemukai Yosef BK* 24A).

The Yam Shel Shlomo (*BK* 6, 4) and Bach (418, 10) qualify Tosafos that the one who covered the crop would not be liable even in *dinei shomayim* if he was unaware of the halacha that by covering over the crop he would exempt the one who set the fire from paying . The reason is because then he is viewed as an *oness* since he was unaware that he could harm the crop owner and rather he did his best to prevent damage. We see again that one who errs is not liable in *dinei shomayim*.

The Re'o and Meiri (brought in *Shitto Mekubetses*) both explain this Gemoro that the reason the one who covered is liable is because his intention was to free the one who set the fire from paying for the damages. Many deduce that these Rishonim argue with Tosafos and the others, and that they maintain that one is only liable in *dinei shomayim* for indirect damages where he intended to cause damage. However if he was only careless he is not liable. The Maharit (1, 95) also explicitly rules (he does not cite a source) that one is only liable in *dinei shomayim* for causative damage if he actually intended to damage.

In conclusion: The answer to the question if you are liable in *dinei shomayim* for the temporary damages depends on the varying opinions and also why the accident took place. Since you didn't intend to damage, the Re'o and Meiri rule that you are certainly not liable even in *dinei shomayim*. If you acted carelessly, for example you weren't paying

attention to the road or you violated traffic regulations, Tosafos and many others would rule that you are liable in *dinei shomayim*. If you made an error of judgment e.g. you reasonably thought you could pass someone and you miscalculated, you would not be liable in *dinei shomayim*. But if we consider these temporary damages to be direct, you are liable.

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Leaving a Taxi because the road became Temporarily Impassible

I was in a taxi and all of a sudden the police closed the road because someone reported a suspicious suitcase. Since we were on a one-way street we were stuck. Since it usually takes a minimum of fifteen minutes for the police to determine that the suspicious object is not dangerous and we were just two minutes from my house, I figured I would be far better off if I just left the taxi and walked the remainder of the way. When I informed the taxi driver of my decision to leave he became very angry since that meant that he would be idle until the road was reopened. However, I didn't think I had to pay, so I simply put the money on my seat and left. Do I owe the taxi driver anything?

Answer:

The first issue that requires clarification is the nature of your relationship with the taxi driver. The Terumas Hadeshen (1, 318) was asked by someone who hired a worker to transport his beams on the worker's own horse from the river to the city. The worker overcharged and the issue was whether the worker was required to return the overcharge. In that case it made a difference if the porter was simply an employee or he was both an employee and also one who rented his horse to his employer. The Terumas Hadeshen ruled that he was both and his ruling is cited by the Ramo (*CM* 227, 33) without dispute. He explains that we consider how much the customer would have had to pay for a porter

who did not own a horse and for one who did. The difference is the cost for renting the horse and the rest is the worker's salary. There are others (*Machane Efraim*, *Gezeilo* 11) who disagree and maintain that the entire payment of the employer is salary and there was no rental of the horse.

Thus, when you originally informed the taxi driver of your destination you effectively hired him and, depending on this dispute, perhaps also rented his taxi in order to transport you to your destination.

The second issue is how to view the temporary closure of the road. Since the taxi driver could not move his vehicle we view him as being temporarily sidelined. It is the equivalent of a worker who became ill. Even though the worker is not at fault for being sick or not being able to move his taxi, nevertheless, if there would not be a custom to pay for sick days, under pure Torah law (*CM* 333, 5) he would not be entitled to be paid for the period when he did not perform any work. However, since idle time is included in the determination of the taxi fare, one has to pay even when the taxi is stuck.

Since we established previously that when you entered the taxi and informed the driver of your destination you hired the taxi driver to transport you to your destination, effectively what you did when you left the taxi was to fire your employee before he completed his job in order to avoid having to pay him for the time he was idle, and in order to arrive home faster.

Thus, your question boils down to be whether you were justified in firing the taxi driver and, according to the opinion of the Terumas Hadeshen, ending the rental of his taxi prematurely. If you were justified in firing your employee and ending the rental then you do not owe him anything. But if your firing was not legally justified, you would be required (See *CM* 333, 2) to pay him an amount that is close to the amount he would have earned if he had completed the job even though

he did not actually do the job. (The amount would be reduced because the worker now had free time because he was fired, a concept that is called *sechar beteilo*.)

The Ohr Someach (*Mechiro* 17, 9) proves that a renter may generally cancel his rental agreement on the grounds that it constitutes a *mekach to'us* (an agreement that was based on an error), even if he is only unable to use the rental temporarily. The reason it constitutes a *mekach to'us* is because when one rents for a short period of time, even temporary inability to make use of the rental is very significant. This is especially true when one hires a taxi. The entire purpose one takes a taxi is in order to arrive at his destination quickly. Therefore, if continuing the taxi ride will slow down the passenger he is justified in ending the employment agreement. Therefore, even if the driver would have agreed to turn off the meter until he could continue driving you may depart and save the amount you would have spent had there not been a road closure. You must nonetheless pay for the ride up until then.

We should note that our application of the concept of *mekach to'us* to enable one to end an agreement prior to its culmination, but not nullifying the entire agreement as is the case in an invalid sale, even though it is somewhat unusual, is fully justified. We can prove this from the ruling of the Maharam Padua (res 39), which is cited by the Ramo (*CM* 321, 1). The Ramo opposes the Maharam's ruling in his situation but he does not contest this aspect of the Maharam's ruling. The Maharam ruled that renters of stores with licenses to lend with interest could discontinue their rental in the middle of the rental period if the rental was no longer profitable due to unforeseen developments that occurred in the middle of the rental period, on the grounds that application of the original rental agreement to the balance of the contract constituted a *mekach to'us*.

Based on their comments concerning the ruling of the Maharam Padua, the Chasam Sofer (*CM* 161) and all the others who side with the Maharam agree that your behavior was justified and even the Nesivos (321, 1) would agree that you could end your agreement when the road closed and leave the taxi.

Since the reason you were justified in terminating your stay in the taxi is that your original agreement to continue the ride until your home is a *mekach to'us*, the dispute between the Terumas Hadeshen and the Machane Efraim whether you were paying also for renting the taxi is irrelevant because both a rental agreement and an employment agreement may be nullified in a case of *mekach to'us*. Therefore, be it what it may, your departure was justified and you do not owe any further money to the taxi driver. We should note that R. Nissim Karelitz is also cited (*Kol Hatorah* vol. 52) as having ruled that the passenger may leave.

We should note further that since the basis of our ruling is that concerning the continuation of your trip the original agreement constitutes a *mekach to'us*, if the road closure is not totally unforeseen the passenger could not end their original agreement prior to reaching his original destination since a blemish that is expected does not cause a *mekach to'us*.

Thus, a passenger would not be able to leave a taxi that is taking him to the Kosel if the taxi gets stuck in the Old City on the way down to the Kosel since the occurrence is not infrequent. Even if the passenger originally told the driver that he wishes to go to the "vicinity" of the Kosel he would not be justified in leaving the taxi in a place where the taxi will be stuck if that is not a normal stopping place for taxis. These were the rulings of Rav Shlomo Amar (*Shoma Shlomo* (7, *CM* 4) as well.

Neighborly Relations

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A Neighbor's Tree Blocks my Light

I live in a neighborhood of private homes. A few years ago my neighbor decided to plant a garden on his property. Among other things he planted several trees. One of these trees has grown high and thick and as a result blocks the light from two of my windows that face his property. Do I have the right to force my neighbor to trim or uproot the tree or not, and if yes who has to pay for it?

Answer:

The answer to your first question depends on the location of the branches that block your light. They might be in his property and they might be in your property. We will first discuss the situation where the branches are in your neighbor's property.

The example the Gemoro brings of a neighbor who blocks his neighbor's light, is where one neighbor wished to construct a wall. The Gemoro (*Bava Basra* 22B) rules that the neighbor must leave a distance of four *amos* (6-8 feet) between his wall and his neighbor's window. The Rashbo (3, 156) was questioned by a neighbor who claimed that even though his neighbor distanced his wall by four *amos* it still blocked his light. He replied that four *amos* was fixed by Chazal as an absolute requirement and even though the light is diminished, nonetheless, one need not distance further. As a result of this ruling even if the wall is very high we can't force its owner to distance his wall more than four *amos*. Therefore, if the branches are more than four *amos* from your window and are within your neighbor's property, you have no claim.

It is interesting to note that there is an exception to the four *amos* rule, which is the subject of many of the sheilos that are discussed by Poskim. The Aguda (*BB* 7A) derives that a shul, which needs a lot of light, is entitled to more than four *amos* (but not more than eight *amos*) and this is ruled by the Shulchan Aruch (*OC* 150, 4) without any dispute. Therefore, one whose property borders a shul may not build within eight *amos* of any of a shul's windows.

In case the branches are within four *amos* of your window, we must understand the rationale behind the *halacha*. We must understand by what right one neighbor can force his neighbor to distance his wall. Why don't we say that a person can use his property in any way that he sees fit since he is the total owner of the property and therefore he should be allowed to build his wall wherever he wants on his property?

The reason one can force his neighbor to distance his wall is based on the principle of *chazoko* (See *Sema* 154, 38 in the name of *Rashbo* and *Hago'os Maimoneyos* (*Shecheinim* 9, 9) and others). The idea is that as soon as neighbor A opens a window that faces neighbor B's property, A makes use of B's property to allow light to enter his window. This is exactly the same as when A leans his ladder on B's house. In both cases A is making use of B's possessions and if B doesn't actively object to the use for a sufficient time (at most three years) we assume that he permits the use. By virtue of A's use of B's property with B's approval, A acquires (even though he did not pay for it) this right and B may not afterwards prevent A from continuing to exercise this right. This right is known as *chezkas tashmishim*.

We assume that you have established a *chazoko* to obtain light from his property. How one establishes a *chazoko* is another topic-see Ramo (153, 16) and the commentaries thereon, including Nesivos 13.

Thus, in *halachic* terms your claim is that since you have established a *chazoko* to get light from your neighbor's property he is not allowed to

prevent you by means of his tree from continuing to use his property in order to obtain light since you own this right. We should point out that the Poskim (e.g. *Noda Biyehuda Orach Chaim*, *tinyono* 16) rule that even if there are other sources of light, one can still prevent his neighbor from blocking the light entering his window. This is especially important nowadays so that even though we have electric lights, the *halacha* still applies. (Perhaps, there are grounds to not give more than four *amos* to a shul nowadays since they are lit by electricity and do not depend on windows for their light. However, Rav Eliashev (*Kovetz Teshuvos* vol. 3) did not raise this point when he ruled about someone who blocked a shul's windows.)

