

# 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

## ORLAH PARTNERSHIP

We are celebrating Tu BiShvat, the New Year for trees. This date is primarily significant for mitzvos ha'teluyos ba'Aretz (agricultural mitzvos) as they relate to trees — such as orlah, neta revai, terumos and maasros, and shemittah — when the halachic year begins regarding the fruit. It is also an opportunity to reflect on our connection with the land,

particularly the Land of Israel.

...

Jonathan had a passion for trees, especially fruit trees! He decided to become a commercial orchardist, and established a partnership with a non-Jewish acquaintance.

Tu BiShvat was particularly meaningful for Jonathan. He held a lavish Tu BiShvat *seder*, in which his family ate many kinds of fruit, sharing *divrei Torah* and songs.

He also attended a *shiur* by Rabbi Dayan in honor of Tu BiShvat.

"The *Mishnah* (*Kiddushin* 36b) states that agricultural *mitzvos* generally apply only in the Land of Israel," explained Rabbi Dayan. "Nonetheless, the concluding *Mishnah* in *Maseches Orlah* (3:9) teaches that the prohibition of *orlah* (fruit of the first three years) applies even outside of Israel as a *halachah l'Moshe miSinai* (oral tradition). Furthermore, it applies even to trees of a non-Jew. Fruit that is questionable *orlah* is prohibited in Israel, but permitted outside of Israel (Y.D. 294:8-9)."

Jonathan pondered; they had planted trees two years ago. Due to technological advances, the trees could already produce marketable fruit. "What do I do about these fruits?" he wondered.

Jonathan knew which trees were *orlah*, so the leniency of questionable *orlah* outside of Israel was not applicable, but his partner would not forgo these fruits!

He approached Rabbi Dayan after the *shiur* and said, "I own *orlah* trees in partnership with a non-Jew."

**"What should I do with the *orlah* fruit?"**

"*Orlah* is prohibited not only to eat, but even to benefit from," replied Rabbi Dayan (Y.D. 294:1).

"When a Jew and a non-Jew are partners in *orlah* trees, the non-Jew may take his share, but the Jew may not benefit from the fruit. Moreover, he may not tell the non-Jew to take all the *orlah* fruit or their proceeds, because giving a gift is also a form of benefit. However, if the non-Jew takes the *orlah* of his own accord, it is permitted (*Rambam Hil. Ma'achalos Asuros* 8:16; *Mishpetei*

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### Weekly Wednesday Shiur

On subjects and principles of  
Choshen Mishpat

By: Harav **Chaim Kohn** Shlita  
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לע"נ ר' שלמה ב"ר ברוך וזוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

## STOLEN CELLPHONE

**Q:** My friend called me and asked if I had an extra cellphone he could borrow for his brother, who was visiting Eretz Yisrael (where I live) for a few days. I told him

that I actually do have an expensive cellphone, with an active account, that is not in use.

I was in a rush to leave the house to attend a wedding, so we agreed that I would leave the phone and charger in a bag on the outside handle of the front door to my apartment. His brother would pick it up from there. I asked him if he agreed to this plan, and he affirmed that he did.

When I returned from the wedding late that night, the bag was gone.

A week later, I called my friend to ask when he was planning to return the phone, because he had told me that his brother was visiting for only "a few days." He told me that he never took the phone, because they arranged for a different phone for his brother. He also said that he tried to call the same night we had originally spoken, to inform me of the change in plan, but I apparently had no cellphone reception at the wedding. He then forgot to update me. Is my friend obligated to replace the stolen phone?

**A:** There are two sets of *halachos* relevant to this question: those of *shomrim* (guardians), which include a *sho'el* (borrower); and those of *areivim* (guarantors).

The *Rishonim* debate whether a *sho'el* (borrower) of an object becomes liable for it if he never made a *kinyan* (acquisitional act) on it, but the owner released control of it at the *sho'el's* behest. The *Rosh* (cited in *Shulchan Aruch C. M. 340:4*) says he does become liable, and the *Rambam* (cited in *ibid.*) says that he does not.

The *Poskim* discuss whether this dispute applies to a case in which a borrower asked the owner of the cow he was borrowing to send it to him by hitting it with a stick so that it would start to walk on its own. The *Shach* (*ibid.* 340:10) says that the same dispute applies, but the



## CASE FILE

Eretz Orlah 11:3:[8]).

"Similarly, the Jew may not have the non-Jew take this year's *orlah* fruit, and, in exchange, take his share from non-*orlah* trees, or from the following year's crop, because he would be trading the *orlah* fruit with others, and thereby benefitting from them (Y.D. 294:13).

