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לע"נ הרב יחיאל מיכל בן ר' משה אהרן אורליאן

CASE FILE

Rabbi Meir Orlian
Writer for the Business Halacha Institute

לע"נ הרב אהרן בן הרב גדליהו ע"ה

FALLING BRANCH

The Feiners were cozy in their house. They watched the snow fall; it blanketed the ground and trees with a thick layer of white.

"Isn't the snow pretty?" Sruli said to his mother.

"Yes, it's beautiful," replied Mrs. Feiner.

"Look at that tree over there," said Sruli, pointing to one of their large, older trees. "It's full of snow. The branches are bending under the weight of the snow."

While they admired the snow-coated trees, they suddenly heard a loud crack. One of the branches broke off and fell!

Mrs. Feiner immediately called her husband. "A large branch just fell off a tree," she exclaimed. "Please check that everything is OK."

Mr. Feiner put on his coat and ran outside. He saw that the branch had fallen on a bike that one of the neighbors had left out on the street.

Mr. Feiner came inside. "Thank G-d, no one was injured," he said to his wife. "However, it smashed our neighbor's bike."

"You need to move the branch," Mrs. Feiner said to his wife. "Someone can get hurt by it."

"It's cold now," said Mr. Feiner. "I'll move the branch tomorrow and cut it into pieces, so we'll have wood for our fireplace."

During the evening, someone was riding a bike and crashed into the branch. He wasn't injured, but that bike also was ruined.

"What's the story with these bikes that were ruined by our tree?" Mrs. Feiner asked her husband.

"I suppose that we are liable for them," said Mr. Feiner, "but I'll check."

Mr. Feiner called Rabbi Dayan and asked:

"Are we liable for the damage of the two bikes?"

"The *Mishnah* (B.K. 117b) teaches that if a tree fell and caused damage, the owner is exempt," replied Rabbi Dayan. "However, if the tree was diseased and the owner was instructed to cut it down, but he tarried more than 30 days, he is liable"

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

A TIME FOR CHANGE?

Q. Mrs. Friedman called her neighbor, Mrs. Schwartz, with an urgent request. She had ordered an expensive watch, and due to unforeseen circumstances, the delivery was delayed. Now the delivery company called to inform her that the package would arrive the next day, but she had left for Florida, so she asked Mrs. Schwartz to accept the delivery on her behalf and take it into her house for safekeeping. As the discussion continued, Mrs. Schwartz expressed interest in buying the same watch, and Mrs. Friedman decided to sell it to her at cost price, figuring that she could order another one just before her return home.

When she tried to reorder, however, she discovered that the entire supply had sold out. Upon her return home, Mrs. Schwartz excitedly handed her the watch to show it to her. Mrs. Friedman was far from happy, however. "Since my plan was to order another watch," she said, "and I was unable to do so, I would like to void the sale to you and take this one for myself."

"But you already agreed to sell it to me!" Mrs. Schwartz protested.

Is Mrs. Friedman halachically permitted to void the sale, considering that the watch was already in Mrs. Schwartz's possession?

A. The first question to consider is whether Mrs. Friedman was in a position to sell the watch when she agreed to do so, considering that it was not yet in her possession, which makes it akin to a *davar shelo ba l'olam* (something that has yet to come into existence), which cannot be sold (*Shulchan Aruch, Choshen Mishpat* 209:4). As such, even though the item came into her possession afterward, the sale that occurred beforehand would not appear to be valid without a new *kinyan*.

Although the delivery was dropped off in Mrs. Friedman's yard, which is a secure location (*chatzeir hamishtameres*) that was *koneh* (acquired) it on her behalf, that does not make her sale to Mrs. Schwartz valid, because when the conversation took place between them, the watch had not yet been delivered. Therefore, because the watch is currently in Mrs. Friedman's possession (because Mrs. Schwartz handed it to her), it would seem that she may keep it by claiming that there was never a valid *kinyan*

CASE FILE

(*C.M.* 416:1).

"This applies whether the tree damaged while falling or afterwards, before it was removed. However, even when the tree was healthy, if the owner intended to keep the wood but delayed in removing it, Tur and Rema rule that he is liable as *bor* —pit, obstacle. It is questionable whether Rambam agrees with this (*Gra* 416:1; *Aruch Hashulchan* 416:6-9).

"Nonetheless, *bor* is liable only for animals or people that were injured by it; *bor* is exempt from damage to inanimate objects. Thus, even if the owner intended to keep the wood, he would not be halachically liable for subsequent damage to inanimate objects (*C.M.* 410:21).