Your question is not about a wall but about a tree. Exactly this question was asked to the Shevus Yakov (1, 159). He gives reasons both for and against comparing a tree to a wall. On the one hand, there are people who purposely plant trees close to their windows in order to have privacy and because they enjoy the smell and the pleasant air. Additionally, in the winter there are no leaves so light comes through and in the summer the sun is out and often the rays will come through. At the same time there are people who are more interested in the light. He therefore, says that one must judge each case on an individual basis, depending on how much light still manages to come through and whether trimming the branches suffices. Many later poskim cite this Shevus Yakov so this will answer another part of your question, namely, that when the branches are within four *amos* of your window, it depends on how much light is blocked.

We must note that the entire discussion until now is in case what is blocking your light is situated in your neighbor's property so that your house and his tree are located so close to the boundary line between your properties so that they are within four *amos* of each other. However, if your house is four *amos* away from the boundary line between the two properties and what is blocking the light from

your windows are branches of his tree that enter your property then the *halacha* is very different.

The Mishna (*Bava Basra* 27B) writes that a neighbor does not have the right to cut off the branches of his neighbor's tree that overhang his property. The Rid (*BM* 107A) says the reason is because the branches belong to the owner of the tree and as long as they don't harm the owner of the field, the owner of the field may not cut them off. However, the property owner may cut off branches that damage him in any way. For example, the Mishna says that if the tree overhangs a field and the shade is harmful to the crop, the owner of the field may cut off the branches. Therefore, if what is dimming your light are branches that overhang your property there is no problem for you to trim them, even if they are more than four *amos* from your window, since they are harming you.

One of your questions is who has to cut off the branches, you or your neighbor. The general rule of the Gemara is that the victim of the damage in neighborly damages must deal with the problem. The reason is that neighborly damages are not damages *per se*. The type of damages that are discussed in Bava Kama such as *shor, bor, eish* are unequivocal damages of one party to another. However, neighborly damages are damages that result from conflicting interests. For example, in your situation, your neighbor is interested in growing a tree and you are interested in having light which are both valid goals. It is only that your interests, in this situation, conflict with each other. Neither you nor your neighbor wishes to damage the other. In this type of damage *Chazal* allowed the victim to prevent or undo the damage but it is he who must deal with the problem.

The main exception to this rule is known as *gerei dilei*-direct damages. For example, in the case discussed by the Shevus Yakov the neighbor planted a tall, thick tree, which immediately damaged his neighbor. That is why the Shevus Yakov considered the option of forcing the one who

planted the tree to deal with the problem. However, in your case, your neighbor only planted a small tree which at the time it was planted did not darken your house. It is only now, years later, that the branches and leaves are darkening your house. The Gemoro (*BB* 25B) explicitly says that this is not classified as *gerei dilei* and the one who must deal with the problem is you, the victim.

In conclusion: If the branches are in your neighbor's field and are more than four *amos* from your window you have no claim. If they are in his property but within four *amos* of your window it depends how much of the light is blocked out. If the branches that are disturbing overhang your property then you may cut them off. In any case you will have to absorb the cost, if any.

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Suffered Water Damage from Rain that Seeped in from his Neighbor's Leaky Roof

I live in Israel Baruch Hashem but my upstairs neighbor lives abroad most of the year and only spends summers in his apartment. He owns not only the upstairs apartment but also the roof above his apartment, which he bought from the builder with the hope of one day building another floor above his present apartment. Last winter rainwater began leaking through his apartment into my apartment. I informed him of the problem and asked him to repair his roof. However, he ignored my repeated requests and the problem only got worse and this year the rainwater damaged my walls and some furniture. I have two questions one: Can I force him to pay for the damages and, two: What can I do to force him to repair his roof and prevent further damage?

Answer:

Before answering your question it is critical to note that in this situation, since the roof belongs entirely to your upstairs neighbor, unless it was explicitly agreed otherwise, it is incumbent upon him to maintain his roof to prevent rainwater from damaging his neighbors. The reason is because in order to register their apartments in the land registry (*tabu*) the owners of all the units in a condominium must file a set of bi-laws governing the conduct of the condominium. Unless they file a special set of rules there is a standard set of rules that applies by default,

known as the *takonon hamatsuy*. Rule 3B of these bi-laws grants any tenant the right to force any other tenant to maintain his apartment in a manner that will not impinge on the use or value of his apartment. Since these are the rules that were adopted by the neighbors they are bound to adhere to the rules. Some dayanim base this responsibility upon (see for example *Hayoshor Vehatov* vol 8 page 20) custom, which is also correct, but that is not necessary since the bi-laws are binding even in the absence of any custom.

In either case what is critical for the ensuing discussion is the fact that your upstairs neighbor is not fulfilling his obligation to maintain his apartment properly. Thus, the original Torah law is not relevant to your case and even if according to the original Torah law your neighbor is not obligated to maintain the roof, nowadays, since the bi-laws are binding, even according to Torah law he is certainly obligated to do so.

Having determined that your neighbor is responsible to maintain his roof, we can now discuss whether under Torah law that makes him liable for damages that result from his failure to fulfill his obligation. A critical factor to consider in determining if your neighbor is liable for the damages that you suffered is that your neighbor did not do anything to damage you. He only caused damage by failing to fulfill his obligation.

It is important to note that your neighbor is certainly not liable for damages, if any, that you incurred before your neighbor became aware of the leak.

There are two classes of causative damages: those for which the one who damaged is liable, known as *garmi,* and those for which the one who damaged is not liable, known as *gromo*. Thus, we can rephrase your first question as: Are the damages that ensued from my neighbor's failure to maintain his property classified as *garmi* or *gromo*?

In order to answer your question it is necessary to carefully study two sections of Gemoro which deal with damages that result from inaction, one where the Gemoro rules that inaction is considered *garmi* and one where, according to many authorities, it is considered *gromo*.

The case where inaction is considered *garmi* is where a section of the fence separating the properties of one neighbor who grew grain in his yard and the other who maintained a vineyard, fell. If the vineyard owner planted up to his property line he must build a fence and if there is no fence separating grain and a vineyard, the grain becomes forbidden to consume since there is a forbidden mixture, *kilayim,* in the vineyard. The Gemoro (*BB* 2A and *BK* 98B) rules that we warn the owner of the vineyard to repair the fence and if he fails to do so he is liable for the damages suffered by the owner of the grain.

The case where, according to many Rishonim, the Gemoro (*BK* 56A) rules that inaction is classified as *gromo* is where the refusal of two witnesses to testify on someone's behalf caused him a loss of money. The Gemoro, as explained by many, rules that the witnesses are not liable in beis din but are liable in the heavenly court which implies that it is considered *gromo* and not *garmi*.

There are three approaches among the Rishonim. The approach of the Rama (*BB* 1, 18) is that inaction is considered *garmi* as we see from the Gemoro's ruling in the case of the vineyard. He deduces from this that a neighbor is liable if his refusal to construct a wall between his and his neighbor's property enabled thieves to steal from his neighbor. His opinion is cited by the Tur (*CM* 157).

The Tur also cites the Rosh who disagrees and maintains that one is not liable for damages that were the result of inaction. The Rosh explains that the reason the vineyard owner is liable if he refused to construct a fence is not due to his inaction by failing to repair the fence but because his vines damaged the neighbor by rendering the grain halachically unfit

for consumption. Thus his liability does not stem from inaction but from the action of his property.

The third approach is advanced by the Ramban (*Dino Degarmi*). He maintains that one is generally liable for damages which ensue from his inaction. Only in cases where the requirement to act is similar to the requirement to testify is the one who damaged by inaction not liable. The reason for the exception of testimony is that the essence of the obligation to testify is that one must save the property of his fellow Jew. This requirement is essentially a corollary of the obligation to return a fellow Jew's lost object. Since the basis for these obligations is the requirement to act kindly towards one's fellow Jew they do not create liability, because one is not liable for the consequences of his failing to act kindly. However, since it may cost money to build a fence around a vineyard, the fact the he is required to construct a fence is viewed as a monetary obligation and, therefore, one who fails to repair his fence is liable monetarily for his inaction.

Thus we have established that there are three approaches to the question whether one is liable for damages that were caused by his inaction. Since maintaining one's property is a requirement that entails an expenditure of money the Ramban and the Rama agree that your neighbor is liable for the damages you suffered due to his inaction. However, the Rosh disagrees since the water that caused the damage is not his property and many Rishonim follow his approach. Thus beis din will not force your neighbor to pay damages based on this alone.

It is important to note that the above disagreement only pertains to the power of beis din to force the owner of the roof to pay. The Rosh agrees that in the heavenly court (the din of the *Shomayim)* your neighbor is liable. This can be derived from the Gemoro we cited earlier. If two witnesses refuse to testify even though beis din cannot force them to pay for the damage they caused, nevertheless in the heavenly court they are liable.

This is important for two reasons. One because, as we wrote in a previous article, the fact that beis din cannot force the guilty to pay does not diminish his obligation to pay. Two is that when one signs an arbitration agreement empowering beis din to judge his case, he gives beis din the power to render decisions that are close to the law even if not the strict letter of the law. Rav Zalman Nechemia Goldberg wrote (*Hayashar Vehatov* 1, page 17) that this grants beis din the power in a case like this, even according to the Rosh, to require your neighbor to pay for the damages. Thus, if you take your neighbor to beis din they will most likely rule that your neighbor must pay.

We should note that there are dayanim who maintain that since it is customary (a custom based on secular rulings) to require the negligent owner to pay for the damages, this is Torah law as well. However, not all dayanim agree with this reason.

Your second question is whether you can force your neighbor to fix his roof. The first point to note is that the Gemoro (*BB* 22B) states unequivocally that it is forbidden to damage in a causative manner and according to many the prohibition is from the Torah. (The Rama on Gittin 52 says that one violates *lo sonu*. Yam Shel Shlomo (*BK* 10, 23) says that one violates the command to love your fellow Jew-*ve'ohavto lereyacho komocho*.) Second, based on a different ruling of the Gemoro (*BK* 114), many Rishonim (Rashbo, Ran) and the Shulchan Aruch (386, 3: 55, 1) rule that beis din ostracizes (*niduy*) one who causes damage until he accepts upon himself to prevent future damage and to pay for any damages that may result. If he agrees in order to avoid being ostracized, he will be bound to fix the roof and until that is done to pay for any damages. However nowadays beis din usually does not ostracize people

If he does not fix his roof you may ask beis din to allow you to take him to civil court. Beis din would probably permit this. The civil court

will certainly obligate him to fix the leak as we noted, and it has the power to compel him to do so.

Also, you can fix the roof yourself and afterwards force him to reimburse you for the cost. The reason is because he is obligated to foot the bill and so if you do it yourself you can force him to reimburse you. This is similar to the Ramo's ruling (*YD* 252, 12) that if one pays to redeem a person from captivity he can afterwards force the captive to reimburse him for the expense and it is similar to what we wrote previously (Parshas Vayero) about the person who paid for a snake trapper to catch his neighbor's escaped snake.

