

BUSINESS WEEKLY



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

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CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

DOUBLE DEBT Eli was undergoing financial difficulties. He reduced expenses to the bare minimum, but still could not make ends meet. His income was inconsistent and insufficient.

Eli approached his neighbor Reuven for a loan. "I'd like to borrow \$2,000 for half a year," he requested.

Reuven agreed and lent him the money.

Three months went by, and Eli needed money again. He turned to another neighbor, Shimon.

"Can I borrow \$2,000?" Eli asked.

"I can lend you," Shimon replied, "but I need the money back in three months."

At the end of the three months, Shimon asked Eli for repayment of the loan. Eli realized that the most he could pay in the near future was \$2,000; he was unable to cover both loans now due.

"I have only \$2,000 that I can possibly pay," Eli said to Shimon. "Unfortunately, I also owe someone else, who actually lent me before you. I need to save money for him."

"That you owe other people is your issue," replied Shimon. "I lent you money, and my loan is due! If you have \$2,000 in your pocket to cover my loan, I expect you to pay me fully without delay!"

"That would not be fair to the other person, though, whose loan is also due," said Eli. "You asked me first for payment, but he lent me first."

"If he didn't ask yet, that's his prerogative!" insisted Shimon. "If you don't repay me the full amount now, I don't know when I'll see the remainder."

"For all I know, he may call tomorrow asking for the money," replied Eli. "I could pay you the full amount, but I'm not sure whether I'm allowed to, if it means that I won't have money left for the first lender. I need to consult on this."

Eli called Rabbi Dayan and asked:

"Do I have to set aside money for the first creditor?"

"If a person owes two people and does not have enough money for both," Rabbi Dayan replied, "if one loan is already due and the other not, the creditor whose loan is not yet due cannot restrain the borrower from paying the one that is due, even if he lent first (*Pischei Choshen, Halvaah* 4:31; *Taz* 104:1).

If both loans are due, and both creditors demand payment – Sma and most authorities

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

THE ENGINE THAT COULDN'T

Q: With air travel crippled this summer, my friend asked to borrow my 30-year-old 15-passenger van to travel around the country with his family, and I agreed.

Upon his return three weeks later, my friend handed me receipts from various mechanics who worked on the van after it broke down several times.

We both agree that the malfunctions were due to the vintage of the van, not negligence on my friend's part. But at no time during the trip did he apprise me of the situation; he simply paid for the repairs and now wants me to split the costs. My counterargument is that he knew the car was old and would likely need repairs during his trip. "The minute I gave you the keys," I said, "the car was yours to use until you returned it to me, so you are responsible for all repairs during that period."

We will remain friends regardless of the outcome, but we are both curious what Business Halacha has to say about this matter.

A. Since a *sho'el* (borrower) is required to pay for any damages – even those caused by *onsim* (unforeseen circumstances) – had the car been damaged due to anything unrelated to mechanics, the borrower would have been required to pay for the repairs (see *Mishpetei Hachoshen* 344:13, differing from *Pischei Choshen, Pikadon*, ch. 8, fn. 49). In this case, however, since the vehicle broke down in the course of normal usage of a vehicle (*machmas melachah*), the borrower is not liable (*Choshen Mishpat* 340:1).

At the same time, the owner wasn't required to repair the van or replace it with a working vehicle.

In order to fully understand this *halachah*, we must differentiate between something that is rented and something that is borrowed. In certain rental situations, the owner is required to repair



CASE FILE

rule that the first lender does not have priority regarding moveable items and cash, so they should divide the available money. There is a dispute whether it is divided equally or proportionately to the loans (*C.M.* 104:10; *Sma* 104:1,9,26; *Knesses Hagedolah, Hagahos HaTur* 104:38; *Pischei Choshen, Halvaah* 4:32-34).

If both are due but only one demanded payment meanwhile, *Beis Yosef* and *Ketzos* write that the borrower should pay him the full amount; others maintain that the money should be divided as if both creditors were before us; others differentiate that if the first lender demanded payment, he receives the full amount, whereas if the second lender demanded, he receives only his share (*Shach* 104:6; *Ketzos* 104:2; *Aruch Hashulchan* 104:1).

Regardless, once a creditor collected, whether the first or second - we do not remove from him what he received. Even if the other creditor subsequently grabbed from him, that other creditor must return what he took (*C.M.* 104:3; *Shach* 104:10; *P.C.* 4:35).

