

BUSINESS WEEKLY



RESTORING THE PRIMACY OF CHOSHEN MISHPAT UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

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לע"נ הרה"ח ר' נחמיה בן הרה"ח ר' שלמה אלימלך ווערדיגער ז"ל נלב"ע - י"ב כסלו, תשע"ג



CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

"REPAY THE MONEY TO MY SON"

Mr. Stern needed \$10,000 to keep his business afloat. He asked a close acquaintance, Mr. Silver, for a loan.

"I'd like to borrow \$10,000 for a year to keep my business afloat," Mr. Stern said. "Are you willing to lend it to me?"

"I'm willing to lend to you," replied Mr. Silver. "At the end of the year, though, repay the money to my son, Moshe, who lives across the street from you. He can use the money." He handed Mr. Stern a check for \$10,000.

A year later, Mr. Stern contacted Mr. Silver. "Unfortunately, my business situation worsened," he said. "As much as I feel indebted, I can repay only \$5,000."

"What do you suggest?" asked Mr. Silver.

"I'd like to repay the \$5,000 that I'm able to," said Mr. Stern, "and humbly ask if you are willing to forgo the other \$5,000."

Mr. Stern thought for a moment. "I'm willing," he said, "but you have to ask my son, Moshe, if he also agrees."

"Why should I have to ask Moshe?" asked Mr. Stern. "You lent me the money; it's your call!"

"Since I told you to repay Moshe, it's his right," replied Mr. Silver. "How can I forgo his right?"

"Even though you told me to repay Moshe," argued Mr. Stern, "essentially I owe you. Giving to your son is in lieu of giving to you. If you're willing to forgo, why do we need to involve Moshe? The two decided to approach Rabbi Dayan. Mr. Silver asked:

"Am I able to forgo the \$5,000?"

"Had the initial agreement been to repay Mr. Silver, and after the loan was already granted he said to pay his son, Mr. Silver would most likely be able to forgo," replied Rabbi Dayan. "There are specific rules how a loan can be halachically transferred, and even so, the lender can often forgo (C.M. 66:1,23,32,36; 126:1).

"However, when the initial arrangement was that Mr. Stern pay the son, the issue is complex. The Gemara (Kiddushin 7a) teaches that someone can give another money to benefit a third party. For example, a person can pay a seller so that a third party will acquire (C.M. 190:4).

"Similarly, Poskim write that a person can lend someone money or buy an insurance policy and stipulate that the payment be to a third-party beneficiary (Cheishev Ha'efod 3:54,115(2); Pischei Choshen, Yerusha 1:[65]).

"When the borrower commits himself directly to the beneficiary, the beneficiary acquires that right, so that the lender cannot revoke it,



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לע"נ ר' שלמה ב"ר ברוך זוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

EXPIRED REGISTRATION: PART I

Q: I borrowed my friend's car, and the police pulled me over because the registration had expired. The car was impounded, and I had to pay \$175

to get it out. Am I responsible for that \$175, or is my friend required to reimburse me?

A: A *shoel* (borrower) is generally liable for *onsim* (losses or damages to the borrowed item due to circumstances beyond his control).

The *Rishonim* offer two reasons why a *shoel* is liable for *onsim*. Some say that because he is the sole beneficiary for the time that he borrowed the item, he is considered to have acquired it from the owner for the period that it will be in his possession, so when it is damaged, it is as though his own object was damaged (*Tosafos, Bava Kamma* 11a; s.v. *Ein*; see *Nesivos* 344:1). Others explain that it is because a *shoel* willingly accepts upon himself to be liable for damages caused by *onsim* (*Tosafos, Kesubos* 56b, s.v. *Harei*, as explained by *Ketzos HaChoshen* 291:4).

Nevertheless, if a borrowed item is damaged in the course of normal use (*meisah machmas melachah*), then even a *shoel* is not liable (*Shulchan Aruch, Choshen Mishpat* 340:1). The Ramban (*Bava Metzia* 96b, cited in *Shach* 340:5; see also *Sma* 340:3) writes that this is because the owner was negligent in lending an object that was incapable of sustaining normal use, as opposed to all other *onsim*, for which the *shoel* is liable because the owner was not guilty of negligence in lending it to him (*Rashba* to *Bava Kamma* and *Machaneh Ephraim, She'eilah* 4 offer alternative explanations for this *halachah*).

The Ramban's logic applies to our case as well; because the *oness* was due to negligence on the part of the lender which caused the car to be impounded, the borrower is not liable.

Another reason that the borrower might not be liable in our case is that the owner was negligent in lending him an object that had such a significant flaw that had the borrower known about it, he wouldn't have borrowed it. And had he not been a *shoel*, the stringent responsibilities of a *shoel* would not have applied to



CASE FILE

unless initially stipulated or there was clearly evident intent that he can change the beneficiary.