Alternatively, you can ask your neighbor to fix the roof and if he says that he will only fix it if you agree to pay the cost, you can agree and later on refuse to pay. This is because the Gemara (*Yevamos* 106A) rules that one may act this way with someone who refuses to act properly. Since not fixing his roof is improper behavior, you may employ trickery to get your neighbor to cease acting improperly and to fix his roof.

In conclusion: There are means to both rectify the problem and also to recover the losses you suffered from your neighbor's failure to repair his roof.

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Placed a Storage Unit adjacent to his Neighbor's Window

I live on the ground floor of a condominium. The area adjacent to my apartment is my neighbor's backyard and my windows overlook his yard. Recently, my neighbor placed an eight foot square by eight foot high plastic storage unit in his yard almost immediately to the left of my window. Its placement darkens my bedroom significantly since that is the side where light enters the bedroom since it is the south side and the wall of the building is on the right side. I should mention further that my husband suffers from dementia, though he is still somewhat functional, and he spends many hours of the day in this room. I should also note that my neighbor's yard is very large and there are many places in his yard where he can place the unit without disturbing me. His only reason for placing it there is because it is closest to the door from which he enters the yard from his apartment. Do I have the right to force him to move his unit?

Answer:

We will first study what the Gemara says about this type of situation and then we will see how that applies to your particular situation.

The Mishna (*BB* 22A) discusses exactly your type of situation, where a person had windows overlooking his neighbor's yard, and rules that if the owner of the courtyard wishes to build a wall on his property in front of the window he must distance the wall at least four *amos* (6-7

feet) from the window. The Gemara (*BB* 22B) explains further that the reason for this distance is to prevent the wall from darkening the apartment and this is ruled by the Shulchan Aruch (*CM* 154, 22). The Shulchan Aruch further rules that if the owner of the courtyard wishes to build his wall not in front of the window but to the side of the window, like in your situation, he must leave at least one *tefach* (less than four inches) between the wall and the window. Thus, it would seem that your neighbor is within his right since he left four inches between the unit and your window.

However, we have to understand the basis for the right of the one who has a window to force his neighbor to distance a new wall from the window. It would seem that the owner of the yard should be able to do as he pleases in his yard since it belongs to him.

The truth is that this is correct. However, there are two bases upon which the owner of the window may prevent his neighbor from building a wall even on his own property. The first way is the way Rashi explains the Gemoro (22A): the owner of the window has a *chezkas tashmishim*, which means that by virtue of his use of his neighbor's property he acquires the right to continue forever using his neighbor's property, in the same manner. Many Rishonim – including the Rambam and this is the ruling of the Shulchan Aruch (*CM* 153, 1) – maintain that in order to continue using the property one does not need to have used the property for three years and one does not need to have a claim that he purchased the right to make use of his neighbor's property. All he needs to do is to use the property for enough time for his neighbor to realize that he was using his property, in order for him to acquire the right to continue doing so.

In your situation, you have this reason but also an additional, and much more powerful, reason to claim the right to prevent your neighbor from building on a portion of his property. The reason is because both your

apartment and your neighbor's yard once belonged to the builder, and he divided up the property into units, one of which is your apartment and another is your neighbor's apartment and his courtyard. Therefore, when you bought your apartment you acquired the right to a window from the builder, even if that entails preventing your neighbor from freely using his property. Similarly, you do not have the right to use your property in a manner that will prevent your neighbor from using his yard in the manner that it was sold to him.

Now that we understand the basis for your right to curb your neighbor's use of his yard, we can investigate whether the distances given in the Gemara and Shulchan Aruch are universal.

The Gemara (*BB* 7A) describes a situation which, according to one explanation of Tosafos, is very similar to your situation. This explanation is ruled in *CM* 154, 27 and other places as we will see, and from it we can derive the underlying principle and apply it to your situation.

According to Tosafos, the Gemara discusses two brothers who divided their inheritance such that one brother received a garden and the other a building that had an open porch (with just three walls). One day the brother who inherited the garden constructed a wall in front of the open porch and the owner of the porch complained. The Gemara discusses whether the complaint was justified.

From the discussion of the Gemara one can derive the basic principle that whatever rights were included in the price that one paid, are his. However, one cannot prevent his neighbor from making minor changes that would not have affected the price he paid for whatever he acquired. In the case in the Gemara, Tosafos explains that if the wall significantly diminishes the light reaching the porch, the porch owner can force his brother to demolish his wall. However, if the porch still gets a lot of light, even if it is somewhat less than what it had previously, the porch owner cannot force his brother to remove the wall.

This principle is the basis for a ruling of the Aguda (a Rishon, commentary to *BB* 7A) that is ruled by the Shulchan Aruch (*OC* 150, 4) and has been applied many times. The Aguda rules that one may not build a wall, even if it is more than four *amos* away from a shul's window, since a shul requires more light than an ordinary residential home. The windows of a shul are comparable to the porch of the Gemara and four *amos* do not suffice. (This was before the discovery of electricity.)

Based on the principle that we derived from the Gemara that you are entitled to all benefits that were included in the price paid for your apartment, we have to consider your situation. Since there is no fixed distance, a dayan has to use his judgment in deciding how much distance to grant a window and dayanim have different opinions on the matter. The reason he Gemara and Shulchan Aruch gave different amounts is because the situation in their times was different.

The opinion of the Mishkan Sholom (Appendix to Chapter 4) is that one should consult an architect and ask if they would design a building in the manner that the neighbor wishes. Whatever an architect would not design, the neighbor cannot do, since that definitely was included in the price paid for your apartment. This approach is somewhat difficult since even if it possible that one would design an apartment in the manner that your neighbor wishes to create, nonetheless your apartment was drastically different from that in the beginning and it would be strained to say that you didn't pay for approximately what you originally had.

A second prominent dayan (Rav Silman) maintains that in most circumstances where one wishes to erect something that will block light from entering from the side, one must not block light that enters from within a 45 degree angle of the window. Applied to your situation, since your neighbor's unit juts out eight feet, he would require your neighbor to leave at least eight feet between his unit and your window.

He says that in some situations 45 degrees is insufficient, but that must be judged individually.

A third prominent dayan (author of the *Seder Hadin*) requires placing the unit in a manner that will not diminish the light by ten percent or more. This rationale is based the testimony of expert evaluators, who determined that diminishing that amount of light, in general, does not diminish the value of an apartment.

You mentioned your husband's condition. It is true that the halacha does consider a person's special individual needs as we see in the Gemara (*BB* 23A) that special consideration was afforded to Rav Yosef because he was unusually disturbed by his neighbor's behavior and the Rivash (res 196) who ruled that a tenant could not bang in his apartment because the banging disturbed his neighbor who suffered from headaches. However, since your neighbor will have to move his unit anyway, this issue will probably be resolved as well.

In conclusion: You can force your neighbor to move his storage unit.

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Does one who lives on the ground floor need to pay for elevator expenses

I live on the ground floor of a condominium. Below the ground floor is the building parking lot out of which there is an exit to the street below. I don't have a car and if I want to go to the street below I use the stairs. Since I and my family don't need the elevator I told the management company that I want to donate my share in the elevator to the neighbors and they should stop charging me for the upkeep of the elevator. Is my request justified?

Answer:

Before we deal with your question we have to clarify your relationship with your neighbors. Since the building owns an elevator and it's not private property, you and your neighbors are partners who jointly own the elevator. As a partner, you are being charged your share in the maintenance cost of elevator, which is what you wish to avoid.

There are two possible ways to achieve your goal. The first way is, as you mentioned, by simply withdrawing from the partnership. The second way is that perhaps, even if you can't withdraw from your partnership, you don't have to pay the maintenance cost since you don't use the elevator. As far as you are concerned, they could stop using the elevator altogether, in which case there would not be any maintenance cost. Thus, this question is a specific instance of a general question:

whether partners who don't benefit from the partnership still have to pay their share.

The first question, whether a partner can unilaterally withdraw from a partnership in order to avoid a loss or an expense, is ruled by the Ramo (*CM* 176, 40). He rules, based on a responsum of the Rosh (89, 15), that in order to withdraw from a partnership one needs the consent of all the remaining partners. The reason is because by withdrawing, the withdrawing partner is harming the remaining partners and no one, even the majority, may harm someone. Since, in your situation if you withdraw you will cause your neighbor's share in the maintenance fees to increase; you require the agreement of all of your fellow partner-owners in order to withdraw. If they agree you have achieved your goal.

If you can't get all of the neighbors to acquiesce to your request, you will have to try the second approach which is to be freed from paying because you don't benefit from the elevator. This question is also found in other contexts. In fact it is found in two contexts. Since the rulings seem to contradict each other we will have to understand the difference between them and see which situation is analogous to your situation.

The Mahari Mintz (*responsa* 7), whose ruling is cited by the Ramo (*CM* 163, 3), was asked by a community that needed to build a *mikvah*. Some of the older people in the community did not want to pay their share in the cost because their wives no longer required a *mikvah*. Basing himself on a ruling of the Maharam of Rottenberg (*Teshuvos Maimoni Kinyan* 27), who required everyone to participate in the cost of building a c*hasuna* hall including those who didn't have any children and those whose children had already wed, the Mahari Mintz ruled that everyone must participate in the cost of building the *mikvah* and we don't accept the argument of the individuals that they don't need to pay because they don't need the *mikvah*. If one is part of a community and the community needs something all must pay their share and we don't

accept the argument of the individual that he personally does not require this service. He added that there is another reason they need to pay their full share, because even the older women need the *mikvah* on Erev Rosh Hashana and Erev Yom Kippur since it was customary for them to be *toveil* on those days.

The second source is a responsum of the Rosh (6, 9) (also cited by the Ramo (163, 6)) who was asked by a community where those who had lent money needed to bribe the local rulers to rescind an edict that absolved borrowers from repaying their loans to those lenders. The lenders argued that this expense should be shared by the entire community because if they couldn't collect their loan they would have less money and the rest of the community would have a larger tax burden. The Rosh ruled against this argument and maintained that this was a private expense of the group who had lent money and not a communal expense.

Since the Ramo cites both of these rulings we cannot say that the Rosh disagrees with the Mahari Mintz. The Sema (note 32, as understood by *Pischei Teshuvo* 28) explains that the reason for the difference between these two rulings is that whereas a *mikvah* is a general communal need since every Jewish community requires a *mikvah*, the need to bribe the local authorities was a special need in this particular situation. The rationale seems to be that when one joins a community he does so with the understanding that he will share in the cost of all regular communal needs. However, an expense that was not anticipated, even if it was eventually needed by the majority of the community, does not qualify as a communal need and the majority cannot force the minority to share in the expense. One can also characterize the difference slightly differently: not that the need was unexpected but that even if many people earn a livelihood by lending money their need is not a communal need but rather a need of many individuals. This is the way the Nesivos (*Chiddushim* 28) understood the Sema.

