

BUSINESS WEEKLY



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

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CASE FILE

Rabbi Meir Orlian
Writer for the Business Halacha Institute

לע"נ הרב אהרן בן הרב גדליהו ע"ה

STOLEN ENVELOPE

After almost two years of travel restrictions, Mr. Shapiro finally had the opportunity to fly to Israel. His neighbor, Mr. Braun had a son who lived there. "I hear that you're flying to Israel tomorrow night,"

Mr. Braun said.

"Indeed!" exclaimed Mr. Shapiro. "I used to fly yearly, but haven't been there for over two years because of COVID. My daughter had a baby ten months ago, and we haven't seen him yet!"

"That is exciting!" acknowledged Mr. Braun. "I also have a son there. I'm actually looking for someone to take money for him."

"How much?" asked Mr. Shapiro. "There are certain legal limits."

"\$1,000," replied Mr. Braun. "There's no problem with it."

"Then I'm happy to take the money," said Mr. Shapiro. "Put it in an envelope with your son's name and phone number. I'll contact him when I arrive."

The following day, Mr. Braun brought over the envelope. "Thank you," he said. "Have a safe flight!"

Mr. Shapiro packed the envelope in his hand luggage. "This way it will be safe with us," he said to his wife.

When Mr. Shapiro boarded, he put the hand luggage in the overhead compartment. He checked that the envelope with the money was there.

After the meal, the cabin lights were shut and Mr. Shapiro got ready to sleep. "Zman Krias Shema comes and goes very quickly when flying in this direction," he said to his wife. "I'll get the few hours of shut-eye that I can."

After three hours of sleep, Mr. Shapiro got up for *davening*. He opened his hand luggage to take out his *tallis* and *tefillin* but did not see the envelope. "That's strange," he said to himself.

After *davening*, Mr. Shapiro took down the hand luggage and went through it carefully. The envelope with the money was missing!

"Someone must have stolen it while we were sleeping," said Mrs. Shapiro.

Mr. Shapiro mentioned the missing envelope to one of the stewards. "We can't do much other than file a report in case someone turns it in," he replied.

When Mr. Shapiro arrived in Israel, he called Rabbi Dayan and asked:

"Am I liable for the stolen envelope?"

"The *Mishnah* (B.M. 42a) teaches that a guardian



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

GOWN GONE!

Q: I rented a gown for my daughter's wedding, and after the *chasunah*, the gown disappeared. I went to the shop to pay for the lost gown, but was surprised when the proprietor told me that I owe her not only the price of the gown, but also the rental fee for the days I had rented it.

Is she correct?

A. The *halachos* governing a *socher* (renter) are the same of those governing a *shomer sachar* (paid guardian). Namely, a renter is liable for theft or loss of a rented object, unless the loss or theft was caused by an *oness* (unpreventable circumstance) (*Shulchan Aruch*, C.M. 307:1).

This does not mean that you must pay the full value of a brand-new gown to replace the one that went missing; rather, you are required to pay only the value of the used gown that went missing.

Regarding whether you are required to pay for the days of the rental, it depends on the terms you agreed to at the time of the rental.

Some *poskim* (based on *Shach* 309:1; see *Ketzos* ibid. 1) rule that you are not obligated to pay for the rental period on top of the value of the gown unless it was specifically stipulated at the time of the rental that you would have to do so.

A majority of *poskim* disagree, writing that only if the agreement stipulated that you would have to pay the replacement value of the gown at the time of the rental (not at the time it was lost), then you are not required to pay for the time of the rental. [In the case of expensive, delicate gowns, the value depreciates considerably after each use.] In absence of such a stipulation you are only required to pay for the value at the time it was lost, and you would therefore be required to pay for the rental period.

There are two approaches to explain the difference between the two cases.

DID YOU KNOW?
Marketing an item under false pretense can cause the subsequent sale to be invalid.

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CASE FILE

who was entrusted with money, but slung it in a bag over his back, is considered negligent and liable," replied Rabbi Dayan. "The *Gemara* explains that money needs to be guarded carefully; the guardian should hold it in his hand or tie it in front of him, so that he can watch it" (C.M. 291:20).

"Even so, the principle is that entrusted items must be guarded in the normal manner for such items, in accordance with the time and place" (C.M. 291:18).

