

# 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

## BORROWED TEFILLIN

"Would you like to go on an overnight trip tomorrow?" Levi asked his friend, Yehuda. "You can help your family get ready for Pesach the rest of the week."

"I'm game," replied Yehuda. "When should we leave?"

"I suggest that we *daven vasikin* and leave right afterwards," answered Levi. "Then we'll have the whole day. Pack everything tonight."

"Agreed!" replied Levi.

Levi later remembered that he gave his *tefillin* that morning to the *sofer* to be fixed. The *sofer* planned to return them the following morning at the 8:30 *minyan*.

"I arranged to go camping with Yehuda early tomorrow, but my *tefillin* are being fixed," Levi said to his brother, Danny. "Can I borrow yours for the trip, and you'll get mine from the *sofer* at 8:30?"

"That's fine," replied Danny, "but please be careful with them on the trip!"

"Of course," said Levi. "I have a special cannister for camping that protects the *tefillin*."

The following day, Levi and Yehuda set out early and hiked until evening. They were getting ready to sleep, when Yehuda exclaimed: "I can't believe it! I forgot my *tefillin*! Can I use yours tomorrow?"

"If they were mine, I'd be happy to let you," replied Levi. "However, mine were being fixed, so I borrowed my brother's. I'll ask him."

Levi called Danny, but got no answer. "My family goes to sleep early," Levi said to Yehuda. "Danny is going to *daven* at 8:30, so he'll first wake up at 8."

"That's too late," said Yehuda. "The shul nearby has *minyanim* only at 6:30 and 7:30. Since you borrowed the *tefillin*, can't you authorize me to use them?"

"Danny lent them to me," said Levi, "but I don't know about you."

"It's late, but Rabbi Dayan is still up," Yehuda said. "We can ask him."

Levi called, and, after apologizing about the late hour, asked:

**"Can I let Yehuda use my brother's *tefillin*?"**

"The *Gemara* (Gittin 29a; B.M. 29b) teaches that a person who

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## BHI HOTLINE

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

## FREE FOR ALL?

**Q.** A *bachur* in my yeshivah typed up and printed a *kuntres* (pamphlet) that included some *divrei Torah*. After editing the

initial manuscript, he wrapped up the old version and placed it in the *genizah* pile in yeshivah. I have asked him, several times, for permission to make copies of the *kuntres*, and he refused. Now that it's sitting in the *genizah*, am I permitted to take it without his knowledge?

**A.** If someone abandons an object in a place where he knows that it will likely get lost, that is called *aveidah midaas*, and the Torah does not obligate the finder to return it (Shulchan Aruch, *Choshen Mishpat* 261:4). Some say that the finder may even take the object for himself, just as he would be permitted to take an item that is *hefker* (ownerless; Tur, cited in Rema *ibid.* and Shach 3).

Others maintain that while the finder is not obligated to return it, he may not take it for himself (Rambam, cited by the Mechaber, *ibid.*).

Some *Poskim* differentiate based on the circumstances. If it is obvious from the owner's actions that he is *mafkir* (relinquishes ownership of) the object, then the finder may take it. (Although generally the owner must declare that he is *mafkir* his object in order for it to become *hefker* [*Choshen Mishpat* 273:3], in this case, his actions alone are enough.) For instance, if after someone threshes his wheat in a field, he takes most of the grain with him and leaves a little behind, since it is obvious that he no longer plans to take what remains, it is *hefker* and anyone may take it (*ibid.* 260:7).

If, however, the owner's actions do not make it obvious that he plans to be *mafkir* the item, but merely show that he doesn't care if it gets lost or damaged, then the item is not *hefker*.

According to this approach, if someone throws an object into a garbage that is going to be carted away, it is clear that it is *hefker*, because the owner knows that someone who finds it there won't bother to locate the owner (Shach *ibid.*; Machaneh Ephraim, *Hilchos Zechiyah m'He'fker* 6; Nesivos 261:1; cf. Sma 260:54).

It would seem, thus far, that the *kuntres* placed in *genizah* should be *hefker*, and you should therefore be allowed to take it.



## CASE FILE

borrow something may not lend it to others without the owner's permission," replied Rabbi Dayan. "This applies even to a *sefer Torah*, despite the *mitzvah* involved" (C.M. 342:1).

"Accordingly, *Mekor Chaim* (Harav Yair Bachrach, author of *Chavos Yair*) (O.C. 14:4) rules that a person who borrowed someone's *tallis* or *tefillin* may not lend them to others without permission (*Pis'chei Choshen*, *Geneivah* 6:6[16]).

"However, elsewhere the *Gemara* (*Pesachim* 4b) teaches that people generally are pleased to have *mitzvos* done with their property.