The Knesses Hagedolo (163, notes on the *Tur* 5) claims that the Maharam Alshich (res 52) disagrees with the Mahari Mintz and maintains that one who will not benefit at all from a from a communal service is not required to participate in the expense. He mentions that a practical difference between the Mahari Mintz and the Maharam Alshich is whether an individual who acquired his own lulav and esrog needs to participate in the cost of the community lulav and esrog. This conforms with the Sema's understanding of the Mahari Mintz since every community (in those days) purchased a communal lulav snd esrog. Therefore, according to the Mahari Mintz, even one who had no need for this service was required to participate. The Knesses Hagedolo adds that it could be that even if in general the Maharam Alshich disagrees with the Mahari Mintz, in this particular case even the Maharam Alshich would agree that the individual would have to participate in the cost since he may eventually need to avail himself of the communal *lulav* and *esrog,* in case his own *lulav* and *esrog* become unfit.

We should note that even if there is a dispute, the Elya Zutta and the Chida (*Birkei Yosef* OC 658, 11) rule that even one who has his own *lulav* and *esrog* must pay for the communal esrog. This conforms to the opinion of the Mahari Mintz.

We should note further that the Gra (note 81) brings support for the ruling of the Mahari Mintz from a Tosefta (*BM* 11, 9) which indicates that he agrees.

The Chasam Sofer (*OC* 193) was asked whether a town community could charge full dues to residents of the surrounding villages who had moved out of the town into neighboring villages, and now only spent Rosh Hashana and Yom Kippur with the community. He ruled that they were justified in charging them in full for expenses like maintenance of the *shul, mikveh* and the salary of the Rav even if the villagers would

not even come for Rosh Hashana and Yom Kippur since if they would eventually need to leave their villages they or their children would naturally return to the town and avail themselves of its services. Thus we see that even if an individual does not now directly benefit from the community he still must share in the communal expenses because he could at some point in the future benefit from these expenses.

An elevator is a communal need of the tenants of a building. Therefore, according to the Mahari Mintz and all those who agree with him, namely the Sema, Gra, Nesivos, Elya Zuto and Chida, you must pay for the maintenance expenses even if you don't benefit from the elevator. Furthermore, even those who follow the Maharam Alshich require you to pay since you or your descendants will likely at some point benefit from the elevator. For example, you may have visitors who can't walk stairs and will park their car in the parking lot and then use the elevator. Or your wife will be expecting and need the elevator to visit the upstairs neighbor. Or you will need to change your solar heater and the installers will use the elevator. We have seen in the Chasam Sofer and Knesses Hagedolo that even the Maharam Alshich agrees in case there can be an eventual benefit that even one who normally does not benefit must pay a full share.

We need to add that there is a small expense that you do not need to pay for as long as you do not use the elevator. The maintenance company needs to reduce your payment by the amount you save the neighbors by not using the elevator. Thus, the cost for the electricity used by the elevator should be divided among those who actually use the elevator and you would not have to participate.

In conclusion: The maintenance company is justified in charging you for the maintenance costs for the elevator and must give you a reduction only on the running costs. We should note that this was the ruling of Rav Naftali Nussbaum as well (See *Otsar Hamishpot* 1, 493).

93

I want to build my Succo Next Year where Someone Else built This Year

We live in a brand new building together with many other frum Jews. This Succos, which was everyone's first year in the building, everyone built their succo in the common yard which otherwise is used as a play area. This year my downstairs neighbor built his succo right near the entrance to the staircase leading to both of our apartments. He built his succo very early – before Rosh Hashana – perhaps in order to ensure that he would get that desirable location. When I saw him building I didn't say anything because we are good neighbors and I would like our good relationship to continue. However, I would also like to build there in the future. Have I forfeited my right to this spot because I didn't say anything? If I didn't, will I have to get there first next year, or is there a way we can make an arrangment and I can wait until after Yom Kippur like it says in Shulchan Aruch without fear that I will again lose the best spot?

Answer:

Before answering your question, we will translate your question into the terms used by the Gemoro and Shulchan Aruch. That way we will see that your question is a specific application of a more general question.

The common area that is discussed by the Gemoro is a *chatser hashutafim* which is a translation of the words a "common yard." You

and your neighbors, including your downstairs neighbor, are joint owners or partners which is translated into "*shutafim*." Finally, the reason that you may be inhibited from building there in the future is that perhaps your neighbor has established a chazokoh to use this place for building his succo. Thus, your question is whether a *shutaf* can establish a chazoko in a *chatser hashutafim* and if yes, how does he establish such a chazoko.

There is a Mishna (*Bava Basra* 57A) which discusses this issue. The Mishna teaches by example and states, "If one placed his animal, stove or mill in the yard… he did not established a chazoko. However, if he built a ten tefach high wall for his animal, stove or mill… he established a chazoko." The authoritative opinion in the Gemoro explains that the underlying rule which is exhibited by these examples is that if one acts in a manner which offends his neighbors and they did not raise an objection, he thereby establishes a chazoko. However, if his action *per se* is not offensive then the silence of his neighbors is insignificant since their failure to object does not indicate acquiescence.

Since it was common, in the time of the Mishna, for neighbors to place their stove etc. in the common property, a neighbor's placement of a stove on the common property has no halachic significance and he has no more rights than he had before he placed his stove there. However, if he built a wall it is significant, since neighbors would normally object, since building a wall was unusual. If a neighbor did not object, then it signifies agreement of the neighbor.

Thus, we have found a principle which allows us to decide which actions enable a neighbor to claim rights in common property. If the neighbor's actions are unusual and the general reaction of other joint owners who are not happy with his actions is to object, their failure to react signifies that they are granting him permission to continue with his action on a permanent basis.

It is important for us to classify this type of chazoko since it has halachic significance. Since the neighbor's actions only constitute use of the common property for his personal use and do not show that he is the owner of the area in question, this type of chazoko is called *chezkas tashmishim*. The significance of this description is that the one who used the property does not need to claim that anyone granted him explicit permission (see *Sema* 140, 22) to engage in his activities. It suffices for him to derive that he has permission from the silence alone, which is not sufficient when wants to establish ownership on the basis of chazoko since in that case he needs to claim that he was explicitly granted permission (See *Mishna Bava Basra* 41A). It also means that, according to many opinions, one does not need to use the property in this manner for three years in order to establish his rights. Rather, if his neighbors noticed what he did and they did not object, it signifies their agreement right away.

Turning now to your specific question: since neighbors do not mind when other neighbors build a succo in the common property, your neighbor did not establish a chazoko. This means that you can object next year if he again wishes to use this spot.

More specifically, what you should do, if no one else wishes to use this spot, is to sit down with your neighbor and arrange the use of the property for the future. Since you both want the exact same place there is no way to divide the property by area, but one could divide the time (See *Choshen Mishpot* 171, 8). Since it isn't in anyone's best interest to divide one season's Succos into days, you could split future years – one year for one and one year for the other.

If you can't come to an agreement over who should get first use, you should cast lots. The fact that he used it this year does not give you the right to use it next year (See *Ramo ibid*) since it was not divided this year, so the period which is being divided is only future years.

As we mentioned at the outset, all these rulings are a specific application of a general issue. The same rulings will apply if your building has a garage for use by the tenants. If two people vie for the same spot they should split usage in an equal manner and even if one tenant used the spot for many years they should split usage in a manner that does not reflect past usage since it is not relevant for the future.

The Mishna taught us additionally, that if a neighbor acts in a manner that normally offends his neighbors he does establish a chazoko. Thus, if your neighbor would have, for example, built a permanent stone floor on that spot then he would have established a chazoko since your silence would have indicated acquiescence. However, since he didn't, you have lost nothing and next year you do not need to build your succo early. Just make a permanent agreement with him to rotate use of this spot.

94

Signed an Agreement under Duress

I live on the ground floor of a two story building and have been suffering from water leakage. The building is very old and when it rains, the rainwater seeps into the wall and eventually makes its way onto my ceiling and into my walls. I have had numerous discussions with my upstairs neighbor. He claims that it isn't his issue because the problem existed before his purchase of the apartment and therefore the issue is between me and the previous owner of his apartment. To get estimates I brought three companies which deal with water leakage and they all agreed that it was a major job and would cost in the vicinity of fifteen thousand dollars. My neighbor, who any case wasn't really interested in doing anything, brought a builder (not a person who specializes in fixing leaking walls) who gave a price of about three thousand dollars. The vast difference in price stemmed from the type of job the builder was planning on doing. Whereas the water leakage companies planned to do a basic job involving reconstruction of problematic areas, the builder only planned to apply sealant –which my companies claimed is only a temporary solution. Furthermore, whereas the water leakage companies guarantee their work, the builder does not, lending credence to the claim of my companies. Finally, with the rainy season fast approaching and my neighbor's lack of co-operation, I myself brought a company to fix the problem. At that point, my neighbor said he would refuse access to his apartment unless I signed an agreement that no matter what I pay, he would only need to pay fifteen hundred dollars, half of

the cost that the builder would have charged. Having no choice I signed the agreement. Is our agreement binding?

Answer:

Before we can answer your question, we have to determine what you were entitled to if you had not signed an agreement. There are four questions.

The first is whether you could have forced your neighbor to participate in the cost of fixing the problem or could he have argued successfully that he doesn't have a problem, and if you do, you should fix the problem yourself and pay for it yourself. The second issue is that even if he did have to participate, what percentage of the cost is his? Third, even if you could force him to participate in the cost of rectifying the problem and if we accept as a given that his solution was only temporary, do you have a right to force him to rectify the problem on a long term basis? Finally, is he correct that you should deal with the one who sold him the apartment?

The answer to the first question is that there are two reasons you could force him to participate in the cost of fixing the problem. One reason is that he is a joint owner of the outside walls. If the problem is not fixed, the jointly-owned property will be damaged and each of you will suffer a loss. The Ramo (178, 3) writes explicitly that when two people are partners in a building, and if the building is not repaired the building will suffer damage, each partner can force the other to participate in the cost of preventing the joint loss. Even when two people are not partners in a property but they each as individuals will suffer a loss from a single cause, they can each force the other to participate in the cost of preventing that loss.

The Nesivos (178, 3) says that this is the underlying principle for many halachos. For instance, the residents of a city can force each other

to pay for many communal needs. The principle is that since each individual needs these services they can force each other to participate in the cost. Therefore, you could certainly force your upstairs neighbor to participate with you in the cost of repairing the wall.

