

BUSINESS WEEKLY



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

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לע"נ הרב יחיאל מיכל בן ר' משה אהרן אורליאן



CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

REUSED IOU

Levi needed to borrow \$1,000 from his neighbor Moshe. "I'm fine lending you," said Moshe, "but I'd like an IOU from you."
"Certainly," replied Levi. "I wouldn't consider borrowing without documentation."

"I've had situations that people claimed they repaid even though I held the IOU," said Moshe. "Please add that so long as I hold the IOU, you are not believed that you paid without proof."

"I'll do that," said Levi. "That's called *ne'emanus* – granting credibility to the lender."

Levi gave Moshe the requested IOU and received the money.

Two months later, Levi repaid Moshe, who returned the IOU to him. Levi stuffed it into his jacket pocket.

The following day, Levi received an unexpected bill for \$1,000. He turned again to Moshe. "I'm sorry," Levi apologized. "I thought I was finally clear, but I need to borrow the \$1,000 again; I received an unexpected bill."

"No problem," said Moshe. "Just prepare another IOU like last time."

"I actually still have the previous one," said Levi. "I'll just give it back to you."

"It's a new loan," said Moshe. "Don't you think you should write a new IOU? Anyway, that IOU has the old date. We should have one with the current date."

"What difference does it make?" said Levi. "The main point of the IOU is to show that I haven't paid yet, so long as you hold it."

"Nonetheless, that IOU was repaid," insisted Moshe. "As any other legal document, how can I collect with it a second time?"

Levi called Rabbi Dayan and asked:

"Can I reuse an IOU for a second loan?"

"The *Gemara* (B.M. 17a) teaches that a loan document that was repaid should not be reused for another loan, even the same day," replied Rabbi Dayan. "This is because the inherent testimony is not for the second loan" (C.M. 48:1).

"There is a dispute between the *Acharonim*, however, whether this applies also to an IOU that grants the lender *ne'emanus* – credibility that the loan was not repaid" (see C.M. 69:2).

"Sma (48:1), citing the *Levush*, rules that an IOU can be reused, since it does not contain testimony and does not impose a lien to enable collecting from sold properties



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

PAYMENT FOR NEGLIGENCE?

Q: I was about to leave for a vacation with my family, when I decided that I didn't feel comfortable leaving all my wife's jewelry at home unattended. I took it to my neighbor, and asked if he would be willing to safeguard the jewelry, and I would pay him \$50 for his trouble.

He agreed, and pointed to a shelf near his front door. "Put it on that shelf," he said. "Later, when I get a chance, I'll hide it in a secure place."

When I returned from vacation, I went to pick up the jewelry, and was shocked to find that it was still on that shelf near the front door.

"I thought you were going to move it to a safe place," I exclaimed.

"I'm really sorry," he said. "It slipped my mind entirely. But *baruch Hashem*, nothing happened to it."

Am I required to pay him for "safeguarding" the jewelry?

A: Rav Akiva Eiger (Chiddushei Rabbi Akiva Eiger Hashaleim, end of Maseches Shavuos) deliberated about this she'eilah (see also *Yad Eliyahu* [Ragolar], Psakim 114).

It is obvious that your neighbor was obligated to safeguard the jewelry. In describing how carefully a *shomer* must guard the object deposited with him, the *Gemara* (B.M. 93b) quotes Yaakov Avinu's description of the lengths he went to, to guard Lavan's sheep — suffering from scorching heat during the day and freezing temperatures at night to ensure the safety of the sheep.

The question is, however, what a *shomer sachar* (paid guardian) is being paid for, and why is he responsible for *geneivah v'aveidah* (theft and loss)? There are two possible reasons a *shomer sachar* is paid, with different halachic ramifications:

1. Since a *shomer sachar* is being paid to guard the object, he is obligated to secure it, to prevent theft and loss. If he failed to do so, he is liable for theft or loss. This means that the primary

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CASE FILE

(*meshu'abadim*), but merely serves as proof of debt by virtue of its being in the lender's hand. Nonetheless, Sma requires that the second loan be on the same day, since otherwise the lender may unjustly claim precedence to other creditors who lent before the second loan" (C.M. 104:13).

"Bach and Taz (48:1), however, maintain that even an IOU cannot be reused, since it was not written with intention for the second loan, so it is void as a document and the borrower can claim that he repaid. Ketzos (48:3) similarly maintains that there is no inherent difference between the witnesses' signature and the borrower's; it also becomes void upon repaying.

"Shach (48:2) rules like the Levush and Sma. He differentiates: Since the signature of witnesses on a loan document becomes void upon repayment, no inherent testimony remains about the second loan, whereas when the borrower resubmits an IOU to the lender, he obligates himself again, as if signing anew.

