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Restoring the Primacy of Choshen Mishpat

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STORY LINE

by Rabbi Meir Orlan

Halacha Writer for the Business Halacha Institute

The Flip Side

Benjy Braun was learning Parshas Matos with his father.

"This parsha contains a fascinating story about the tribes of Gad and Reuven," said Mr. Braun. "It emphasizes Am Yisrael's responsibility for each other, and especially for those in the Land of Israel."

Benjy read about the tribes of Gad and Reuven, who asked to settle the eastern bank of the Jordan River. Moshe consented to their request only on condition that they first cross the Jordan with their brethren and help complete the conquest of Canaan. He then instructed Elazar, Yehoshua, and the tribal leaders:

"If the children of Gad and the children of Reuven will cross the Jordan with you... give them the land of Gilad as a heritage. But if they do not cross over, armed, with you, then they will settle with you in the land

of Canaan (Bamidbar 32:29-30)."

"Why was it necessary for Moshe to explicitly state the flip side of the condition?" Benjy asked. "Isn't it obvious that if they don't fulfill the condition, they don't get the Transjordan?"

Benjy's father looked in Rashi, but couldn't find an explanation. "That's a tough question," he finally acknowledged. "Let's ask Rabbi Tzedek on Shabbos."

On Shabbos, they approached Rabbi Tzedek.

"Benjy had a question on Parshas Mattos," Mr. Braun said.

Rabbi Tzedek looked at Benjy fondly. "What was your question?" he said.

"Why did Moshe have to state both sides of the stipulation with Gad and Reuven?" Benjy asked. "Isn't the flip side obvious?"

"Perhaps, but the Gemara (Kiddushin 61a;

Gittin 75a-b) derives from these verses important principles about the proper formulation of legal stipulations," answered Rabbi Tzedek. "These are referred to in halacha as 'the stipulation of bnei Gad and bnei Reuven.' For this reason, the Torah was very specific in its wording of Moshe's stipulation."

"Oh," said Mr. Braun. "I wasn't aware that there was a specific formulation."

"Yes, a stipulation must be formulated with four elements to be legally binding," explained Rabbi Tzedek. "Otherwise the stipulation is invalid and the transaction is upheld as if there were no stipulation (E.H. 38:2).

"The first, and most obvious from the verse, is the need to spell out both sides of the stipulation (tenai kaful)," continued Rabbi Tzedek. "That is, if the condition is ful-

continued on back

Convincing the Cabbie

Submitted by M. O. T.

I hired a car service to drive me around for four hours at a cost of \$200. After three hours, when I instructed the driver to take me to the airport, he refused to continue and quit the job.

There was no way I could arrange another ride to catch my flight, but I sensed that if I offered him an additional \$50 he would agree to continue.

Q: Would it have been permissible to promise to pay him that additional amount - and when we reached the airport, pay him only the original agreed-upon amount?

A: It would depend on whether you originally informed the driver the description of his task so that he knew that if he were to terminate the job before its completion, it would cause you a loss. Based on a pas-

suk (Vayikra 25:55), halacha rules that a salaried worker may resign even in the middle of a job (C.M. 333:3). However, this privilege does not apply if the employer would thereby suffer a financial loss (davar ha'avud). In such a case, the employer is permitted to promise the employee additional money to complete the job, and then, upon completion of the job, pay him only the original agreed-upon salary (C.M. 333:5).

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filled, the transaction will carry through; if the condition is not fulfilled, the transaction is nullified. This is parallel to the case of bnei Gad and Reuven, in which Moshe spelled out that if they would go forth in battle, they would be granted the eastern bank of the Jordan; if not, they would be settled on the western side."

"What is the second criterion?" asked Mr. Braun.

"The order of these two clauses: the positive side of the condition must be stated first, and then the negative (hen kodem l'lav)," replied Rabbi Tzedek. "In this case: 'If they will cross....,' and afterwards, 'If they will not cross....' The stipulation should not be formulated in the opposite order: 'If they do not cross....; If they will cross....'"

"And the third criterion?" asked Benji.

"The conditional 'if' clause must precede the transaction statement, not the other way around (tenai kodem l'maaseh)," explained Rabbi Tzedek. "In this

case: 'If they will cross the Jordan, they will receive....,' and not: 'They will receive.... if they cross.'"

"And finally, the condition must be something possible to fulfill (davar she'efshar l'kayemo)," added Rabbi Tzedek. "In this case, it was possible for them to cross the Jordan and do battle. However, if a person stipulates a certain transaction if the person jumps to the moon, the stipulation is disregarded and the transaction is upheld."

"Does that mean," asked Mr. Braun, deep in thought, "that if I sold something on condition, but the precise formulation was not followed — the sale is binding without fulfillment of the condition!"

"This formulation is required for stipulations in marriage and divorce," explained Rabbi Tzedek. "There is extensive discussion whether this formulation is also needed in monetary law (C.M. 207:1)."

ly"H, we will continue this topic next week.

Accordingly, since you would suffer a loss if you were not to get to the airport on time, it is permitted for you to offer the driver additional money, and pay him only the original agreed-upon amount when you reach the airport.

However, there is an important stipulation to this halacha. The employee may not resign in the case of a davar ha'avud if he realizes at the time of employment that this would cause his employer a loss. An employee who was not informed that the job involves a potential davar ha'avud cannot be compelled to continue working against his will. Since that was never part of the agreement, he

may resign (Teshuvos V'shav Hakohen 13, cited in Pischei Teshuvah, C.M. 181:5; however, see Imrei Hatzvi, B.K. 116b).

Therefore, if you told the driver that the final stop would be the airport and he understood that the job involved a davar ha'avud, you may offer him additional money that you would not actually have to pay. However, if you simply hired him for four hours and did not inform him that quitting would entail a davar ha'avud, you would have to pay him the additional amount that you offered him to take you to the airport, since he would then have the right to quit.

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Shomrim: Guardians #21

MONEY MATTERS

Q: I accepted guardianship of an entrusted item together with someone else. How is the liability shared?

A: Two people who borrowed together are jointly responsible and mutual guarantors for each other. The same is true for two people who accepted guardianship together (C.M. 77:1). Therefore, if the guardians are liable, each

should pay half. If one is unable to pay his share, the other guardian remains liable as a guarantor for the full amount. He is entitled to collect half from the first guardian later, when the latter is able to pay.

[However, some authorities dispute this and maintain that guardians are not guarantors for each other; see Machaneh Ephraim, Shomrim #27; Pischei Choshen, Pikadon 1:16 (33).]

If only one party was negligent, he is liable for the full amount. If he is unable to pay, the second guardian still remains liable as a guarantor but is entitled to full reimbursement from the negligent party when he is able to pay (see Shach 77:1).

If one of the guardians transferred full responsibility to the other party, some maintain that the remaining guardian is liable alone (see Nesivos 77:1; P.C., ibid.).

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