



BUSINESS WEEKLY

WERDIGER EDITION

Restoring the primacy of Choshen Mishpat

Issue #306 | Pesach | Friday, April 22, 2016 | 14 Nissan 5776

UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA



STORY LINE

By Rabbi Meir Orlian

NEGLECT TO SAVE

The day was getting longer and the weather warmer. A group of boys got together in the park after school to play ball. They piled their knapsacks together in the corner of the court.

After a few games, the sky grew dark. "It looks like it's about to pour," Aharon said.

The boys gathered their belongings and headed home. Aharon was the last to leave. He noticed a book lying where the knapsacks had been piled, but ignored it and hurried off. Ten minutes later, the skies opened and it began to rain heavily.

The following day, Aharon saw that his friend Shimmy looked upset. "What's the matter?" Aharon asked.

"A book fell out of my knapsack yesterday in the park," Shimmy replied. "I went back to check this morning, but the book got completely ruined in the rain."

"I saw a book lying there yesterday," Aharon said. "I was worried about the rain."

"You saw it?!" exclaimed Shimmy. "Why didn't you take it with you?"

"I didn't realize it was yours..." Aharon answered.

"You still should have taken the book," said Shimmy. "Whoever it belonged to, you could have saved it."

"You're right," acknowledged Aharon. "I wasn't thinking and didn't want to be bothered."

"It was an expensive book and cost almost \$100," added Shimmy. "I need it for class and will have to buy a new one. It's a shame that you didn't take the book; you knew that it belonged to one of the group. Anyway, there's a mitzvah of *hashavas aveidah*."

Although Shimmy didn't ask, Aharon wondered whether he owed Shimmy anything. He called Rabbi Dayan and asked: "Does a person who ignored a lost item or neglected to prevent a loss carry any liability?"

"Preventing loss is also included in the mitzvah of *hashavas aveidah*," answered Rabbi Dayan. "Nonetheless, one who neglected doing so is not liable, but there might be a moral obligation."

"One example discussed in the *Poskim* is a person who was entrusted with *chametz* before Pesach," explained Rabbi Dayan. "The *Shulchan Aruch* writes that when Pesach arrives, the guardian should sell the *chametz* to a non-Jew. If he did not, he must burn it when the time for *biur chametz* arrives, and cannot assume that the owner sold it. [The *halachah* might differ nowadays when the vast majority of people sell *chametz*.] Magen Avraham (443:5) writes that if the guardian neglected to

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CHOMETZ SALE

Due to health considerations I cannot make it to the Rav to sell my *chametz*.

Q: Is it acceptable to arrange for the sale of my *chametz* by phone or is it necessary to appear personally to execute the *kinyan*?

A: First, it is imperative to note that the Rav does not purchase anyone's *chametz* (even though there was such a practice). Nowadays, the Rav is empowered to act as an agent to sell others' *chametz*. A *kinyan* or even witnesses are not necessary to appoint an agent. Merely indicating that one wishes for someone to act as his agent is sufficient (C.M. 182:1). [Even if the principal erroneously thinks that he is selling his *chametz* to the Rav, one may assume that the sale performed by the Rav on his behalf is valid. This is based on the principle of *zachin l'adam shelo b'fanav* — one may act for the benefit of another, even without his consent (*Be'er Yitzchak* 1; *Sdei Chemed*, *Chametz U'matzah* 9:2). This is especially true in our case where the person indicated his intent to sell his *chametz* (see *Magen Avraham* 436:11).] Consequently, it is acceptable to empower a Rav as one's agent by phone. Once appointed, the Rav will perform all of the proprietary acts on behalf of the principal. However, as we will explain, there are a number of reasons why one should make an effort to sign a power of attorney to formally appoint a Rav as his agent.

1. One advantage to signing a power of attorney is that it demonstrates the intent (*gemiras daas*) of the principal. This is also the reason why a *kinyan* is made, and there are many instances when a *kinyan* is made in order to be certain that the party has full intent and knows that what is happening has halachic basis (Rambam, *Mechirah* 5:13). This is especially true regarding the sale of *chametz*, which, according to many opinions, involves subterfuge: *haaramah* (*Maharsham* 2:223 based on *Ritva*, *Kesubos* 56a).



