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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

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

FOUND GEMSTONE

David and Sapir had just gotten married and were celebrating their Shabbos *sheva brachos*. After *davening* on Friday evening, the family gathered in the shul *simchah* hall for the Shabbos *seudah*.

As David walked to the table, one of his young nephews, Michael, still in his stroller, asked for challah.

"We haven't made *Kiddush* yet," David laughed.

"Challah, challah," Michael chanted.

"The tables are set so nicely," Michael's father said. "I don't want to remove a challah roll before people sit down."

"There's a box with extra challah over there," David replied, pointing to the corner of the room. "I'll get Michael a challah roll."

David put his hand in the box to take out a roll, but felt something small and hard at the bottom of the box. He looked inside and saw a small gemstone.

"Wow! How did that get in the box?" David exclaimed.

"The stone must have fallen from someone's ring," his *kallah*, Sapir, answered.

"Where are the challos from?" David asked the caterer.

"They're from Yiddishe Bakery down the block," replied the caterer. "Why do you ask?"

"I just found a gemstone in the challah box," David answered.

"Lucky you!" said the caterer. "An unexpected wedding gift. I'm sure your *kallah* can find use for it."

"I don't know that we can keep the gemstone," replied David. "What about the *mitzvah* of *hashavas aveidah*, returning lost items?"

"We're fortunate to have Rabbi Dayan with us," David said to his *kallah*. "We can ask him!"

David approached Rabbi Dayan and asked:

"Am I allowed to keep the gemstone? What should I do with it?"

"The *Mishnah* (B.M. 26b) teaches that if someone buys a crate of fruit and finds loose, unidentifiable money in it, he can keep it," replied Rabbi Dayan.

"The *Gemara* (ibid.) explains that this applies when the seller bought from various farmers, so that there is no way to trace the ownership of the money, and we can presume *yei'ush* of the owner. However, if the person bought the fruit directly from a certain farmer, who packed the crate of fruit with his own household members, he must return the money to the farmer, since clearly it belongs to him or one of his household members (C.M. 262:17).

"Meiri (ibid.) notes, though, that if the farmer packed the fruit with workers who are not members of his household, the money can belong to any one of them, so that when the money is loose, without identifying features, we presume *yei'ush* (abandonment) of the owner.

WHOSE MORTGAGE?

Part I

Q. Reuven wants to buy a house, but he does not have enough credit to qualify for a mortgage. His relative,

Shimon, is willing to take out a mortgage and buy the property in his name, with Reuven making the monthly mortgage payments to the bank.

Does this pose a problem of *ribbis* (forbidden interest), and if it does, is there a way they can remedy this issue?

A. Since the bank presumably requires Shimon to be personally liable for the loan and responsible for making the mortgage payments, *Halachah* views this sort of deal as involving two distinct loans: one between the bank and Shimon, who is signing on the mortgage, and the other between Shimon and Reuven, who is the actual owner of the property. Reuven's guaranteeing to make the mortgage payments to the bank is considered as if he has borrowed the money from Shimon. Since Reuven's payments are more than the principal of the mortgage (i.e., the amount he "received" from Shimon), he is, in effect, paying back that loan with interest, which is forbidden even if he makes the mortgage payments directly to the bank (see *Bris Yehudah*, *Ikrei Dinnim* 21:10; *Mishnas Ribbis* 17:[10]).

There are two common ways to solve this problem.

The first and more common method is a *heter iska*. Although *heter iska* is a valid mechanism to avert issues of *ribbis*, many *Poskim* emphasize that a person relying on the *heter iska* must understand its basic principles (*Shelah*, *Chullin*, *Ner Mitzvah* 56; *Tzemach Tzedek*, Y.D. 88; *Igros Moshe*, Y.D. 2:62).

We will therefore refamiliarize ourselves as to how a *heter iska* works. The *heter iska* is based on the distinction between a loan and an investment. A Jew is not permitted to accept interest on a loan to a fellow Jew, but he is allowed to invest with him and reap the profits.

When someone borrows money, it is his to use as he pleases. Any profit he makes from investing it therefore belongs to him, and if he shares that profit with the lender in exchange for his waiting for repayment of the loan (*agar natar*), it is a violation of the prohibition of *ribbis*. Invested funds, on the other hand, belong to the investor, and the profits are therefore his.

What determines whether money was given as a loan or an investment?

Risk.

A loan must be repaid even if the investment the borrower made with it was a losing proposition, so the lender does not risk his capital by extending the loan. Invested funds, on the other hand, involve risk; there is no guarantee of profit or even that the investor will recoup his capital. The *heter iska* converts the loan into an investment by the lender/



CASE FILE

"Regardless, when the money is bundled in an identifiable manner, the buyer must announce it, like any other lost item with identifying features.

