BUSINESS WERDIGER EDITION WEEKLY
Restoring the primacy of choshen mishpat

Issue #259 | Bamidbor | Friday, May 22, 2015 | 4 Sivan 5775

UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

STORY LINE

By Rabbi Meir Orlian

ALREADY PAID

Aryeh needed a $2,000 short-term loan. "I'm happy to lend it to you," said Shlomo. "I'll draft a loan document for you to sign."

A few months later, Shlomo asked Aryeh to repay the loan.

"I already paid you," replied Aryeh.

"Are you sure?" asked Shlomo.

"Yes, absolutely positive," said Aryeh.

"I'm sure that you didn't pay," said Shlomo. "I remember that I considered asking you for the money a few times, but saw that your financial situation was still difficult. The fact that I'm holding the loan document proves that you still didn't pay."

"A few days before Pesach I brought you $2,000 cash," said Aryeh. "You were running out the door to take your child to the doctor, so I didn't bother taking the loan document back. I was supposed to pick it up later that evening, but wasn't able to, and then we were away for Pesach and afterwards I forgot about it."

"I remember taking my child to the hospital, but don't remember at all that you came by to pay," said Shlomo. "Let me consult with my lawyer."

Shlomo spoke with his lawyer, who said that a loan document signed by the borrower is fully enforceable, unless there is proof of payment."

"That may be the law," Aryeh argued. "But the question is: What would beis din rule in our case?"

"I don't know," replied Shlomo. "But I'm happy to take the case before beis din."

Shlomo summoned Aryeh to adjudicate before Rabbi Dayan's beis din. He presented the signed loan document and demanded payment. Aryeh stated his claim that he had already repaid the loan, but never took the loan document back. "Who is believed?" they asked.

"This halachah requires clarification," replied Rabbi Dayan. "The more formal the loan document, the less a claim of repayment would be believed without proof. A person who borrowed without a written loan document, even in the presence of witnesses, is believed with a heses (rabbinic) oath to say that he repaid," explained Rabbi Dayan. "However, if he borrowed with a loan document signed by witnesses, he is not believed. The lender can claim: 'Why am I holding your document?' if the loan was repaid" (C.M. 70:1; 82:2).

"Many Rishonim compare an IOU note signed by the borrower to a loan in the presence of witnesses," continued

DID YOU KNOW?

In times of cash flow difficulty, paying one's employees on time takes precedence over paying vendors' invoices.

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BHI HOTLINE

EMPTY MILK CRATES

I have seen Golden Flow milk crates in the street, in private yards and outside of community institutions.

Q: Am I obligated to return these to the company?

A: Dairy companies do not allow people to take their milk crates, since it is costly to replace them. Thus it would seem that the mitzvah of hashavas aveidah — returning lost objects — should be in force. Nevertheless, although it is prohibited to take the crates, the mitzvah of hashavas aveidah does not apply.

Golden Flow delivers their products in the morning, and at that time the delivery man takes back the empty crates. Therefore the agreement is that the merchant or organization leaves the empty crates where the order is to be delivered. Even though the place is not protected and many crates [in violation of Halachah] are taken, the practice continues because it is the most efficient system.

The company knows that by employing this practice some crates will be "moved" and "borrowed," yet individuals who find their crates are not obligated to return them. The precedent for this halachah is aveidah midaas — intentional abandonment. One is not responsible for items that the owner intentionally abandoned, like for example a wallet intentionally abandoned in the public domain by the owner. Although it is not considered hefker (ownerless) and the finder may not take it for himself, nevertheless, he is not obligated to return it to the owner (C.M. 261:4).

STORY LINE

Rabbi Dayan. "The borrower can claim that because an IOU note does not have the full legal status of a loan document signed by witnesses, he did not insist that it be returned. However, a small number of Rishonim maintain that the lender's argument, 'Why am I holding your document?' applies also to an IOU note."

"What does the Shulchan Aruch rule?" asked Aryeh.

"The Shulchan Aruch (C.M. 69:2) rules like the majority of the Rishonim, that the borrower is believed with an oath to say that he repaid, whereas the Rema cites the dissenting opinion and rules that the Dayan should do as he sees fit, based on the circumstances of the case," replied Rabbi Dayan. "However, the Shach (C.M. 69:8/14) sides with the Shulchan Aruch, that the borrower is believed, and concludes that this is the accepted practice. Nonetheless, he concedes that in special circumstances — where there is strong basis to believe that the borrower would not leave the paid IOU in the lender's hand — the Dayan should do as he sees fit."

"Later Acharonim write that the borrower is not believed that he paid an official 'Pay to the bearer' document," added Rabbi Dayan. "Since this document is enforceable in civil court and can easily be transferred to others, the borrower would certainly not pay and leave the document in the lender's hand" (Pischei Teshuvah 69:4; Nesivos 69:4).

"This rationale might be applied nowadays to a legally enforceable loan document signed by the borrower," concluded Rabbi Dayan. "Thus, the Rema's ruling that the Dayan should do as he sees fit would apply, even according to the Shach" (see Hayashar V'hatov, vol. IX, pp. 84-85).

MONEY MATTERS

Adapted from the writings of Harav Chaim Kohn, shlita

BEIS DIN AND CIVIL COURT #11

Ensuring Compliance With Beis Din

Q: What can I do to make sure that my opponent will comply with beis din's ruling?

A: Litigants can take legal measures to ensure that their opponent will fulfill beis din's ruling, especially nowadays when beis din's own ability to enforce its ruling is limited.

Therefore, each party can demand that the opponent sign an Agreement for Arbitration, to enable legal enforcement of beis din's ruling. Refusing to sign this is tantamount to refusing to adjudicate (Neos Desheh #51; Maharsham 3:165).

Furthermore, if there is imminent concern that the opponent will hide property, it is sometimes permissible to place seizure measures on property in civil court, even without permission from beis din. However, since this usually requires submitting a claim in civil court, you must summon the other party at the same time to beis din and notify him that you sued in civil court only in order to seize the property. (See Shach, C.M. 75:2; Aruch Hashulchan, C.M. 4:5; Rama MiPano #51.)

BHI HOTLINE

The mitzvah is in force only when the owner behaves responsibly with his possessions and it does not apply to intentionally abandoned possessions, even if the owner has a reasonable explanation for doing so (Ketzos 291:3).

There are authorities who contend that when the owner intentionally abandons something, it becomes truly hefker, and anyone can take it (Rema, C.M. 261:4). Accordingly, one could argue that anyone could take the milk crates. However, this applies only when the owner despairs of recovering his object because there is no expectation that a finder will return it. Items that were not abandoned completely but are susceptible to becoming lost (e.g., objects given to children to hold), although they are categorized as aveidah midaas and the finder is not obligated to return them (C.M. 188:2), nonetheless, they are not considered ownerless and a finder should not keep them for himself as they are partially protected (Nesivos 261:1).

Thus, you may not take a milk crate. A person who took one is obligated to return it to the owner, even though the owner subsequently despaired of retrieving it (see Nachalas David, B.K. 20b).

In general, stolen objects must be returned to the owner's domain; in this case, however, Golden Flow informed us that anyone who has taken one of their crates could and should return it to a location where they get retrieved. [In the event that one has a large number of crates, call the company directly to make arrangements for pickup.]

For questions on monetary matters,
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