STORY LINE

sell the *chametz* and had to burn it, he is liable, because even an unpaid guardian is expected to take basic measures to protect the entrusted item.

"However, most authorities disagree and maintain that even a paid guardian is not liable for the loss of the *chametz*," continued Rabbi Dayan. "The guardian was entrusted to safeguard the *chametz* for the owner, not to sell it. The obligation to sell the *chametz* and prevent its loss is rooted in *hashavas aveidah*. One who sees a lost item and neglects to return it is not liable, unless he picked it up and thereby became responsible for it. (*Gra, C.M.* 348:23; *Ketzos* 61:21; *Mishnah Berurah* 443:12).

"Is there any moral obligation?" asked Aharon.

"Payment *lifnim mishuras hadin* (beyond the letter of the law) is mentioned regarding a highly respected person who finds a lost item that is beneath his dignity to retrieve," answered Rabbi Dayan. "He is not obligated to tend to it, but one of the *Amora'im* compensated the owner *lifnim mishuras hadin*. However, he may have paid to relieve himself of any responsibility whatsoever to retrieve the item. It remains unclear, though, whether one who neglected to tend to a lost item as required and it got ruined has a moral obligation afterward; the *Ketzos* and other *Acharonim* indicate that there would be some moral obligation" (see Rama, *C.M.* 2663:3; *Pischei Choshen, Aveidah* 1:3[8]; *Pischei Teshuvah, C.M.* 28:4).



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2. Formally giving the Rav power of attorney also demonstrates to the gentile who is purchasing the *chametz* that the participants take the transaction seriously, and also gives it greater validity from a legal secular perspective.

3. Many details related to the sale are spelled out in the power-of-attorney document, which would otherwise not be mentioned or discussed. For example, people discuss "selling their *chametz*" but do not also include in their related conversations the fact that it is necessary to lease the place where the *chametz* is located, which is an essential prerequisite for the sale for several reasons (*Divrei Malkiel* 4:22[11]).

4. One of the means by which ownership of the *chametz* is conveyed is with a contract. There are authorities who maintain that an agent may not sign this contract on behalf of the principal since the *kinyan* is not evident in the wording of the contract (*Mekor Chaim* 448:9; Rav Akiva Eiger, *C.M.* 191:1). When the Rav includes the signed power-of-attorney document together with the contract, there are authorities who maintain that this is effective to make a valid *kinyan* with a contract (*Reishis Bikkurim* 5; see also *Davar Lamishpat* 3).

5. One of the *kinyanim* utilized to sell *chametz* is called *adaysa* (acquisition by admission) in which the seller admits that the *chametz* belongs to the gentile. According to some, this is the most effective *kinyan* used to sell *chametz* (*Ketzos* 194:3). However, in order for this *kinyan* to be effective, the buyer must have written proof (i.e., an admission) or witness testimony that there was an admission, and this would be lacking without a signed power of attorney (*Mishkan Shalom* 42).

For these reasons one should make an effort to sign a power of attorney, but in a difficult circumstance, it is sufficient to appoint the Rav as his agent by telephone (see *Chut Shoni Ribbis*, p. 217).

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MONEY MATTERS

PARTNERSHIP # 28

Joint Repairs

(Adapted by Rabbi Meir Orlan from the writings of Harav Chaim Kohn, shlita)

Q: I own a semi-attached house. Work needs to be done on the roof, but the other owner does not want to invest in the repair. It is not technically feasible to do only half the roof. Must he share in the repair?

A: Partners have a responsibility toward one another for necessary expenditures that can only be done together. Thus, if the repair is necessary, the other partner has to participate. However if it is only for enhancement, he can refuse, in accordance with the common practice (*Rama, C.M.* 178:3).

Even if the two owners are not actual partners, the joint need that can only be solved together forms a mutual obligation, similar to townspeople regarding taxes, or members of a building for joint needs of the building (*Nesivos* 164:1; 178:3).

Similarly, if there is a problem with the plumbing or electricity that affects all, each owner can force the other to share in the cost (*C.M.* 163:6; 170:1; *Pischei Choshen, Shutfim* 2:23).

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