As for the amount your neighbor has to pay for the repair, the rule is that if you each have the same amount of outside wall then you each have to pay half of the cost. This would seem obvious and can be derived again from the way costs for communal needs are divided between the members of the community (*siman163*, *seif* 3).

The *issue* of whether one neighbor can force the other to invest in the higher cost of a longer-lasting solution can be derived from the Gemoro (*Bava Basra* 2A) that discusses the rules governing the construction of a wall that prevents one from looking into his neighbor's property, as required by the halachah. The rule is that if one wishes to build with better materials and the other with cheaper materials, custom prevails. Therefore, if the custom is to repair leaking walls by reconstructing the damaged areas and not just by applying sealant then you had the right to force your neighbor to pay half of the cost that you paid to the company that repaired your jointly-owned outside wall.

Finally, his argument that you should deal with the one who sold him the apartment is not valid since he is the current owner and the requirement to rectify the problem falls on the current owner. He may be correct that the seller is liable, but that is between him and his seller and has nothing to do with you.

It is important to note that even if you could not have initially forced your neighbor to pay more than half of what the builder would have charged, if you went ahead and did work that lasts longer than what the builder would have done, your neighbor would have to pay somewhat more than half of the cost that his builder asked for. The reason is that he is benefiting from the fact that your job lasts longer, and he will save

money in the long run as a result of what you did. Thus the situation is *ze nehene veze chosair,* and if one benefits from another's expenditure he must pay the value of the benefit he receives. This may or may not be half of the extra cost of the work you did, but in any case the agreement you signed meant that you would forego some money that was rightfully owed to you.

Thus we have established that you were coerced into signing an agreement to forego payment of money that you were entitled to receive under Torah law. We will now turn to the issue of whether such an agreement is binding.

The Gemara (*Bava Basra* 48A) says that if one sells under duress, the sale is valid. However, Tosafos (c.v. *omar*) clarifies that only a coerced sale is valid, but, a present that is coerced is not valid. Furthermore, critical for your question, is that the Shulchan Aruch (*CM* 205, 4) rules that a sale for less than the full value is classified as a present. He also rules that it is not necessary for the one who was coerced, to say anything at the time of the sale. As long as it is clear to beis din that the sale was forced, the sale is invalid. In your case, since your neighbor admits threatening that he would deny your workers access to his apartment if you refused to sign, he admitted forcing you to sign.

Since, as we derived earlier, under the terms of the agreement you signed you would receive less than what you deserve, therefore, your agreement is an agreement to give a present which is invalid if it was coerced. We should add that in your situation, even if we were to regard this as a sales agreement it would not be binding since a coerced sale is only valid after the seller receives payment, which did not happen in your case.

We should also note that the upstairs neighbor would not have been acting properly had he denied your worker's access, since the only way the job could be done was by entering his property. Certainly, since we

clarified that he was a partner, he was required to allow access to your workers in order to allow them to fix a problem for which he is partly responsible.

Even if he was not a partner but you needed access in order to fix your problem he is not allowed to prevent your workers' access to his apartment. This can be derived from a ruling of the Ramo (*siman* 274) that if a person's bees flew onto a neighbor's tree the bee owner is allowed to cut down a branch of the tree in order to recapture his bees. Finally, we should note (*CM* 205, 7) that even a threat to cause monetary damage is considered coercion. Therefore, since your neighbor's refusal to enable your workers to repair the damage would have caused you to suffer rain damage it is classified as a coerced agreement to give a present and the agreement is not valid, and beis din must determine how much he has to pay.

Watchmen

95

Forgot to take Friend's Object off the Bus

I recently traveled from Cleveland to New York by bus. My friend in Cleveland asked me to take an item for him to New York. I put the item along with my suitcase in the luggage compartment under the bus. I specifically did not place my friend's item in my suitcase so that it should not get bent. When I disembarked in New York, I forgot that I had also put my friend's item under the bus. Am I liable for the loss of his item?

Answer:

We must first analyze your question in halachic terms.

Since you were not paid for taking the bag you have the status of a shomeir chinom. Even though you weren't asked to watch the bag, it is obvious that you were being relied upon to do so which the Shulchan Aruch (291, 2) rules gives you the halachic status of a shomeir chinom. The Torah writes that a shomeir chinom is liable only if he was negligent. Thus, your question boils down to whether your forgetting to take the bag off the bus constitutes negligence or not.

This exact case is not discussed by the Gemara but a similar case is discussed. The Gemara (*Bava Metsiyo* 35A) discusses someone who was asked to watch jewelry for free and when the owner came to ask for its return the watchman said he couldn't find it. The Gemara rules that the watchman is liable and gives as the reason, "Whenever one says he doesn't know it is considered negligence." The generality of this expression indicates that whenever one forgets something it is

considered negligence. This would seem to indicate that your forgetting is viewed as negligence and if so you are liable.

However, the poskim question the general applicability of this statement because there are other situations where the halacha does not view forgetting as negligence.

One situation is where a person forgot to make an *eiruv tavshilin*. The Gemara (*Beitso* 16B) discusses a person who forgot to make an *eiruv* and Shmuel told him that he may rely on his (Shmuel's) *eiruv* since he (Shmuel) has in mind to make an *eiruv* also on behalf of those who did not make their own eiruv. However, when the scenario repeated itself the next year Shmuel told him that he cannot rely on his *eiruv* because he (Shmuel) does not have in mind to make an *eiruv* on behalf of those who are negligent. Thus, we see that only one who habitually forgets is viewed as being negligent, but forgetting one time is not negligence.

A second proof the poskim bring is from one who put a stone in his garment and later it fell from his garment and damaged another person because he forgot that he had placed it in his garment. The Gemara (*Bava Kama* 26B) rules that he has only partial liability because forgetting does not constitute negligence.

The Shevus Yacov (2, 148) says that the reason the watchman of the jewelry who could not find the jewelry was liable is that the watchman acted improperly. The reason is that one who is entrusted with another person's object must place the object in a manner that will ensure that he won't eventually forget where he put the object. He mentions, for example, that a watchman should record where he placed the entrusted object. Thus, it is not that forgetting constitutes negligence but rather that when one cannot locate the object it indicates that he didn't care for the entrusted object properly. This is similar to the Meiri's explanation of the Gemoro, except that the Meiri says the negligence is because an entrusted object requires constant attention even if it was placed in a

secure location. If the watchman had given the entrusted object the attention it deserved he would have never forgotten where it was. Again, we see that forgetting *per se* does not constitute negligence. It is just that proper care by a watchman precludes not knowing where the entrusted object is. It is the failure to give proper care which constitutes negligence.

Rabbi Akiva Eiger (*Vezos Leyehuda* page 67) also is not decided if the negligence of the watchman lies in his placement of the object in a place which he could forget.

If one follows these explanations it would seem that you are not considered negligent since you were expected to place the object where you did and there was nothing you had to do to look after the object while you were in transit. One could argue that you should have written a sign on your suitcase to remind you to take your friend's item. However, this seems unreasonable since people do not normally do so and a shomeir chinom is only expected to do what is normal.

The Mekor Baruch (*siman* 52) also understands that there is no proof from the Gemoro that forgetting constitutes negligence. He understands that the reason the person who forgot where he placed the jewelry is liable is because he can't swear that he wasn't negligent and the Torah says that a shomeir chinom must swear to that effect.

There are others though who differentiate between a watchman and others. While it is natural that people do forget on occasion, one who is a watchman must not forget. Thus, the Ulam Hamishpot (291, 7) suggests that one who is entrusted with someone else's object must make certain that he does not forget it. Similarly, the Chessed Le'avrohom (*Tinyono*, end of response 36) considered one who forgot the owner's instructions as being negligent. Also the Ohr Someach (2, 15) understood that the watchman's forgetting constitutes negligence.

The Nechba Bakesef (CM 23) was asked a somewhat similar question to yours and we can derive two important points from his response.

He was asked concerning someone who was traveling by donkey from Yerushalayim to Tzefat and was asked by a friend to do him a favor and take a garment for him to Tzefat. He placed the garment under himself on the donkey. In the middle of the night, at a place where the terrain was difficult, he was thrown from the donkey together with the garment. When he got back on the donkey he forgot to take the garment. The Nechba Bakesef ruled that for two reasons he is not liable for the garment. First, he says that since the poskim dispute whether a watchman is liable for forgetting, one cannot force someone to pay. Second, in this case there were extenuating circumstances since he was thrown from the donkey and anyone in that situation could forget about the garment due to the circumstances. Therefore, he says that even those who normally would rule that one who forgets is liable would agree that here the traveler is not liable.

The Magen Avrohom (527, 6) when discussing the case of *eiruv* and comparing it with other rulings in other situations, cites and agrees with the Maharshal who writes that the key factor is why one forgets. Forgetting itself does not constitute negligence but if the reason one forgot is because of laziness then it is classified as negligence.

In conclusion, there is a major dispute among the poskim whether you are liable. In any case beis din would not force you to pay since there are many opinions who would rule that you are not liable unless you acted negligently. If there was a special reason why you forgot e.g. you were very exhausted after traveling so many hours, there would be even more reason to be lenient. This is also the ruling of the Mishpat Shlomo (4, page 148). However, he points out that if your friend wishes he can ask beis din for you to swear that you did not act negligently and since nowadays beis din dos not allow people to swear, beis din would make a compromise. Therefore, it would be proper for you to agree with your friend to absorb part of the loss.

96

Got a Flat Tire while doing a Favor to the Car's Owner-Part 1

My neighbor organized a *minyan* to *daven* at *kivrei tsaddikim* for his very ill brother-in-law. My neighbor was going to drive part of the group in which I was a participant, but in the end he was not able to participate himself. He suggested that I drive his car in his stead. On the way back, the car went over a small screw on the highway which caused a flat tire. I had the flat repaired and returned the car. Can I require the owner to refund the money I paid to repair the tire?

Answer:

To answer the question we must clarify how the halachic views this situation. Normally, when one borrows something he is classified as a *shoeil*-a borrower. The Torah writes (*Shemos* 22, 13) that a *shoeil* is liable even for an *oness* i.e. an unforeseen occurrence which was totally beyond the *shoeil*'s control. The example of the Torah is where one borrowed an animal and it died of natural causes.

It might seem that your situation fits this classification. Thus, even though you are blameless for going over a screw since it is barely noticeable, nevertheless, as a *shoeil* you would be liable. However, we will see that both assumptions are highly questionable: perhaps you weren't a *shoeil,* and perhaps what you did is not classified as an *oness* but as something for which even a *shoeil* is not liable.

