

BUSINESS WEEKLY

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



Issue #742 | Mishpatim | Feb 21, 2025 | 23 Shvat 5785

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 וזוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

DAYAN'S RELATIVE

We continue the episode from two issues ago...

Mr. Isaacs borrowed \$10,000 from Mr. Silver for a two-year period but claimed that he repaid it in the presence of witnesses. Mr. Silver denied having received payment.

One witness, Mr. Weiss, was disqualified, because he was the father-in-law of the guarantor, who is considered a relevant party of the loan.

"Do you have other witnesses?" Rabbi Dayan asked Mr. Isaacs.

"Yes, I have another witness," answered Mr. Isaacs. "He is not related to any of the involved parties."

"Who is the other witness?" asked Rabbi Dayan.

"His name is Mr. Weintraub," replied Mr. Isaacs.

Rabbi Tzedek, who was serving on the panel as one of the three *dayanim*, perked his ears. "What is Mr. Weintraub's first name?" he asked.

"Mr. Moshe Weintraub," replied Mr. Isaacs. "He is a well-known, trusted and reliable person."

"I'm afraid that might be a problem for me," said Rabbi Tzedek.

"What problem could that be?" asked Mr. Isaacs. "What's wrong with Mr. Weintraub?"

"Mr. Moshe Weintraub is my brother-in-law," replied Rabbi Tzedek. "He is my wife's brother; she was a Weintraub. We are related!"

"What difference does that make?" asked Mr. Isaacs. "You're not a relevant party to the case. Mr. Weintraub is not related to any of the relevant parties: lender, borrower or guarantor!"

"Nonetheless, since the witness is related to me, there may be a problem with my adjudicating this case," explained Rabbi Tzedek. "If he is a necessary witness, it might require a different *dayan* to serve on the panel."

Mr. Isaacs turned to Rabbi Dayan and asked:

"Can Mr. Weintraub testify with Rabbi Tzedek on the panel?"

"The *Gemara* (*Sanhedrin* 27b-28a) derives the disqualification of relatives as witnesses from the verse, *'Lo yum'su avos al banim'* (*Devarim* 24:16)," replied Rabbi Dayan. "It interprets the verse to mean that people should not be held liable on account of their relative's testimony."

"The *Yerushalmi* (*Sanhedrin* 3:9), cited by the *Rif* (8b) and *Rosh* (3:32), teaches that the witnesses also may not

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SUBSCRIBER DISCOUNT: RIBBIS ISSUE?

a *heter iska*.

Q: I noticed that a certain periodical notes that its subscription price, which represents a significant discount off the official cover price, is backed by

Why is a *heter iska* necessary, and why don't other periodicals state that they have a *heter iska*?

A: There are two possible *ribbis* issues with pricing structures that offer discounts for prepayment: one, the discount offered in exchange for advance payment. Two, the publisher's guarantee of the current price for the entire term of the subscription.

Generally speaking, a buyer may not prepay for merchandise in order to get a discount. Because he is not receiving the merchandise yet, the money he is prepaying is viewed as a loan to the seller. If the seller offers a discount in exchange for that loan, he is giving the buyer/lender more than the value of his loan, which is considered *ribbis* (*Shulchan Aruch, Yoreh Dei'ah* 173:7).

If the seller does not offer a discount but guarantees to supply the merchandise at the current market price even if the price goes up by the time he supplies it, that, too, is considered *ribbis* (see *ibid.* 175 for numerous details of this *halachah*).

Both of these cases are prohibited only *mid'Rabbanan* (Rabbinically ordained), because the money is not being given as a loan but as payment for a purchase (*derech mekach*); it is not *d'Oraysa* (Torah-level) *ribbis*. Therefore, Chazal limited this prohibition and permitted prepayment for something or to lock in a price if the seller already has such merchandise available, because we then consider the transaction as though the purchase was actually executed — not as a loan. This applies even if the seller later supplies different merchandise of the same variety — not the merchandise that he had on hand when he offered the discount and received the prepayment.

They also permitted guaranteeing a price if the market price has already been set and the buyer could buy it from others.

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CASE FILE

be relatives of the *Dayanim*, because then — if the witnesses were proven to be *eidim zomemim* (scheming false witnesses) — they would be punished partly on account of their relatives. *Rashba* (Responsum 2:156) rules that even post facto, their testimony is void.

"*Ran* (Kesuvos 12b) explains that although the *Bavli* seemingly rejects this logic — because punishment through *hazama* is considered something external — and bases the disqualification of witnesses who are relatives to each other on Scriptural derivation, it extends also to witnesses who are relatives of the *Dayanim*.

"*Mordechai* (*Sanhedrin* #695-696), as well, cites the *Yerushalmi* and explains that the testimony is disqualified as *eidus she'i ata yachol l'hazima* — that cannot be proven blatantly false, because the *Dayanim* will not accept *hazama* on their relatives. However, he cites also an opposing opinion that relatives of the *Dayanim* are valid witnesses, because their testimony can be debunked in another *beis din*. *Tosafos* (*Kesuvos* 21b; *B.K.* 90b) similarly maintains so.