"Therefore, although borrowing without permission is usually considered tantamount to theft, the Shulchan Aruch and classic *Acharonim* allow a person to use another's *tallis* and *tefillin* without permission, with certain limitations – i.e., he uses them only occasionally, does not move them from their current location, and refolds them properly – since presumably the owner would be pleased to have the *tallis* and *tefillin* used for the *mitzvah*, unless it is known that he does not allow it (C.M. 359:5; O.C. 14:4; 649:5; *Mishnah Berurah* 14:13, 25:53).

"A *sefer Torah* is different, since it is more valuable and more easily ruined, and therefore cannot be used without permission, as mentioned (M.B. 14:16; Shach 72:8).

"Seemingly, *Mekor Chaim* prohibited lending borrowed *tefillin* to others only in a manner inconsistent with these limitations, or since the author himself was hesitant to allow using *tefillin* without permission.

"Therefore, with the aforementioned limitations, Yehuda can use the *tefillin* tomorrow according to the classic ruling, since even if Danny hadn't lent them to you, Yehuda could borrow them for occasional use without permission.

"Nonetheless, some contemporary *Poskim* discourage using other people's *tallis* and *tefillin* without permission," concluded Rabbi Dayan, "since nowadays, people are more particular about them than in the past, unless you are confident that the owner would not mind (Aruch Hashulchan 14:11; Tzitz Eliezer 12:7; *Piskei Teshuvos* 14:9)."

**Verdict: A person who borrows *tefillin* is not authorized to lend them to others, but classic *Poskim* allow using *tefillin* even without permission occasionally, in their location, and when rewrapping them properly. However, some contemporary *Poskim* discourage this, unless you are confident that the owner would not mind.**



## MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

## MONEY MATTERS

Minhag Hamedinah  
Common Commercial Practice #15  
Laws of Neighbors

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

**Q. I operate certain machinery in my property, but my neighbor claims that it causes him damage. Can he restrain me from operating it?**

A: Shulchan Aruch (C.M. 153-155) details the laws of neighbors, distancing of potential damage and what constitutes a *chazakah* – presumed or established right, based on the *Gemara* and *Rishonim*.

However, Aruch Hashulchan (153:4) writes that if there is a common practice in the city regarding these *chazakos*, we follow the common practice. Therefore, the *Dayan* must also know the common practice regarding distancing of potential damage between neighbors.

Nonetheless, Aruch Hashulchan distinguishes between *chazakos* based on presumed *mechilah*, where we follow the common practice, and *chazakos* that require an accompanying claim of purchased rights, where the common practice is not applicable, since the litigant claims that he purchased these specific rights (see *Pis'chei Choshen*, *Nezikin* 15:1[2]).

Nowadays, many of the common practices between neighbors are based on civil laws that are followed, which are binding as *minhag hamedinah* (*ibid.*).



## BHI HOTLINE

There is a question, however, from a *Gemara* (*Bava Kamma* 26b, according to Rashi's interpretation) that teaches that if someone threw his own object off a roof, and another person smashed it with a stick on its way down, the second person is not obligated to pay for destroying it, because "he broke a broken vessel"; since the object was clearly going to break when it hit the ground, we consider it broken even before he hit it with the stick, and he is therefore not liable for destroying it.

The Rosh (*Bava Kamma* 2:16) wonders why we need to resort to this logic to exempt him from payment. Based on the above halachic principles, we can deem the owner's lobbing it off the roof an act of *aveidah midaas*, which should have made it permissible for the second person to catch it and take it for himself. In that case, he certainly shouldn't be liable for breaking it, so why invoke the rationale of "he broke a broken vessel"?

Some *Poskim* infer from this *Gemara* that when a person throws something away, but he has a specific purpose for doing so, it does *not* become *hefker*. For instance, if someone threw an object in anger, his intention is to break it and soothe his wrath. He does *not* want someone to rescue that object and use it, because his anger will not abate if it does not break. It therefore does not become *hefker*, and if a person then smashes it midflight, the only reason to exempt him from liability is that "he broke a broken vessel" (see *Machaneh Ephraim* loc. cit.; Shu"t Beis HaLevi 1:24; Dvar Avraham, note to 1:15; *Ulam Hamishpat* 261:4).

According to the aforementioned Rosh, however, it is *hefker*.

Another example is if a greengrocer throws out old produce. He does not want anyone to take it, because then they will not buy fresh produce.

Returning to your question, since the person who wrote the *kuntres* does not want you to take it, but he wants it to be buried with the *genizah*, he was not *mafkir* it, and therefore, according to some *Poskim*, you may not take it (*Dinei Mishpat* pg. 401).

Additionally, you might violate the *cherem* (edict of excommunication) instituted by Rabbeinu Gershom against reading another person's private documents or correspondence (see *Yoreh Dei'ah* 364 in *Be'er Hagolah*). If, however, you want to read that *kuntres* to publicize the *divrei Torah* that he wrote, it might not be prohibited (see *Sema* 292:45 and Shach 35).

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