Moreover, since cash (and certainly a bank transfer) is not specifically identifiable, even if the first lender stipulated a halachic lien (*shi'abud agav karka*) on movable items, he cannot extract the money from a later lender who collected before him (*C.M.* 104:5).

"Thus, since meanwhile only Shimon demanded repayment," concluded Rabbi Dayan, "you can pay him the full amount like the first opinion."

Verdict: A person who owes two creditors and only has enough money to pay one, some say to pay the one whose loan comes due first or who demanded first, even though he will not be able to pay the other. If both are due and demanded payment, the money should be divided, even though one lent before the other. However, if one collected, he remains with the money.



MONEY MATTERS

APOTROPUS #22

FIDUCIARY GUARDIAN

Based on writings of Harav Chaim Kohn, shlita

**Forsaken Property
(Netushim)**

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

Q: What is *beis din's* responsibility toward forsaken property?

A: *Beis din* generally does not appoint an *apotropus* for adults, but when a person is taken captive or has to flee and forsakes his assets (*netushim*), *beis din* should look after them (*B.M.* 39a).

If someone is willing to serve as *apotropus* and manage the assets on behalf of the owner, that is best. Otherwise, *beis din* should entrust movable property to a reliable person; real estate that needs to be worked, such as fields, should be given to immediate relatives to work as sharecroppers; real estate that is easy to manage, such as rental property, *beis din* should appoint someone to collect the rent and hand it to him to hold for the owner (*C.M.* 285:2).

If the assets were originally entrusted to someone by the owner, or held by a partner, the *poskim* discuss whether *beis din* should remove them from him; they should do as they see fit (*Knesses Hagedolah, Hagahos HaTur* 285:1).



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the rented item, or the renter is allowed to deduct the price of the repairs from the rental payment.

For instance, if someone offers to lease a house or a donkey, without specifying which house or which donkey, if the house collapses or the donkey dies, he must supply the renter with a replacement (*Choshen Mishpat* 312:17; 310:1). If, on the other hand, the owner specified which house he is renting out, he is not required to provide a replacement, because when he says that he is renting *this* house, the implication is that he is renting it "as is" (*Sma* 312:30). In the case of a donkey that is specifically identified as being up for rent, the renter is permitted to sell the carcass of the donkey and use the proceeds to purchase another donkey. If the sale price does not cover a replacement donkey, he can use the proceeds to rent one for the remaining days due to him under the rental agreement, because he has a lien on the donkey for the entire rental period (*Choshen Mishpat* 310:2).

In the case of a rented house, however, the renter is not allowed to sell the house in order to purchase or rent another. The difference between the cases is that when a donkey dies, it is an accepted norm to sell the carcass, whereas the rubble of a collapsed house is generally not sold (*Sma* 312:30).

Applying these *halachos* to vehicles, had someone agreed to rent a vehicle without specifying which one, the owner would be required to supply another one if the first one breaks down. If the owner specified which vehicle he was supplying, whether or not the renter can sell it in order to supply a replacement would depend on whether it's considered normal to sell a vehicle that breaks down in order to buy another. Since that is not the norm when the required repairs are minor, typical automobile repairs, the renter would not be allowed to sell the vehicle, and the *poskim* debate whether the owner is obligated to repair it for him (see *Choshen Mishpat* 312:17 and 314:1, with *Ketzos* 1).

But this is only true for a rental, in which the rental payment activates a lien on the donkey - or, in our case, the vehicle - for the entire rental period.

When an item is borrowed, however, the owner does not guarantee the item's usability; he merely allows the borrower to use the object as long as it is alive or in working order. If it breaks or dies, the borrowing period terminates immediately (*Choshen Mishpat* 244:2; see *Pischei Choshen, Pikadon*, ch. 9, fn. 7 and *Mishpetei Hachoshen* 341:6, fn. 14 regarding whether the borrower is allowed to repair it in order to continue using it).

If the borrower decided of his own accord to fix it (see Business Weekly issue #285), when the borrower returns it to the owner, if the owner benefited from those repairs, he is required to pay for that benefit (as we see from the precedent of *yoreid l'sdei chaveiro* [*Nesivos* 341:15 and see *Aruch Hashulchan* 13]).

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

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