"Thus, although *Halachah* requires the guardian to hold money in front of him, nowadays the common practice of almost everyone is to put one's wallet in the back pocket, not the front pocket. Therefore, this is also acceptable, despite the possibility of pickpockets.

"However, placing cash in luggage is not acceptable, even hand luggage kept in an overhead bin. You should have kept the envelope in your pocket or tucked the handbag under your feet.

Similarly, it is common for women to hold cash in their pocketbook. This is acceptable, but – following the *Gemara* and common practice – it must be kept in sight. Leaving the pocketbook unattended would constitute negligence.

"Even if the guardian also left his own money in the luggage, or a woman risked leaving her pocketbook unattended on her seat or table, this does not exempt them from their responsibility as guardians. A person can take risks with his own money, but not with other people's money" (C.M. 291:14).

"Thus," concluded Rabbi Dayan, "leaving money in hand luggage out of sight, especially when sleeping during the flight, is considered negligence and you are liable."

Verdict: Money must be held securely or kept in sight. Otherwise, the guardian is considered negligent and liable.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS Mechilah (Forgoing) #1 Introduction

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

Q: Someone owes me money. I said that I forgo the debt, but we didn't make any kinyan. Is my statement halachically binding?

A: There is a fundamental difference between *mechilah* (forgoing) and a transaction. A transaction entails transfer of ownership: something is sold or given as a gift, and changes ownership from the seller to the buyer or from the giver to the recipient. A transaction requires an act of acquisition (*kinyan*) to confirm it (C.M. 189:1).

On the other hand, *mechilah* relates to forgoing and waiving of rights. A creditor has rights to collect from the borrower and a worker has rights to collect wages from his employer. If the creditor or worker forgoes his rights – he releases the other party from that obligation.

Mechilah is valid with words alone and there is no need for a *kinyan*, since there is no transaction or change of ownership; the borrower or employer simply remains with his money (C.M. 12:8; 241:2).

B'e"H, in the coming months, we will address the laws of *mechilah*.



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The *Nesivos* (309:1) writes that if you agreed to pay the value of the item at the time you rented it, we view it, retroactively, as though you bought the item at the time. Since you were using your own gown, you are not required to pay the rental fee. But if you are only obligated to pay for the value at the time it went missing, then you were using a gown owned by the shop, and you must pay for that use.

The *Beis Ephraim* (C.M. 45-46) writes that, since in truth you should not be obligated to pay for the value at the time of rental, if not for the stipulation requiring you to do so. We assume that you agreed to that stipulation only on condition that that would be the sum total of what you could owe, and you would not have agreed to that stipulation had you known that you would have to pay for the rental period as well. In absence of such a stipulation at the time of the rental, you are only obligated to pay the value at the time of the loss, in which case you must pay for the rental period as well.

The question is what the *halachah* would be if the rental agreement stipulated that if you fail to return the gown, you must pay the price of a new one. Is that compared to the case where there was a stipulation that you pay the value at the time of the rental – in which case you don't have to pay for the rental period?

The resolution of this case seems to depend on the different explanations cited for the *halachah* above.

According to the *Nesivos*, the gown is considered retroactively to have been sold from the time of the rental. Therefore, if you agree to pay the price of a new gown, it's not considered a retroactive sale, but a separate stipulation you agreed to, so you must pay for the rental fee.

But according to the *Beis Ephraim*, the above assumption applies here as well – you certainly would never have agreed to pay for a new gown *and* for the rental period.

[We must note that, as discussed in Issues 404-406, if you agreed to pay for the value of the gown from the time of the rental *and* for the rental period, many *poskim* would consider this *ribbis* (see *Yoreh De'ah* 176:4).

If, however, you agreed to pay for a new gown as a penalty for losing the old one, or because it would be difficult to determine the value of the used gown, it is permissible to pay for the rental period as well (*Toras Ribbis* 13, fn. 35; *Nesivos Shalom* 176:4, 12). But the agreement must be set up with a *kinyan* to formalize it (*Chiddushei Rabbi Akiva Eiger* 291:27), and the correct terminology must be used to avoid the issue of *asmachta* (*Pischei Choshen, Pikadon* 88, fn. 51).]

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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