"However, the Jew may sell the trees to the non-Jew vis-à-vis the fruit for the *orlah* years for a set sum before the fruit grow, because the fruit that grow subsequently will belong to the non-Jew.

"Alternatively, they can stipulate when initially forming the partnership that the non-Jew take the fruit the first three years and to the Jew in later years. This would be similar to the arrangements in *hilchos Shabbos*, that partners may stipulate initially that the non-Jew will take the proceeds of Shabbos, and the Jew of Sunday. However, they may not reckon the amount of fruit that grew each year and divide accordingly, because this is considered as trading the *orlah* fruit (O.C. 245:1).

"Moreover, some allow the partners to arrange, even after the partnership is established, that the non-Jew tend to the trees alone the first years and take the fruit, and the Jew tend to them in the following years and take the fruit," concluded Rabbi Dayan. "This differs from Shabbos, because on Shabbos the work itself is prohibited, whereas there is no prohibition to work the trees during the *orlah* years, only to benefit from the fruit, and it is common that the person who works the trees receives the fruit (*Rema* 294:13, *Mishpetei Eretz, Orlah* 11:2)."

**Verdict: A Jew who is a partner with a non-Jew in *orlah* trees, should either: sell the trees vis-à-vis their fruit for these years; arrange initially that the non-Jew take the fruit for the first years; or let the non-Jew take the fruit or their proceeds of his own accord.**



## MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

## MONEY MATTERS Minhag Hamedinah

Common Commercial Practice #4  
Self-Adopted Communal Practices

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

### Q: When can self-adopted communal practices, which are not based on any regulation, become minhag hamedinah?

A: Even communal practices that are not based on any regulation, but rather people adopted these practices and act accordingly, have halachic sanction, with two provisions:

1) Most of the people there act that way, whether because most of them came from a place where everyone acted that way, or because most of the people act that way of their own accord (C.M. 218:21; *Rema* 331:1). Presumably, this requires a predominant majority of the people, so that it became an accepted practice in that place. Moreover, some write that so long as it is commonly known that a minority acts otherwise, the person in possession can claim that he is from the minority (*Rambam, Hil. Ishus* 23:12; E.H. 66:1; *Nachal Yitzchak* 61:5:4).

2) The practice was implemented often and is a common occurrence, so that clearly it is an accepted practice there (*Rema* 331:1, 163:3; *Gra* 163:57).



## BHI HOTLINE

*Nesivos* (ibid. 340:12; cf. *Nesiv Binah* 3) writes that in such a case, even the *Rosh* would agree that the *sho'el* is not liable for the cow if it never reached him. He explains that the *Rosh* holds the borrower liable when the owner relinquishes possession of it only if the *sho'el* can guard it immediately. If the *sho'el* is not present when the owner relinquishes possession, however, even the *Rosh* would agree that he does not become liable.

Accordingly, your friend is not liable for the phone as a *shomer*, because he can rely on the *Rambam* and the *Nesivos* to absolve himself of payment, because he never made a *kinyan* on the phone.

The remaining question is whether your friend became an *areiv* (guarantor) on the phone. A prototype *areiv* instructs a lender to lend money to a third party and to rely on him to repay it if the borrower cannot do so. The same applies to any situation where someone releases money at another person's behest and that person guarantees that it will be returned to him. Accordingly, by instructing you to put the phone in a place where it could easily be stolen, your friend became an *areiv*.

It is possible, however, that because the phone never really left your possession — it was still on your property; you simply placed it in a spot where it wasn't guarded properly — it is not subject to the *halachos* of *areiv* (see *Bava Metzia* 99a with *Ritva* regarding sending an object to a borrower with an *eved Canaani*).

Ultimately, he is not liable as an *areiv*. The *Rishonim* discuss a case in which Reuven instructed Shimon to throw money into the sea, and he would repay him. The *Ramban* (*Kiddushin* 8a, cited in *Rema* 380:1) says that Reuven must repay Shimon, because Shimon did release money at Reuven's behest, making Reuven an *areiv*. The *Rashba* (*Kiddushin* 8b, also cited in *Rema* ibid.) argues that a person becomes an *areiv* only if the money he instructed the other person to relinquish brings some benefit to another person.

According to the *Rashba*, in the case of your phone, because the *sho'el* did not derive any benefit from the object he wanted to borrow, the person who instructed him to relinquish control of it is not an *areiv* (*Nesivos* 340:12; see however *Avnei Choshen* ibid.).

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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