"Thus, in our case, you are clearly exempt from the damage to the first bike, because the tree wasn't condemned.

"Moreover, even if the tree was condemned, it seems that you would be halachically exempt because the bike is an inanimate object.

"A person who left his items on the roof and they were blown down by a normal wind is liable for damage they do while falling as a subset of *aish* — fire, which is characterized by damage done through an additional force, the wind (*B.K.* 3b; *C.M.* 418:1).

"Nonetheless, several *Rishonim*, cited by Sma, indicate that even a diseased tree that damaged while falling is categorized as *bor,* not *aish,* because it fell naturally, not due to an external force. Although some *Acharonim* question this and consider it *aish*, according to the simple understanding of the *Rishonim* that it is *bor*, you are exempt from damage to inanimate objects (see *Tosfos and Rashba B.K.* 6b; *Rosh B.K.* 1:1; *Sma* 416:2; *Pischei Choshen* 8:[57,59]).

"The damage to the second bike, after the branch fell, is clearly a case of *bor*, so that you are again exempt, even though you planned to keep the wood and delayed in removing it.

"Nonetheless, you should do your civil service and remove potential damage; state law might consider you liable," concluded Rabbi Dayan. "Some *Acharonim* further indicate that there is an obligation *latzies yedei Shamayim* for damage of *bor* to inanimate objects, but Chazon Ish rules otherwise" (*Pischei Choshen, Nezikin* 1:[1]; 7:9]; 9:[53]).

Verdict: A person is not liable for damage of a healthy tree that falls. However, if he wants to keep the wood and delayed in clearing it away, he is subsequently liable as bor, **i.e., for injury to people or animals, but not to inanimate objects.**

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS

Yei'ush – Abandonment

#20

Swept by a River

לע"נ ר' יחיאל מיכל ב"ר חיים וזוג' חי' בת ר' שמואל חיים ע"ה

Q: While boating on the river, I found a lost item floating. May I keep it?

A: When swept by a river, we distinguish between cases when the owner cannot save the item, and when he can. We can extrapolate from this to other cases of calamity.

When the item is most likely lost completely, such as when swept out to a large river or sea, or when a fire rages and the owner fled, the finder can keep the item even if the owner is not yet aware of the loss, or, alternatively, even if he declares that he does not have *yei'ush*, and even if he futilely chases after the item (*C.M.* 259:7; *Sma* 259:16; *Rema* 264:5).

Some explain that this is also based on *yei'ush*. Since the *yei'ush* is self-evident, the Torah allowed the finder to keep the item even when there is a *siman,* and even before the owner knows of the loss. Moreover, we disregard his statement that he does not have *yei'ush*, and consider him as one who bemoans an inevitable loss (*Rambam, Hil. Gezeilah v'Aveidah* 11:10; *Nachalas Dovid B.M.* 22a, based on *Ritva*).

Others explain that the Torah considers this case as automatic *hefker,* which is stronger than *yei'ush* (*Ramban B.M.* 22b; *Nesivos* 262:3).

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transferring ownership from her to Mrs. Schwartz.

In reality, however, the watch still belongs to Mrs. Schwartz, because the *halachah* is that when someone sells a *davar shelo ba l'olam*, although the sale is not valid at that point and either party may renege on the sale agreement, if the item later reaches the buyer before the seller reneges, it belongs to the buyer (ibid.).

The reason for this, explain the *Rishonim,* is that as long as the seller has not reneged, we assume that he would like to fulfill his earlier commitment to sell, so that he should be considered a trustworthy person. The *Shach* (ibid. 5) writes that this is true only if the seller knew that the item already reached the buyer and did not react, in which case we assume that he decided to follow through on the sale. Other *Acharonim* rule, however, that even if he didn't know that the item reached the buyer, if he did not renege, then he tacitly agrees to the sale and it is final (see ibid. 66:17 & 126:22, and *Ketzos Hachoshen* 123:1).

In our case, then, because Mrs. Schwartz already received the watch, and Mrs. Friedman was aware of that, according to all the aforementioned opinions, Mrs. Friedman has no right to the watch.

If Mrs. Friedman stated clearly, however, while discussing the sale of the watch, that she was selling it *because* she was going to order another one for herself, then it is possible that she may void the sale on the grounds that it had been made based on an *umdena* (presumption). Whether she may do so hinges on a debate between the *poskim* whether a person's declaration as to why he is selling an object can be invoked as grounds to void the sale if that reason does not ultimately materialize (see *Shu"t Chasam Sofer, Choshen Mishpat* 102; *Pis'chei Teshuvah* 207:5; *Nachlas Tzvi* ibid.; and *BHI* #680).