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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

BROKEN FAN

"Can you please move the fan to the blue bedroom?" Mrs. Abrams asked her husband. "*Be"H,* guests will be sleeping there on Shabbos."

Mr. Abrams wriggled the plug out of the wall and moved the fan to the blue bedroom. He plugged the fan in, but it didn't go on. He tried another outlet, but it still didn't work.

"It seems that the fan died," Mr. Abrams told his wife. "It's not turning on. I'll buy a new one tomorrow."

"Please take the fan outside, then," Mrs. Abrams said. "Tomorrow is bulk pick up."

Mr. Abrams took the fan out to the curb. He met his neighbor, Mr. Green. "What are you doing with the fan?" Mr. Green asked.

"It stopped working," Mr. Abrams replied. "I'm leaving it for bulk pick-up."

"Can I have the fan?" asked Mr. Green. "I'd like the parts."

"Sure," said Mr. Abrams. "I have no use for it."

Mr. Green took the fan. He first tried changing the plug, and the fan came to life.

"The fan was fine," Mr. Green told Mr. Abrams the following day. "It just needed a new plug."

"Then I'd like the fan back," said Mr. Abrams. "I disposed of it because I thought the motor went; it was in error."

"Motor or plug, the fan was broken," said Mr. Green. "You didn't bother to check what the problem was. You were throwing out the fan, and let me have it. If I hadn't taken the fan, it would now be sitting in a garbage dump!"

"Obviously, I'll pay you for the repair," said Mr. Abrams, "but I think that you should return the fan."

The two approached Rabbi Dayan and asked:

"Does Mr. Green have to return the fan?"

"A sale or gift rooted in clear error is void," replied Rabbi Dayan (*C.M.* 66:34; 232:2; 253:5; *Sma* 126:46).

"Nonetheless, the *Gemara* (*Krisus* 24a) addresses the case of an ox that *beis din* sentenced to death based on witnesses who said that

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

PARTNER'S NEGLIGENCE PAYOUT

Q. My partner and I buy and sell merchandise. I heard about a great deal on some merchandise from which we could turn a hefty profit, but the manufacturer wanted $10,000 up front. I was unsure whether he was trustworthy, but the profit margin was so enticing that I sent him the money. As it turns out, my suspicions were confirmed; he disappeared with my money and never sent the merchandise.

Am I obligated to compensate my partner's portion of this investment because I was negligent in this matter? If yes, what if I investigated, to some extent, and it seemed that the manufacturer was honest? Am I still required to pay?

A. Obviously, if you and your partner stipulated, upon forming the partnership, how such damages would be settled, that agreement would be binding. Our discussion will address how this situation should be handled in the absence of such an agreement.

Generally, each partner in a business is required to treat the shared assets in accordance with local business practices. If one of the partners diverges from the local practice and causes a loss, he must absorb the entire loss himself, but if there is a profit, he must share it with his partner (*Shulchan Aruch, Choshen Mishpat* 176:10). For example, if the local practice is not to sell merchandise on credit, and one partner decides to extend credit to a customer who then defaults, that partner is obligated to repay his counterpart for his half of the loss; but if the customer does pay in full, he must split the profit with his partner.

The question is whether this obligation stems from the *halachos* of *shomer* (guardianship) or *hezek* (damages). Partners are *shomrei sachar* (paid guardians) for the shared assets, and since one was negligent in guarding his partner's share, he must compensate him for the loss (ibid. 176:8). Or is that partner's departure from local business practice akin to inflicting damage on his friend's portion (see *Shach* ibid.16)?

One practical difference between these two approaches would be in a case in which, according to *Hilchos Shomrim,* the negligent partner is not obligated to pay — e.g., a case of *be'alav imo* (as we will explain shortly). Is he still obligated to pay because he is a *mazik*? (Cf. *Pis'chei Teshuvah* ibid. 13 and *Mishpat Hamazik* 3:13.)

In the case of *be'alav imo*, the owner of an object was doing some sort of work for the *shomer* (guardian) when the latter took possession of that object to begin guarding it. The *halachah* in

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it gored someone, but the witnesses were afterwards debunked as *eidim zomemim*. Rabi Yochanan rules that whoever takes possession of the ox now acquires it, since the owner relinquished ownership of the ox when it was sentenced (*Hil. Nizkei Mammon* 11:13).

"Seemingly, the owner relinquished ownership of the ox in error, based on the false witnesses. Ketzos (142:1; 406:2) derives from this that *hefker* rooted in error is valid.

"Nesivos (142:3) and other *Acharonim* reject this, and maintain that *hefker* in error is also void.