In order to decide whether you were a *shoeil* it is critical to determine the definition of a *shoeil*. Even though the translation of the word *shoeil* is "a

borrower," that is not the defining characteristic. Rather, the Gemoro (*Bovo Metsiyo* 94B) defines a *shoeil* as *kol hano'oh shelo,* i.e. the *shoeil* is the sole beneficiary of the transaction. The Gemara afterwards modifies that a bit. The borrower does not need to be the sole beneficiary but it suffices if he is the major beneficiary. This leads us to two questions about your situation. Were you a beneficiary and, if yes, were you the primary beneficiary?

Let us first deal with the question if you were the primary beneficiary. It would seem highly questionable because, while we all should *daven* for the sick, we don't travel to *kivrei tsadikim* for every sick Jew. You agreed to participate as a favor to your neighbor, the car's owner. Therefore, it would seem that not only that you were not the sole beneficiary, but you were not even the prime beneficiary. Rather the car's owner was more of a beneficiary than you.

In order to clarify this point further we will examine several cases that were discussed by poskim.

The Porach Matei Aharon (2, 115) was asked concerning a bride who borrowed jewelry from her groom and when she wore it to the public bathhouse it was stolen. The Porach Matei Aharon ruled that the bride did not have the status of a *shoeil* since the groom also benefited from his bride's wearing of the jewelry, and one is only a *shoeil* if he is the sole beneficiary.

A much earlier authority that discussed a similar case is the Mordechai (*Bovo Metsiyo* 360). In his case, a scribe borrowed a *sefer* in order to copy it for its owner and the original was stolen. The Mordechai rules that the scribe is classified as a *shomeir sochor* because he used the *sefer* to make money. However, it was obvious to him that the *sofer* is not a *shoeil* since the reason he borrowed the *sefer* was for the owner's benefit.

Another case that was discussed by the poskim is a customer who wanted to buy wine but was lacking a vessel to enable him to transport

the wine. The Imrei Yosher (R. Meir Arrick 1, 47) ruled that if in order to enable the sale the seller lent the customer his own receptacle which then broke due to an *oness,* the responsibility depends on the nature of the sale. If the main beneficiary of the sale was the seller (e.g. a slow moving item) the customer does not have the status of a *shoeil* since the seller was the prime beneficiary of the sale and the loan was granted only in order to enable the sale to take place. (This is a very pertinent question nowadays where customers use the store's carts in order to transport their purchases to their car.)

This is very similar to your case because the reason your neighbor lent you his car was to do him a favor by davening for his brother-in law. Therefore, it would seem that in your case since the car's owner was the primary beneficiary thus you were not a *shoeil* and you are not liable for damages for which you are not at fault.

A second consideration in determining if you were a *shoeil* is the fact that you did not borrow the car for mundane matters but in order to *daven*, which is a mitzvah. There is a general issue if one is classified as a *shoeil* when he just wants to use a borrowed object to perform a mitzvah.

The primary source for discussion of this issue is a responsum of the Ran (20) that is cited by the Sema (72, 21) concerning one who borrowed a *sefer*. The Ran ruled that the borrower does not have the status of a *shoeil* because the one who lent the *sefer* himself fulfilled a mitzvah when the borrower used his *sefer* to learn and therefore, the borrower was not the sole beneficiary. There is much discussion about this ruling and the reason of the Ran.

The Ketsos (72, 34) and the Machane Efraim (*Sheilo* 3) offer a specific reason for the Ran's ruling that the borrower is not a *shoeil*. They maintain that the reason one who borrows an object in order to perform a mitzvah is not classified as a *shoeil* is because when one performs a

mitzvah he does not derive physical benefit from the borrowed object since when one performs a mitzvah even if there is physical benefit, it is superfluous, what the Gemara calls *mitzvos lav leihonos nitnu*. They understand that the Gemara requires one to derive physical benefit in order to be classified a *shoeil*. (Some disagree on this point: see e.g. Ohr Someach (*Sheilo* 7, 4) who understands that the Gemoro does not require physical benefit, but just deriving the primary benefit from the borrowed object.)

If one follows the opinion of the Ketsos and Machane Efraim, we have an additional reason why you were not a *shoeil*, namely, because you didn't borrow the car to derive a physical benefit but just to *daven* which is a mitzvah, especially if done on behalf of another. We should note that this reason is independent of the first reason and would apply even, for example, if you had borrowed the car from someone who had no interest in your *davening* for that sick person, since according to these *meforshim* the motive must be a physical benefit.

In conclusion: There are two reasons you did not have the halachic classification of a *shoeil*. While the second reason is controversial and thus would not by itself enable you to force the owner to reimburse you for your expense, it would seem the first is sufficient and especially in combination with the second reason. We will discuss a third reason in the next article, which again will not suffice by itself to force the owner to reimburse you but will combine with the other reasons to entitle you to reimbursement.

We should further note that had you not already paid, each of the three reasons would have sufficed to free you from liability. It is only because you already paid, and thus need to collect from the owner, that we have to ensure that no major opinion would free the owner from reimbursing you.

97

Got a Flat Tire while doing a Favor to the Car's Owner-Part Two

You borrowed the car of your neighbor who asked you and several others to *daven* at *kivrei tsaddikim* on behalf of his sick brother-in-law. On your way back, you punctured the tire by driving over a screw. You had the tire repaired and asked if you had to pay for the repair and whether now that you paid, if you are entitled to reimbursement.

Answer:

In the previous article we learned that there are two reasons why you were not a halachic *shoeil* on the car that you borrowed. We saw that each of these reasons would have sufficed by itself to free you from paying for the repair of the flat you caused by driving over the screw that was lying on the highway. Furthermore, we saw that based on one reason you are even entitled to a refund for the money you paid.

In this article we will learn that even if you had been classified as a halachic *shoeil* there is a reason why you did not have to pay and, according to many, you are entitled to reimbursement based on this reason as well.

This reason is based on the *halachos* of *shoeil*. We learned that a *shoeil* is even liable for damages that result from things that happen for which he is blameless. Thus, it might seem that he is liable for anything that happens to an object that he borrowed. However, there is a class of damages for which even he is not liable. These are damages that result

from normal use of the borrowed object known in the Gemoro as *meiso machmas melocho*. An example of this is if one borrowed an animal to plow his field and while plowing the animal dropped dead because he wasn't healthy enough to plow the field. In this article we will discuss the reason for this exception and subsequently derive precisely which situations are included in this category.

We find among the Rishonim several opinions for the reason for this leniency. The Ramban (*Bava Metsiyo* 96B) says that the reason for this exception is because the owner is the one who is at fault for the damage. In the above example, he is responsible for the animal's death since he should not have lent his animal for plowing the field if it was not suited for the task. The Rashbo (*ibid*) offers a different reason, namely that we understand that when an owner lends his object to perform a given task he is waiving his right (*mocheil*) to collect for damages that result from normal usage of the borrowed object.

The Gemoro (97A) rules that one is not liable if he borrowed a cat in order to get rid of mice and the cat died because it ate too many mice since that is classified *meiso machmas melocho*. The Ramah (cited by the *Tur CM* 340 and also in the Ramah's commentary to *Bava Basra* 88A, #121) derives from this ruling that if one borrowed an animal to perform a task and it is known that in order to perform the task the animal would need to travel to its job and in the course of its journey the animal was stolen, the borrower is not liable since that is also classified as *meiso machmas melocho*. Even though traveling was only incidental, since it was not the task that it was borrowed to perform, nevertheless, since it was necessary in order to be able to perform its job, damages that result from the journey are still classified as *meiso machmas melocho*. The Bach and Prisho explain that the derivation from the case of the cat is because the cat was not borrowed to eat the mice but to get rid of them, which could have been accomplished without the cat actually

eating the mice. Nonetheless, eating the mice was an action which led to the ultimate goal of eradicating the mice.

The Tur, after citing the Ramah, continues that his father the Rosh, disagreed and maintained that incidental damage cannot be classified as *meiso machmas melocho* since it is not what the animal was borrowed for. Later Poskim are divided on the question of which opinion is authoritative. The Beis Yosef, and subsequently the Shulchan Aruch (340, 3), rules like the Ramah and claims that even the Rosh agrees with the Ramah. However the Ramo, Shach (340, 5) and many others rule against the Ramah.

The argument of the Shach is important. He claims that the previously cited Ramban disagrees with the Ramah since one cannot blame the owner for the theft that ensued from the loan. If the owner lent his animal, in spite of its poor physical condition, then he is blameworthy. However, he cannot be blamed for burglars and pirates since those losses have nothing to do with the animal's physical condition.

At first glance it would seem that whether the damages that you caused are classified as *meiso machmas melocho* depends on the dispute between the Ramah and the Rosh. However, there are two reasons why it may not. There is one reason why both would agree that it is not *meiso machmas melocho* and one why all may agree that it is *meiso machmas melocho*.

The reason why all may agree that it is not *meiso machmas melocho* is because of a question that was raised by the Kava Dekashaiso. He (question 39) asks that it would seem that there is proof from the Gemoro (*Niddo* 58A) against the Ramah. The proof is from the fact that Gemara rules that if a lady borrowed a garment and stained the garment due to her menstrual bleeding she is liable for the cleaning bill. It would seem that according to the Ramah this should be classified as *meiso machmas melocho* since it is an incidental expense that resulted from the major purpose of the loan, wearing the garment.

Rav Wosner and others (cited in the notes found in the Kava Dekashaiso that was published by Gal-Ed) answered that since the woman who borrowed could have prevented the stain, even the Ramah agrees that she should be liable. This answer does not affect your question since you could not have prevented the flat tire.

However, Rav Naftoli Nussbaum (cited in *Machane Yisroel* res. 63) gives an answer that may pertain to your question. He answers that the Ramah only classified incidental damages as *meiso machmas melocho* if they are not repairable but for any incidental damage that is repairable even the Ramah agrees that the borrower must pay the cost of the repair. Based on this novel idea, Rav Nussbaum ruled that one who punctured boots that he borrowed, by walking over a nail is liable for the repair, but if the boots could not be repaired he was not liable. If one follows this approach, the Ramah would agree that in your case you were liable for repairing the flat (if we ignore the considerations from last week's article). However, it would seem that this is a weak opinion since there are other good answers to this question and also the Ramah and all those who previously cited the Ramah did not differentiate between damages that could or could not be fixed.

However, there is a reason for arguing that even the Rosh would agree to classify your damages as *meiso machmas melocho*. The reason is that in your case travel on the road was not incidental. In the case of the animal, the purpose for borrowing the animal was to plow and its travel on the road was only incidental. It was necessary only to get to the work. However, you borrowed the car for the purpose of traveling on the road. That was the one and only purpose. It is true that you only traveled the road in order to *dave*n but the car was not needed to *daven*. It was borrowed specifically in order to drive over the road. Therefore, it would seem that even the Rosh would agree that this is *meiso machmas melocho* and you could even ask for a refund of the money you spent repairing the flat.

