

BUSINESS WEEKLY

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



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האה"ח מרת מאטיל לאה (Marta) בת הר"ר יוסף אלימלך הלוי שראן ע"ה



CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

LATE-PAYMENT PENALTY

"I'm sorry, but I'm going to be late with the rent this month," Mr. Braun notified his landlord.

"You know that there is a \$200 penalty when paying after the 10th of the month," replied Mr. Joshua, the landlord.

"I'll have to bite it," said Mr. Braun. "I simply don't have the funds available now."

Over the course of the year Mr. Braun was late in paying a number of times. At the end of the year, Mr. Joshua sent him a bill for all the late-payment penalties, which had accumulated to \$1,000.

The following day, Mr. Braun called. "I received the bill for the late-payment fees," he said. "I was speaking with someone who raised the issue of potential *ribbis*."

"What do you mean?" asked Mr. Joshua.

"Well, every month I owe you for the rent, and if I delay in paying I have to pay extra," explained Mr. Braun. "That's like interest; I pay you more than I owe because of the delayed payment."

"Sounds strange to me," said Mr. Joshua. "First of all, I didn't lend you anything. Second, I don't ask for extra payment if you pay on time; if you delay, that's your problem! Third, I've had many religious tenants before, and nobody made an issue about the late fee."

"Anyway, why do you wake up now, at the end of the year?" added Mr. Joshua. "If you want to be careful about *Halachah*, I heard that not paying rent on time is not allowed, and could be a violation of *bal talin* (withholding wages)..." (C.M. and Ketzos 339:1).

"I'll try to be careful in the future," said Mr. Braun, "but still would like to check the issue."

Mr. Joshua called Rabbi Dayan and asked:

"Is a late-payment penalty clause allowed in a rental contract?"

"The *Gemara* (B.M. 63b) refers to interest (*ribbis*) as '*agar natar*', compensation for waiting for the money to be returned," replied Rabbi Dayan. "Based on this, Rashba explains that if a person lends without interest but stipulates that if the money is not returned on time the borrower will have to pay a penalty, this is not actual *ribbis*, since there is no *agar natar*. If the borrower pays on time, he does not pay extra; even after the fine is imposed, he does not earn an extension in repaying, since the principal remains due immediately.

"Nonetheless, Rashba writes that this is

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

MISSING MOWER

Q: Reuven owns a lawnmower that he originally stored in his basement. A few months ago, Shimon began to rent an apartment in Reuven's house, which included a garage. At one point, Shimon borrowed Reuven's mower, and Reuven asked him to store it in the garage after he used it so they would not have to schlep it up and down the basement steps each time one of them wanted to use it. Shimon agreed.

A few weeks later, the lawnmower was stolen. Is Shimon required to compensate Reuven for the lawnmower?

A: We must first determine what Shimon's status was at the point the lawnmower was stolen. Was he considered a *sho'el* (borrower), in which case he was responsible even for *onsim* (circumstances beyond his control), or was he a *shomer sachar* (paid guardian), in which case he would be responsible for *geneivah v'aveidah* (theft and loss), but not *onsim*?

When someone borrows an object for a certain amount of time or a specific use, once the time has elapsed or he has finished using it, his status as a *sho'el* comes to an end, and he may not use that object anymore even if it is still in his possession. On the other hand, at that point he is also no longer responsible for damages on the level of a *sho'el*, so he is not liable for *onsim*. Rather, from the moment he finishes using the object, he becomes a *shomer sachar*, because the benefit he derived from using it is deemed a payment for his continued safeguarding of the object until it is back in the owner's possession (*Shulchan Aruch*, C.M. 340:8 and 343:1; see Issue #490).

In our case, Reuven asked Shimon to keep the lawnmower in his garage, and even if Shimon had returned it to Reuven, Reuven would have put it into the garage. Therefore, when Shimon placed it there himself, it was considered to have been returned to Reuven. Not only was he no longer a



CASE FILE

prohibited because of *haaramas ribbis*, conniving, since such a leniency could be exploited by the lender to gain a return on the loan, circumventing the prohibition of *ribbis*" (Y.D. 177:14).

"Therefore, if the lender wrongly stipulated such a fine, there is a dispute whether the borrower is required to pay it, since it is not actual interest. Certainly, *b'di'eved*, if the lender collected such a fine on a loan, he does not have to return it" (Y.D. 163:3).