"Some therefore explain Rabi Yochanan's ruling that the owner relinquished the ox is on account of *yei'ush*, since the owner expected it to be put to death out of his control, and *yei'ush* is valid even in error (*Nesivos* 262:3; Mishpat Shalom 194:2; *Maharam Shick Y.D.* #391). Others explain that the ox was not relinquished in error, since at that time the ruling was valid; the subsequent debunking of the witnesses is a new occurrence *(Aruch Hashulchan* 405:28; see also *Beis Yitzchak O.C.* #76:3-4).

"Hence, Harav Y. Zilberstein, *shlita*, writes in *Chashukei Chemed* (*Eruvin* 7a, ftnt. 1) that if someone disposed of a refrigerator and his neighbor took it, but it was only a faulty plug, he must return it, since it was a clear error.

"Here, too, seemingly, Mr. Abrams disposed of the fan in error; had he known that it was only the plug, he would have kept it.

"Perhaps we can distinguish, though, between a large item, such as a refrigerator, which a person clearly won't dispose of because of a faulty plug, and a small item, like a fan, which a person might not bother to fix," concluded Rabbi Dayan. "Similarly, we find that *Responsa Be'er Yitzchak* (*Y.D.* #23) rules that when a person assumed a certain *halachah* and didn't bother to check whether it was correct, he cannot claim an erroneous purchase that would void the sale."

Verdict: Many rule that *hefker* rooted in error is void, like other transactions. Nonetheless, where *yei'ush* is applicable, or where it was not in error at that moment, some rule that it is valid.

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
Yei'ush – Abandonment
#8
Would-Be Yei'ush

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

Q: When can I presume the owner's yei'ush and take for myself an item that does not have identifying features?

A: Regarding an item that does not have identifying features – *simanim* -- or that was lost in a predominantly gentile area, we presume the owner's *yei'ush* when he becomes aware of the loss, since he has no reasonable way of reclaiming the item (*C.M.* 262:3).

Therefore, if the item is large, heavy or valuable, so that the owner presumably became aware of the loss shortly afterwards – one who finds the item may keep it, since there already was *yei'ush* (*Sma* 262:8).

Otherwise, if the owner was not yet aware of the loss, so that he did not yet have *yei'ush* – even if he would have *yei'ush* had he been aware -- *yei'ush shelo midaas* – the person who found the item may not keep the item for himself, even after the owner subsequently becomes aware and has *yei'ush* (*Sma* 262:9; *Taz* 262:3).

Be"H, next week we will discuss what to do if it is questionable whether the owner was already aware.

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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such a case, as derived from a *gezeiras hakassuv* (scriptural decree; see *Shemos* 22:13-14), is that the *shomer* is not obligated to pay for damages to the object — even if he was negligent in guarding it (*Choshen Mishpat* 291:28 & 346:1).

Returning to the case we discussed above, some *poskim* rule that if the local custom is that *no one* sells on credit, then a partner who did so is considered a *mazik*, and is obligated to repay his partner's lost portion; he is not absolved because of *be'alav imo*. But if some local businesspeople do sell on credit, then, although the partner who did so acted improperly, since this is not the standard practice, he is not considered a *mazik*, only a *shomer* who was negligent (*Mishpat Shalom* 176:10).

Applying this principle to your case, we must consider whether you were obligated to investigate carefully to ensure that the seller was not a thief — a common phenomenon, for instance, with manufacturers from China. If the likelihood of your being conned was high, then you are considered a *mazik* for not taking steps to protect the shared assets from that possibility. But if other businesspeople would risk buying from such a seller and prepaying for the merchandise, then you are not a *mazik*; you are merely negligent in guarding the shared assets, so you can only be held responsible as a *shomer*.

If so, you would not be obligated to repay your partner even without the exemption of *be'alav imo*, because a *shomer* is responsible only if he was negligent in guarding something that has inherent value (*gufo mammon*). An item that doesn't have inherent value, but rather has the potential to be used to access money — a check, for example — is not subject to the *halachos* governing *shomrim* (*Choshen Mishpat* 301:1 & 66:40).

A bank account, too, is not *gufo mammon*, because the physical money belonging to the accountholders is not stored in a specific place for them; rather, the balance of the account represents the amount the bank owes the accountholder and must repay him upon request. The balance in a bank account is, therefore, not subject to the *halachos* of *shomrim* (see *Erech Shai* 66:40). Since you sent the money to the manufacturer from the company account, you are not obligated, according to the letter of law, to repay your partner.

Nevertheless, you should repay *latzeis yedei Shamayim* (to avoid Heavenly retribution; see *Imrei Binei, Hilchos Pesach* 5). Even in a case of *be'alav imo,* a *shomer* is obligated to pay *latzeis yedei Shamayim* if he was negligent in guarding the item placed in his care (see *Ohr Hachaim*, *Parashas Mishpatim* 22:14 and *Tal Torah, Bava Metzia* 97).