The only reason to question this ruling is because it would seem that the Ramban would not agree that this is *meiso machmas melocho* since one cannot fault the owner for the flat and the Ramban explained that the reason to free the borrower from liability in case of *meiso machmas melocho* is the owner's fault. However, we should note that the (previously cited) Rashba would agree that this is *meiso machmas melocho* because he maintains that the owner forgave any claim for damages that result from normal usage, a classification that fits your situation.

In summary, we have seen that the Ramah would certainly classify your damages as *meiso machmas melocho* and the Rashba likely would agree and there is no reason to believe that the Rosh would disagree. The Shulchan Aruch would certainly agree that it is *meiso machmas melocho* and we must now consider how the later poskim would rule on this issue.

Even in the case of the Ramah where travel is incidental many, including the Maharshdam (*CM* 435), maintain that one cannot make the borrower pay since the Ramah and Shulchan Aruch maintain that he is not liable. Moreover, in your situation where the car was borrowed for the trip, where the Rashbo would agree with the Ramah and very possibly the Rosh would also agree, certainly you would not have needed to pay for the repair. That is the ruling of modern poskim such as Minchas Yitzchak (2, 88) and Mishpat Shlomo (3, 19). The Chasam Sofer (res *CM* 52) and Minchas Yitzchok would seem to maintain that even if you paid you could force the owner to reimburse you but that is not certain.

In conclusion: There certainly is a third reason why you did not have to pay for the repair and very likely we have a second reason why you can claim reimbursement.

98

Liability for Theft of a Rented Car

My friend has a spare car that I rent from him when I need. Since the car is ten years old and only worth about three thousand dollars, my friend doesn't carry theft insurance for the car, a fact which I was aware of. Recently, I rented the car for two days. I live in an apartment building without private parking and so at night I parked it on the street in front of the building and made sure to lock it. When I returned in the morning the car was gone. I informed my friend who immediately notified the police, but they could not find the car. Am I liable for the loss since it was in my possession at the time of the theft?

Answer:

When one rents something he is called a *socheir*-a renter, and his relationship with the rental is that he is a shomeir. He is not the owner but he has responsibility to watch over the rental object. The Torah discusses four situations where a person is obligated to watch over another person's possession-called a *shomer (*in the plural *shomerim),* and specifies the laws governing the liability of three of the *shomerim*. While the Torah does not spell out the liability of a *socheir* the consensus in the Gemoro is that the laws governing the liability of a *socheir* are the same as one who is paid to watch an object-i.e. a *shomeir sochor*. The Torah writes explicitly that a *shomeir sochor* is liable for theft. Therefore, it would seem that you are liable for theft of the car.

However, there are several factors to consider which affect the *halacha.*

The first issue is whether a *shomeir sochor* is liable for every theft or not. We must bear in mind two important facts. The first is that while the Torah states that a *shomeir sochor* is liable for theft it also states that he is not liable for *oness*-damages to the object that result from unusual circumstances that were beyond the *shomeir sochor*'s control. Second, the Gemoro explicitly states that a *shomeir sochor* is not liable if armed bandits stole the object he was watching.

Therefore, we must examine whether a *shomeir sochor* (henceforth abbreviated as SS) is liable for other cases of theft that result from unusual circumstances which were beyond the paid watchman's control i.e. a situation that can be classified as an *oness*. The example that is discussed by Tosafos is where a paid watchman buried the money, which he was entrusted to watch over, deep inside the ground so that in order to steal the money a burglar had to discover the burial place and then conduct an extensive digging operation

This question is the subject of a major dispute in Tosafos and numerous other Rishonim. Tosafos in one place (*BM* 42A) and according to many (Yam Shel Shlomo and others) the Rambam (*Sechirus* 1, 2), and others, rule that a SS is not liable for theft that results from an *oness*. However, in another place (*BK* 57A) Tosafos cites the Ri that a SS is liable even for theft that is an *oness*. This is also the opinion of the Rosh (*BM* 3, 21) and Tur (*CM 303)* and other Rishonim (including the Ramban and Rashba),

Whereas, the rationale for the lenient approach is simply because a SS is not liable for *oness*, the rationale for the stringent opinion is difficult and the Rishonim suggest two approaches. The Rosh and the Ramban (and his disciples) understand that the Torah requires a SS to actively watch over the object that he is paid to watch over. Thus if, for example, he was hired to watch money, it is his duty to keep the money with him at all times and he may not place it even in the most secure place. If he

did hide it in a secure place and it was stolen he is liable because he was derelict in fulfilling his responsibility.

The approach of Tosafos is different. He maintains that the reason the SS is liable has nothing to do with a SS's duty to watch the object. Rather, it is because the Torah excludes theft from the usual leniency that is granted to a SS in case of *oness*. In spite of the fact that a SS who placed money in a secure place carried out his responsibility, nevertheless, he is liable.

The later poskim also dispute which opinion is authoritative. For example, the Maharshal (*YSS BK* 6, 11) Shach (*CM* 303, 4) and Gro (*CM* 303, 4) all rule leniently.

A situation that was hotly debated about three hundred years ago in Egypt concerned a SS who was entrusted with merchandise which he placed under lock and key in his personal secure storage facility. When the SS came later to remove the merchandise he discovered that some of it was stolen, apparently by someone who forged a key and unlocked the warehouse. The Perach Shushan (*CM* 1, 1) ruled that the SS was liable for the loss because he followed the stringent opinion and understood their rationale in a manner similar to Tosafos: that even though the SS acted properly, nevertheless, the Torah rules that he is liable for theft. He explains that since the Torah rules that the SS is liable, when a theft that is an *oness* occurs it is because Hashem wanted to punish the SS and that is why he brought upon him this loss which was beyond his control (*mazolo goram*). It is similar to any other damage that a person suffers due to circumstances that are beyond his control e.g. a tornado blew away the roof of his house.

The question was sent to the beis din in Yerushalaim and the av beis din, the Maharam Chaviv (his responsum is printed in the *Ginas Verodim CM* 1, 1) ruled that the SS is not liable for many reasons, some of which apply to our case as well. First, the lenient opinion of Tosafos in BM

and the fact that Rambam and also others (which we now include the Maharshal, Shach and Gro) rule leniently. Second, even the stringent opinion would agree to rule leniently in this situation since the SS acted in the customary manner. The Ginas Verodim (*CM* 1, 2) concurred with the lenient opinion arguing that the owner of merchandise was aware at the outset that the SS would just lock the merchandise in his storage facility. If he had wanted more security he should have paid extra for it. Thus, even if what the watchman did would not have been customary would free him from liability since he acted in accordance with the desires of the owner.

We should note first that the Shulchan Aruch in many places rules that custom overrides the rules that are written in the Gemoro. This is a basic principle that governs all monetary relationships. The Yerushalmi (*BM* 7, 1) phrases it "custom overrides the law." This is ruled in the Shulchan Aruch explicitly in the case of watching objects. The Gemoro (*BM* 42A) rules that even one who is not paid to watch an object (i.e. a *shomeir chinom*) must hide money, that he is entrusted to watch over, in the ground. However, the Shulchan Aruch (291, 18) rules that one is not required to do so in a place where that is not the custom.

Second, we should note that the argument of the Ginas Verodim that the watchman is not liable since the owner was aware and tacitly agreed with the manner that his merchandise would be kept, is the ruling of many others including the Terumas Hadeshen (333) and Maharshdam (CM 134).

Returning to your question, there are a number of reasons that you are not liable: 1-you acted in the customary manner and, 2-even if it was not the custom, the owner of the car knew that you, in particular, would park the car on the street and nevertheless he entrusted you with his car and did not demand that you return the car at night.

The only opinion that maintains that you are liable is the opinion that even if a SS watched in the proper manner he is still liable, an opinion which is held by Tosafos in one place and by the Perach Shushan.

Nonetheless, both those who are lenient in all cases – which is the opinion of one Tosafos and other Rishonim and followed by the Maharshal, Shach and Gro – and those who rule that one should be stringent in case of *oness* because the SS was derelict in fulfilling his duties – the approach of the Rosh and Ramaban – would agree that you are not liable because you did whatever was expected of you and what is customary.

In conclusion: You do not owe anything to the owner.

99

Part of a shipment was lost in Transit

I recently made aliya from the U. S. We hired a company to ship the contents of our house to Israel. The company sent someone to our house to see what we were sending and quoted us a price which was based on the amount of goods that we were sending. We packed everything into eighty large crates which we numbered, and we compiled a list of the contents of each crate. The company sent a truck that picked up the eighty crates and the driver signed that this is what he received. Shortly after our arrival in Israel we received our shipment. Much to our dismay only seventy-four boxes arrived. We called the company's agent in Israel and he reported back that the container containing our crates was opened by customs and this is what they got back from customs. There were no items that were listed as confiscated by customs and I wasn't charged any customs duties since I am a new immigrant. It seems that the six boxes were lost or stolen while they were in customs' warehouse. I was under the impression that the lift was insured since I was just given a price by the company and they never said anything about insurance but I took it for granted that my lift was insured. However, again to my dismay the company said that they didn't take insurance and if I wanted insurance I would have had to pay for it. I asked the company if I could contact their representative who oversaw clearing the shipment at customs since they are entitled to have a representative present when customs opens a shipment and the agent could have ensured that everything was repacked

properly. The company would not give me this information from which I concluded that either they didn't use an agent or that he was negligent. Since I prepared an itemized list, I know how much I paid for the lost items and the state they were in and I feel I am entitled to this amount plus the cost to reship these items since I will have to repurchase these items and reship them. Additionally, one of the six boxes contained my grandfather's handwritten *chiddushei Torah* which are priceless since there is no other copy. Am I entitled to anything from the company and if so how much, or can they just blame the loss on customs?

Answer:

In order to determine if the company is liable, we have to clarify the company's relationship to your goods. The company charged you money to ship your goods but did not discuss the issue of responsibility for safeguarding your shipment.

There is a Mishna (*BM* 80 B) which is ruled by the Shulchan Aruch (306, 1) that gives a general principle which covers your situation well. The Mishna states that craftsmen who do not discuss the issue of responsibility, automatically assume the status of a *shomeir sochor,* a paid watchman. The reasons that the craftsman assumes the status of a *shomeir sochor*, even though he is not paid specifically to watch over the item he is fixing, are given by the Gemara, Rishonim and Poskim as: First, because by virtue of the fact that the object is in the craftsman's possession he benefits because thereby the craftsman can ensure that he will be paid, since he will not surrender the object until he is paid. Second (See *Shach* 306, 1), since it is because of the object that the craftsman is able to earn money, it is as if the craftsman rents the object in order to earn money by fixing it. These reasons clearly apply to your situation as well, so the company had the status of a *shomeir sochor* even though they never discussed the issue.