"Moreover, Shach maintains that an IOU can be reused even at a later date. He considers the date of an IOU irrelevant vis-à-vis other creditors, regardless, since the borrower can write any date that he wants, unless the loan was granted in the presence of witnesses who can attest to the date. Thus, the IOU merely prevents the borrower from claiming repayment. Conversely, if the IOU was handed over in the presence of witnesses, it becomes like a loan document with witnesses, and cannot be reused. Aruch Hashulchan (48:2) follows the Shach.

"Thus," concluded Rabbi Dayan, "in this case, according to the Shach you can reuse the IOU, but other *Acharonim* would require a new one" (*Pischei Choshen, Shtaros* 3:31[87]).

Verdict: An IOU can be reused according to many *poskim*, but with certain limitations.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS

Dayanim (Judges) #30

Location (Exceptions)

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

Q: Are there exceptional cases, in which the defendant is required to go to the locale of the plaintiff?

A: If one litigant is highly influential in his city – e.g., he is a strongman, community leader, very wealthy, or a great Torah scholar – so that there is reasonable concern that *beis din* in his locale might be deferential to him or that the other litigant will be afraid to claim properly, the other litigant can insist to adjudicate elsewhere, even in a lesser *beis din* (*Rema, C.M.* 14:1; *Pischei Teshuvah* 14:5).

Furthermore, a defendant's son is obligated to go to his father's locale, and similarly a disciple to his *Rebbi's* locale. The *Acharonim* discuss a dispute between a husband and wife (*Rema, Y.D.* 240:8; *Pischei Teshuvah, C.M.* 14:4; *C.M.* 1:5).

If a contract stipulates that any dispute will be resolved in a certain place (and certainly, in *beis din* there), it is binding. If a loan document stipulates that payment should be made in a certain place, the *Acharonim* dispute whether this includes adjudication before *beis din* there (*Maharsham* 3:213; *Minchas Elazar* 2:2).



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purpose of the payment is to ensure that the *shomer* will guard the object. Therefore, if he neglected it, he is not entitled to payment, even if no harm ensued.

2. A *shomer sachar* is paid because he accepted responsibility for theft and loss. (This is akin to buying an insurance policy for an object so the owner can recoup the value of the object if it is lost or stolen.) According to this approach, even if the *shomer* does not secure the object properly, he is entitled to payment, because he committed to reimburse the owner had it been lost or stolen.

Another difference between these approaches would be applicable if the object was stolen, and the *shomer sachar* must now pay for it. Is he entitled to deduct the amount he was supposed to be paid from the price of the object? According to the first approach, he is not, because the purpose of the payment was to ensure that he would guard it properly, and he didn't. According to the second approach, he is entitled to deduct his payment because he is reimbursing the owner, as per the agreement.

The *Ketzos Hachoshen* (227:11) sides with the first approach, ruling that the *shomer sachar* is required to compensate the owner for the object he did not secure properly, and he is not entitled to payment. He cites proof from a Gemara (*B.M.* 58a, codified in *Shulchan Aruch, C.M.* 301:1) that states that although certain items — property, contracts, slaves, and *hekdesh* — are excluded from the *halachos* of *shomrim*, if a *shomer sachar* is unwilling to swear that he guarded them properly, he is not entitled to payment. Clearly, concludes the *Ketzos*, a *shomer sachar's* payment is contingent upon his safeguarding the object.

This proof can be refuted, however. In such cases, since the *shomer* is not liable if the object is lost or stolen, the purpose of the payment can *only* be for the actual safeguarding of the object. In ordinary cases, in which the *shomer* is liable for loss and theft, it is possible that the payment is primarily for acceptance of liability, and the *shomer* might therefore be entitled to deduct his payment from the amount he must pay for the loss or theft (*Rav Akiva Eiger, Ksav V'Chosem* 14; *Cheshkek Shlomo, B.M.* 58a; *Chazon Ish, B.K.* 7:18; see *Me'iri, B.M.* 83a).

The *Mishnah Berurah* (306:18) writes that if a *shomer* was negligent in guarding the object one day, the owner may dock his payment for that day (see also *Shu"t Pnei Meivin, O.C.* 160).

Chedvasa d'Shmaatsa (41) writes that even if the payment is for the *shemirah*, if the *shomer* did not guard the item but it was not lost or stolen, the *shomer* is entitled to payment, because it was his *mazel* that prevented it from being stolen; Heaven decided to spare him from having to compensate the owner (see *B.K.* 116a, and what we wrote in BHI issue #464; see *C.M.* 334:2).

Since this subject is the matter of debate, if you haven't paid your neighbor yet, you are not obligated to pay him, but if you did pay, you may not demand the money back.

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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