"However, many limit this to a one-time late-payment penalty. If the penalty increases with time, many authorities consider this *ribbis gamur*, absolute *ribbis*, despite the fact that it is formulated as a 'penalty,' since then there is compensation proportional to the delay in time, so that there is *agar natar*" (Y.D. 177:16).

"All this is relates to a loan. Regarding other transactions, the Sages did not prohibit a (one-time) penalty. Therefore, the customer can stipulate that if the vendor does not provide the merchandise by a certain time, he will have to add extra merchandise. Conversely, the vendor can stipulate that if the customer does not pay on time, he will have to pay a (one-time) penalty" (Y.D. 177:18; *Bris Yehuda* 4:6-7).

"Rental payment is similar to purchases. The landlord can stipulate initially that if the rent is not paid by a certain date, there is a (one-time) penalty for that month."

"However, there is another factor to consider regarding penalties, that of *asmachta* (insincere obligation)," concluded Rabbi Dayan. "This can affect the practical ruling in our case. *B'e"H*, we will address this in the next issue."



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

APOTROPUS #7
(FINANCIAL GUARDIAN)
Appointment by Beis Din

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

Q: What is beis din's responsibility in appointing an apotropus for orphans?

A: *Beis din* is considered the "father of orphans" and is responsible to look after their welfare. Therefore, if the father did not appoint an *apotropus*, or if the orphans or inheritors are not present, *beis din* is required to appoint an *apotropus* to look after their assets until they mature or arrive (C.M. 290:1; *Responsa Maharam Lublin* #12).

The responsibility for appointing an *apotropus* is on the official *beis din* or rabbinate of the city, or on the generation's leaders. If *beis din* wants to oversee the assets directly, they can do so (C.M. 110:11; *Nachalas Shivah* #39).

Beis din is required to appoint an *apotropus* also for mentally incompetent people (C.M. 235:20; 290:27).

Many maintain that even if the father is alive, but known to squander the child's assets, *beis din* can appoint an *apotropus* for him (*Responsa Ritva* #162, cited by *Beis Yosef* 290; *Knesses Hagedolah*, *Hagahos Beis Yosef* 290:26).



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sho'el, he was not a *shomer sachar* either (*Mishpetei Hachoshen*, p. 468).

The question is what level of responsibility Shimon had to guard the lawnmower as a favor to Reuven. In an earlier issue (#447), we explained that not every person who agrees to have an object stored on his property is considered a *shomer*. A person becomes a *shomer* only if the owner of the object specifically asks him to guard it ("*shemor li*"), or at least makes it clear that he wants him to guard it, and he agrees by stating something to the effect of, "You can put it down *before me*." If he merely says, "Put it here," or "My house is open," the implication is that he is *not* accepting the role of guardian, but is merely allowing the owner to store it on his property (*Shulchan Aruch*, C.M. 291:2; *Taz*, C.M.).

If the owner, whom we'll call Levi, decided to place the object in that person's (Yehudah's) property with the understanding that Yehudah would not bear any responsibility for safeguarding the object, then even if Levi allows Yehudah to use the object whenever he wants to, that usage does not turn Yehudah into a *shomer*, and each time he finishes using it and returns it to its spot, he is absolved of responsibility for guarding it (see *Shach*, *ibid*. 6).

Furthermore, since Levi benefits from this relationship — because Yehudah is happy to store it on his property because he gets to use it — Yehudah is considered a *socher* (renter) of the object, not a *shoel* (see *Tumim* 72:19). Therefore, even if the object is damaged while Yehudah is using it, he is liable only for the object's theft or loss, but not for *onsim*. If it broke due to normal usage (*meisah machmas melachah*), he is definitely not obligated to pay (*Shulchan Aruch* 340:1), because he would be absolved of liability for such damage even if he were a *sho'el*.

If Levi did not allow Yehudah to use the object whenever he wanted, and Yehudah used it without permission, he is categorized as a *sho'el shelo midaas* (borrower without the owner's knowledge), which is akin to a *gazlan* (thief). He is then responsible for *onsim*, and even for damage caused during normal usage. Furthermore, according to most *poskim*, merely returning the object to its spot after this unauthorized use is not enough; he must inform Levi that he returned it (*ibid*. 292:1 with *Sma* 4 and *Shach* 1; *ibid*. 355:3 with *Sma* 6 and *Shach* 1).

In our case, however, since Shimon never became a *shomer*, but merely allowed Reuven to store the mower in the garage, if Shimon used the mower without permission and returned it to its spot, he does not have to notify Reuven that it is there for it to be considered returned (see *ibid*. 355:1).

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

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