"For this reason, some *Achronim* write that if a woman specified when she got married that her *kesubah* be paid to a third party, she cannot forgo it to her husband, since he obligated himself directly to the beneficiary (*Pischei Teshuva E.H. 105:3*).

"Similarly, regarding vows, if Reuven banned (*konam*) Shimon from benefiting from him unless Shimon gives barrels of wine to his independent son — many *Rishonim* rule that Reuven cannot say, 'It is as if I received' the barrels, to allow Shimon to benefit from him without annulling the vow; the son would have to forgo (*Rashba, Ran, Meiri Nedarim 24a; Y.D. 232:20*; see, however, *Levush, ibid.*).

"Thus, if Mr. Stern initially was *mischayev* (obligated himself) directly to Moshe, Mr. Silver cannot forgo the payment to Moshe.

"However, in our case it is very possible that you never intended that Mr. Stern obligate himself directly to Moshe, especially if Mr. Silver holds the loan document," concluded Rabbi Dayan. "The intent was likely that the debt be towards Mr. Silver, and the repayment to Moshe was just a practical means of fulfilling this obligation. Bottom line, *Beis Din* would have to evaluate, based on the specific circumstances, to whom Mr. Stern obligated himself (see *Nesivos 60:19*)."

Verdict: If an agreement between two people stipulates an obligation directly to a third party, they may not forgo the right of the third party. *Beis Din* would have to determine to whom the recipient obligated himself.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
Yored L'sedei Chaveiro
Property #21
Condominium

לע"נ ר' יחיאל מיכל ב"ר חיים זוגו' ח'ל' בת ר' שמואל חיים ע"ה

Q: A person in a condominium enhanced the public lobby or garden. Can he demand that the neighbors share in his cost?

A: Seemingly this depends on whether the enhancement was warranted so that the condominium was considered fit for such enhancement (*Rema 375:7; Mishkenos Yisrael #22*).

However, because the owners in the condominium are partners in the public areas, a partner is considered as having acted with permission (provided that the expenditure was not frivolous), unless the neighbors protested and indicated that they would not share in the expense, or there are rules stating otherwise in the condominium agreement (*C.M. 375:5; Pischei Choshen, Genevah 8:[56]*).

However, if the person enhanced his own apartment, — even if doing so raises the value of neighboring apartments — if there was no additional expense on account of the neighbors, he is doing it for himself. The neighbors do not have to share in the cost, unless they indicated willingness to pay for such gain (see *Rema 264:4; Pischei Choshen, Genevah 8:13-14*).



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him.

The *Maharik* (155, cited in *Rema 291:4*) discusses a case in which Reuven hired Shimon to transport books for him from one place to another, and he lied to Shimon, telling him that there are no customs fees associated with bringing those books to the other place. The customs officials seized the books, and Reuven demanded that Shimon reimburse him for the seized books. The *Maharik* accepted Shimon's claim that had he known that there actually was a tariff, he would never have agreed to transport the books because he did not want to deal with the tax authorities, and he is therefore exempt from any liability.

The *Acharonim* discuss what type of case this applies to. Some say it applies only if the loss was due to the owner's misleading the person who agreed to guard the item (a person who is paid to transport something is considered a *shomer* — guardian — of that item). If the loss was unrelated to anything the owner did, the *shomer* is liable (*Shaar Mishpat 291:4; Machaneh Ephraim, Shomrim 13*).

Others argue that because in this case, Shimon would never have accepted upon himself to transport the item had he known about the customs issue, then his agreement to transport the item was made under a mistaken premise and he is not a *shomer* at all and therefore not liable, regardless of whether the eventual loss or damage was related to Reuven's having misled him (*Maharik ibid; Erech Shai 291:4; Shu"t Chelkas Yoav, Even Ha'ezer 34; Ohr Samei'ach, Nizkei Mamon 4:11*).

Some write that it depends on why a *shoel* is liable for *onsim*. If it is because the Torah views him as the owner (as cited from *Tosafos in Bava Kamma*; see *Chazon Ish, Choshen Mishpat, Likutim 12:14*), then if the damage to the item is unrelated to the owner's misleading him, he is required to pay. But if he is responsible because that's what he agreed to (as cited from *Tosafos in Kesubos*; see *Ketzos 291:4 and 340:1*), in this case he will not be liable because he didn't accept upon himself responsibilities when misled by the owner (*Chelkas Yoav ibid.*).

Returning to our case, if, for instance, the car were not impounded, but rather had been damaged when a tree limb fell on it, according to the first opinion the borrower would be obligated to pay, but according to the latter opinion, he would not be liable.

Because in our case, the damage (having to pay the impounding fee) was directly related to the owner's negligence of not informing the borrower that the registration had expired, the borrower is not responsible for retrieving the car from the impound lot according to all *Poskim*.

In the coming issue, we plan to discuss what happens if the borrower decides to retrieve the car from the impound lot: Is the owner required to reimburse the borrower?

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 or ask@businesshalacha.com

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