"*Beis Yosef* (C.M. 33) cites the *Rif* and *Rosh*. *Darchoi Moshe* (ibid.) cites the *Mordechai* but notes that regarding monetary issues we do not require *eidus she'ata yachol l'hazima*.

"*Shulchan Aruch* (C.M. 33:17) rules simply that witnesses who are relatives to the *Dayanim* are disqualified, and *Rema* does not comment, seemingly accepting the *Shulchan Aruch's* ruling. *Sma* (33:26) notes that *Darchoi Moshe* cites opposing opinions and suggests that he did not comment, because many concur with *Shulchan Aruch's* ruling.

"*Tumim* (33:12) explains that although we do not require verification of details to enable *eidus she'ata yachol l'hazima* in monetary matters, it needs to be implementable should it occur, not so when the witnesses are relatives of the *Dayanim*. Alternatively, *Noda B'Yehuda* (vol I, E.H. #72) explains that we compare monetary cases to capital cases through "*mishpat echad*" (*Vayikra* 24:22) to disqualify relatives of the *Dayanim*.

"Despite *Shulchan Aruch's* ruling, *Gra* (33:35) references *Tosafos* who disagrees with the *Yerushalmi*. *Shach* (33:17) and *Urim* (33:26) cite the *Bach* (33:34) and others who conclude that the issue remains questionable, so that post facto perhaps the testimony should not be disregarded.

"Thus," concluded Rabbi Dayan, "Mr. Weintraub should not testify before Rabbi Tzedeck. Post facto it is questionable whether such testimony may be considered."

Verdict: Witnesses who are relatives to the *Dayanim* are disqualified. Post facto, it is questionable whether their testimony may be considered.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS

Ye'ush – Abandonment

#24

Aveidah Mida'as – Willful Loss (cont.)

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

Q: My neighbor is moving. He left many usable items on his lawn overnight unguarded, and other items at the curbside for collection. May I take those items?

A: We mentioned a dispute between the *Rambam* and *Tur* whether you may take for yourself *aveidah mida'as*, an item that the owner was knowingly disregarding with (C.M. 261:4). Nonetheless, when the owner clearly did not intend to make the item *hefker*, although he left it out carelessly, even *Tur* agrees that you may not take it for yourself. For example, someone who carelessly entrusts a young child with an item does not make it *hefker*. Therefore, if the child loses the item, although you are not obligated to make the effort to return it to the owner, you may not take it for yourself (*Taz* 261:4; *Ketzos* 261:1).

Thus, you may not take the items left out on the lawn. The same is true for delivered stock that was left outside a store before it opened. Conversely, many say that items left in a place destined for garbage collection are certainly *hefker*, because the owner intends that anyone can take them for himself so that even according to the *Rambam* you may take them (*Rema* C.M. 260:11; *Shach* 260:33; see *Nesivos* 261:1).

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But these two leniencies are irrelevant to a periodical, because the publisher can't possibly deliver the forthcoming issues at the time of the prepayment, so both *ribbis* issues (the discounted subscription price and the price guarantee) apply.

Some *poskim* therefore rule that such a discount may not be offered unless there is a *heter iska* to solve the issue of *ribbis* (*Shu"t Lehoros Nossan* 6:74, among others).

Others write that there is no *ribbis* issue, because the discount is not necessarily offered because of the "loan." The publisher might be offering the discount because it makes it easier and/or cheaper to process payment for the entire term of the subscription at once instead of charging for each issue separately. (This is essentially like the publisher offering a discount for wholesale instead of the newsstand price.) He might also offer a discount in order to secure the subscriber's commitment to keep purchasing the magazine for the entire term. Therefore, write these *poskim*, because offering subscriptions is a common practice related to other factors that are unrelated to any loan element, there is no *ribbis* issue (see *Bris Yehudah* 23, fn. 20).

Some *poskim* maintain that this *heter* works only for a discounted price but not for a guaranteed price. Since that leniency is predicated on the concept of a wholesale price being cheaper than a retail price, it does not explain why the seller would guarantee the current price for those who pay now even if the price goes up later, because he would not offer the current price to people who buy wholesale later (*Mishnas Ribbis* 9:30).

Some *poskim* therefore suggest that a person may purchase a subscription to take advantage of the offer, but if the price goes up later, he must pay the difference to avoid the *ribbis* issue.

Others write, however, that the publisher might still be offering the guaranteed price long-term not to procure a "loan" but to ensure that he has the customer's business for the entire term of the subscription, and if he does not guarantee the price, he has no way of getting people to commit to purchasing the periodical regularly (see *Chut Shani*, *Ribbis* 13:1; *Chelkas Binyanim* 173:99).

Some publishers apparently follow the stringent opinion that views subscription discounts as *ribbis*, and write that it is subject to a *heter iska*. But most publishers follow the lenient opinion that there is no issue of *ribbis*, which is why you have not seen it in other periodicals.



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