Having determined the company's relationship to your shipment, we can now determine whether they are liable for your loss. Since the company should have had an agent present when it was opened by customs, precisely in order to prevent what transpired, the company behaved negligently with your shipment and it was due to this negligence that your boxes were lost. As the Torah (*Shemos* 22, 9) rules that a *shomeir sochor* is liable for losses that are suffered due to the *shomeir's* negligence, the company is liable for your loss i. e. the contents of the lost boxes. In fact, a *shomeir sochor* is liable for theft or loss even if he is not negligent.

The next issue that needs to be decided is how much the company must pay. You wrote that you itemized your list and you know how much you paid for the lost items and feel you should be paid for the cost to replace them plus shipping. However, this is an incorrect approach.

The Gemara (*BK* 4B) writes that when one suffered a loss because his *shomeir* was negligent, we view it as if the *shomeir* damaged the owner of the lost objects since the owner's loss ensued from the *shomeir's* improper behavior. The Magid Mishna (*Sheilo* 8, 3) who is cited by the Shach (295, 7) and many others (e. g. *Ketsos* 291, 1, *Nesivos* 291, 1 and 13) rules that the watchman must pay the value of the lost goods at the time they were lost. Thus, their original cost in the U. S. and the cost of shipping are not directly relevant. The determinant is their value in Haifa on the day your shipment was inspected and the boxes were lost. Thus, in order to determine the amount that you are entitled to receive you will have to present your list to someone who knows prices in Israel in order to give an exact value.

We should add that the company does not have to believe your itemized list since they have no way of knowing whether you are telling the truth. However, the Shulchan Aruch (90, 10), based on the Rambam, rules in precisely these circumstances that you are believed under oath to state what were the contents of the lost boxes. Nowadays, when

beis din does not allow litigants to swear, beis din will have to use its judgment as to whether to give you the full amount that you can claim.

You also claim that one box contained the only copy of your grandfather's *chiddushei Torah* which are priceless. Indeed, they are priceless. However, the Radam (res *CM* 13 and cited by *Divrei Geonim* (51, 23)) rules that the company does not have to pay for their loss. Even though we disagree with the Nesivos (148, 1) and we rule that one is liable even for damaging objects that have no market value when the only one for whom they are valuable is their owner (e. g. eyeglasses), nevertheless, one is not liable for damaging items like *chiddushei Torah* that are not slated to be sold for profit.

The reasoning of the Radam is that the value is not a monetary value but a non-material benefit for which the one who damaged is not liable. We can describe the situation as if the one who damaged this item prevented you and your descendants from deriving spiritual pleasure from your grandfather's efforts for which they don't have to pay even if the loss is terrible.

This is somewhat similar to one who prevented someone from performing a mitzvah for which one does not have to pay, even if the one who prevented another from performing the mitzvah, himself performed the mitzvah. It is only because Chazal imposed a fine in this situation that he has to pay anything.

You asked for the cost of reshipping the lost goods. As we mentioned, this does not play the role that you thought. However the cost of shipping does affect the amount of compensation you are entitled to, since it affects the value of the lost items have in Israel.

There is a second issue that concerns the amount you paid for shipping. You paid the company to deliver eighty boxes to your home in Israel and they only delivered seventy-four boxes. The Beis Dovid (res. *CM* 1 and cited by *Pischei Teshuvo* (301, 1) and many others) proves from the

Gemara (*Avodah Zora* 65A) that when one who was contracted to deliver one hundred barrels for a hundred shekels, delivers only ninety-nine barrels, we don't prorate the agreement and say that if the agreement was to pay a hundred shekels for a hundred barrels that implies that if he delivers only ninety-nine barrels he is entitled to ninety-nine shekels. Rather, the original contract is no longer valid since the worker did not fulfill his part of the agreement. Therefore, the company worked for you without a contract since the contract only covered the situation where they would deliver the entire eighty boxes and did not specify what they are entitled to in case they deliver only seventy-four boxes.

When one works without a contract he is classified as a *yoreid,* and he is only entitled to the cheapest going rate. Therefore, you should check out the rates of other companies that provide a similar service and you need to pay your company the cheapest rate you find to deliver seventy-four boxes under terms that are similar to the terms of service that your company obligated itself to provide. Even if you already paid the company its original price, you can halachically force the company to return the difference between the amount you paid and the amount that you would have had to pay an alternate company for seventy-four boxes.

In conclusion: You are entitled to payment for both the items that were lost in transit as well as the difference between what you paid for shipping and the cheapest rate you can find for transporting the boxes that did arrive. You should consult with a beis din to determine exactly how much you are entitled to for the items lost in transit.

100

Child Lent his Bike to a Friend and it was Stolen

My son lent his bike to a friend. My son keeps the bike tightly chained with a combination lock to a pipe in the back yard of our building. He told his friend the combination on the lock and told him to return the bike to the place he found it when he finished using it, which he says he did. However, when my son returned, the bike was gone. One of the neighbors says he saw an Arab who entered the building and after about fifteen minutes left with a bike which now we realize was my son's. When my son spoke with his friend the cause became apparent. In order to prevent theft one must wrap the chain tightly around the pipe since otherwise it is possible to slide the chain off the pipe and take the bike along with the chain. When his friend borrowed the bike he found it wrapped tightly but his friend, who was unaware that this was necessary, failed to do so which allowed the thief to steal the bike. Is his friend liable for the loss?

Answer:

You left out an important detail: the age of the children. We will see that the age of your son is probably not important but the age of his friend is.

When one allows someone to ride his bike the borrower assumes the legal status of a *sho'eil,* a borrower, for as long as he is allowed to use the bike. When the borrower informs the owner that he finished using

the bike, or the time period for which he was allowed to use the bike ends (See *CM* 340, 8), the borrower assumes the status of a *socheir,* a renter, until he returns the bike. Even though he no longer is allowed to ride the bike, he still has the status of a *socheir* and not the status of a *shomeir chinom,* one who watches for free, since he did benefit from the bike when he drove it. Finally, when he returns the bike the borrower is totally absolved from all responsibility.

Since a *sho'eil* is liable even for *oness* (circumstances that were beyond the control of the borrower), if the theft had taken place when the friend was allowed to drive the bike he would certainly be liable. Even after the period when he was allowed to drive the bike ended, the friend is liable for ordinary theft since a *socheir* is liable for theft.

Therefore, there are only two possibilities that absolve the friend from liability. One possibility applies even if the theft took place before the bike is legally considered to have been returned. Specifically, if the theft was a result of an *oness*, some opinions (See *Tosafos BM* 42A and *CM* 303, 2-3) absolve the borrower from liability. However, this certainly was not the case here since the chain could have been wrapped tightly and this was not done. Thus, the only possibility to absolve the friend is if we consider the bike as having been returned to your son, in which case the borrower has no liability.

As we mentioned at the outset, the age of the friend is crucial. The reason is that if the friend was under bar mitzvah he is certainly not liable since it is clear from the Gemara (*BB* 87B) that a minor never assumes the legal status of any kind of *shomeir*. The Pischei Choshen (2, Chapter 1 Note 34) rules that even those who maintain that it is proper for a minor who damages to pay when he grows up, agree that a minor who was negligent with an object that he was entrusted with does not need to pay when he becomes of age, since the owner himself acted negligently when he entrusted a minor with his object. Thus, your question is only relevant if his friend was over bar mitzvah.

In theory, the age of the owner of the bike is also quite significant since there is a dispute among the Rishonim whether one who is entrusted with an object that belongs to a minor assumes the status of a *shomeir*. The opinion of the Rambam (*Sechirus* 2, 7), which is followed by the Shulchan Aruch (96, 1), is that he does assume the status of a *shomeir*. However, the Ramo follows the opinion of many (*Rashba, Ran* on *Shavuos* 42A) that he does not assume this status and even if a person who was paid to watch over a minor's possession was negligent he is not liable for an ensuing loss.

There is an additional dispute in the case of one who, like your son's friend, borrowed an object. The opinion of the Machane Efraim (*Shomrim* 9-10) is that all agree that one who borrows an object from a minor assumes the status of a *sho'eil*. However, many Acharonim (including the *Imrei Binah To'ein* 37, *Nachal Yitzchok* 96, 1, *Minchas Pitim* in *Sheyorei Hamincha* 302) disagree and maintain that those who disagree with the Rambam maintain that even one who borrows an object from a minor is not liable.

However, the reason this issue is irrelevant is that when one gives a present to a minor who lives with his parents (See *Money Matters* Page 214) it is considered as if he gave the present to the father. Moreover, even if the father himself (See the notes of *R. Akiva Eiger* on *CM* 270 in the name of the *Nemukei Yosef* who is the source of this halachah) gave a present to his son, the father retains ownership.

There are two reasons for this ruling. The Rishonim (*Ran on BM* 12) who are the source for this ruling say that an underage child who is not financially independent does not have the ability to acquire presents even from his parents due to his lack of independence. (The Gra (note 6) finds this explanation quite difficult.) The Sema (note 6) gives his own reason for this ruling, namely, that when people give a present to a minor child they really intend to give it to his parents since children

tend to act irresponsibly. Therefore, if your son was past Bar Mitzva when he received the bike it was his, but if he was under bar mitzvah it was your bike. In either case the bike was not owned by a minor. Therefore, from a practical standpoint, your son's age is irrelevant.

Thus, if the boy who used the bike was over bar mitzvah the only way that he can be absolved from liability is if the way he placed the bike is considered a return of the bike. We should note that usually when one borrows a bike he must: 1-inform the bike owner that he returned the bike and, 2-return it to a safe place. The standards of what is called a safe place are quite high and according to some (*Darkei Moshe* 340 and *Sema* 340, 12) relate to the relationship that the borrower had with the object prior to its return. Since one who borrowed the object had the status of a *shoeil* the standard is very high. The Ramo (340, 8) rules that when one borrows an object from the husband it does not suffice to return it to his wife! This is not true for our women who have permission to transact business with their husband's money but it illustrates the high standard of what is called a safe place. Certainly, chaining the bike loosely to a pipe where it can be slid off does not qualify.

However, when an owner tells the borrower explicitly to place the borrowed object in a specific place when he finishes using it, the Mishpatei Hachoshen (*Ohr Efraim* 340, 26) proves that once the borrower follows his instructions he is considered as having returned the object even if he did not inform the owner and even if the place is not totally safe. The reason is because we view the owner as having waived his right to require return to a totally safe place. Since in your situation, we cannot say that the boy who returned the bike in a significantly different manner complied with the instructions he was given, we cannot classify the borrower as having returned the bike and he is liable for the theft.

In conclusion: The friend, if he is post-bar mitzvah, must pay you for the loss of your son's bike. Bear in mind that he only must pay the value of the bike when it was stolen, which is less than the price of a new bike unless your son's bike was brand new.