"Similarly, here, the box of challos was packed in the bakery, and the stone clearly came from one of the workers there. A gemstone can often be identified by the accompanying certificate, which indicates its weight and other features (C.M. 267:7).

"Since in Yiddishe Bakery, most of the workers are Jewish, and so are most of the customers, the requirement of *hashavas aveidah* applies, since the owner can reasonably expect that the stone might be returned.

"Therefore, you should notify the bakery about the stone, and see whether any of their workers claim that she lost a stone from her ring and can bring supporting documentation that this stone is hers (see *Pis'chei Choshen, Aveidah* 3:14[42]).

"Even so, it seems that you have found a gem that is truly yours," concluded Rabbi Dayan, "your sapphire – Sapir – is more valuable than any gem!"

With that, the family began singing *Eishes Chayil*, and proclaimed: "*Eishes Chayil mi yimtza, v'rachok mipninin michrah*" – she is far more precious than gemstones.

Verdict: A person who bought something and finds in the package an unidentifiable lost item is not required to return it to the seller, unless circumstances indicate that it is his. However, if the lost item is identifiable, the finder must announce it like any other lost item.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS

Ye'ush – Abandonment

#2

Biblical Source

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

Q: What is the Biblical source that after ye'ush there is no need to return lost items?

A: The *Rishonim* provide two sources for ye'ush.

First, the *Gemara* (B.M. 27a) derives from the mention of *simlaso* – clothing, in the context of *hashavas aveidah* (*Devarim* 22:3), that this *mitzvah* applies only to an item that the owner typically seeks, such as clothing that usually has identifying features, *simanim*. However, items that people do not seek, because they do not have identifying features, the finder can keep – since the owner abandons hope of retrieving them and has ye'ush (*Rambam, Hil. Gezeilah v'Aveidah* 14:1-3).

Second, the *Gemara* (B.M. 22b) derives from the phrase: "*asher tovad mimenu*" – that is lost from **him** (*ibid.*), that *hashavas aveidah* applies only when the item is lost to its current owner, but accessible to others. However, when the item is swept out to sea, etc., so that it is lost to everyone, whoever finds it later can keep it – since the owner is forced to abandon it and has ye'ush (*Rambam, ibid.*, 6:2).

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investor assuming risk.

But since the lender/investor wants to minimize the risk he is undertaking, he can do so by making several stipulations in the *heter iska*: First, if Reuven, the "managing partner" in the investment, claims that the investment lost value, it must be confirmed by two witnesses in accordance with *Halachah*. Second, if the managing partner (Reuven) claims that the anticipated profit was not realized, he is not trusted unless he takes an oath to that effect. He is then given the option to exempt himself from that oath if he agrees to pay an amount they agreed upon (which, in our case, is the interest paid to bank).

In most cases, it would be difficult for the recipient to prove with witnesses that there was a loss of capital, and if there was a profit, the managing partner may take an oath only if it did not reach the anticipated amount. Furthermore, even if the profits weren't realized, the manager will generally refrain from taking an oath.

A *heter iska* is usually structured as *palga milveh, palga pikadon*, meaning that half of the capital is a loan and the other half remains the investor's funds that he puts at risk. The investor keeps the profits generated by his capital (*pikadon*) and the managing partner profits from the funds he borrowed (*milveh*). But the manager/borrower must also be compensated for managing the investor's funds, because if he were to do so for free in consideration of the loan, that alone would constitute *ribbis*. That compensation can be just a dollar, if that is what was stipulated at the onset of the deal.

In other cases, the *heter iska* is structured as *kulo pikadon*, which means that the entire capital and profit belong to the investor. The manager agrees to be paid only if the profits exceed the investor's anticipated profits, which is whatever they specify in their agreement. *Kulo pikadon* is necessary when the investor demands a high return that cannot realistically be realized if it is only half *pikadon*. There are standardized *heter iska* documents available, but before filling out such a form, the parties should consult with Rav versed in the *halachos* of *ribbis*, because certain deals will require detailed solutions or specific wording in the document. In fact, it is best to draft an individualized *heter iska* for each deal.

In our case, Shimon will acquire an investment in Reuven's assets by providing the funds for the purchase, and it is stipulated that Reuven will be absolved from an oath if he will make the monthly payments to the bank. Reuven will receive a dollar compensation for managing the investment.

In the next issue, we will discuss the other mechanism that can be used to avoid the prohibition of ribbis in the case of such a loan.

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