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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

Submitted by the Beis Hora'ah

WHOSE BEIS DIN

For three years, the Sorschers had enjoyed their furnished attic apartment, rented from Mr. Rubin. The cozy apartment had become home, and the rental arrangement had proceeded smoothly, other than a one-time incident of water damage from an open window. They paid on time and had a good relationship with Mr. Rubin.

Eventually, however, the Sorschers decided to move to another city.

Shortly after they vacated the apartment, Mr. Rubin entered to prepare it for the next tenants. He was disappointed to discover that some small appliances no longer worked properly and several pieces of furniture had sustained damage.

"The apartment was in good condition when they moved in," he said, inspecting the damage. "How did all this happen?"

Mr. Rubin contacted Mr. Sorscher and requested that they compensate him for the repairs and replacements.

"The faulty appliances you mentioned stopped working during normal use," Mr. Sorscher replied. "We simply bought new ones that we took with us. Any damage to the furniture is through normal wear-and-tear."

"It doesn't look that way to me," insisted Mr. Rubin. "I'd like the local *beis din* to hear the case and settle the matter."

"I'm certainly willing to have the case adjudicated in *beis din*," Mr. Sorscher said, "but I now live in another city. I shouldn't have to travel back just to explain to you why I don't have to pay. We can adjudicate in my local *beis din*."

Mr. Rubin was taken aback.

"But the apartment is here," he replied. "The rental agreement was made here, and the damage you're disputing occurred here. Why should I have to travel to your new city?"

Mr. Sorscher had an answer ready.

"There's a well-known rule in Choshen Mishpat," he argued. "The plaintiff follows the defendant! You're bringing the claim against me and want me to pay, so you should come to my city!"

"That may be the general rule," countered Mr. Rubin, "but we both lived here. Why should I have to travel? You chose to move!"

"So what?" replied Mr. Sorscher. "I live here now, and I'm the defendant."

Unable to resolve the question, the two approached Rabbi Dayan and asked:

"Where should the case be adjudicated?"

"Indeed, Rema rules that if the plaintiff and defendant live in different cities, generally the plaintiff must follow the defendant," replied Rabbi Dayan (C.M. 14:1).

"GR"A (14:18) explains simply that since the plaintiff is interested in pursuing the case, he must make the effort to go.

"Many explain, though, that – in principle – the borrower should follow the lender (based on Sanhedrin 31b), but later generations instituted that the plaintiff follow the defendant. This was to prevent people from frivolously suing a wealthy person from another town in the hope that he would settle to avoid having to travel. Furthermore, this would avoid arguments over whose *beis din* is greater, and the

HEIRLOOM HIERARCHY

Q. Yaakov owned two antique handwritten manuscripts from *gedolei Yisrael*. He summoned his two sons and offered the

older son to choose one, explaining that the other would go to his younger brother.

Ten years later, after Yaakov had already passed away, the older brother discovered that the manuscript he chose was forged and is worthless.

He now argues that he should have a share in the value of the younger brother's manuscript, since he received nothing of value in exchange.

Is this a valid claim?

A. This question seems to reference the halachah regarding brothers who split their father's estate, after which a creditor seizes a field that their father had pledged as security for a loan he did not repay before his passing. In such a case, we follow Rav's ruling (*Bava Basra* 107a) that their original division of the estate is void, and the brothers must redivide the remaining properties among themselves (*Shulchan Aruch, Choshen Mishpat* 175:4).

We further find that if brothers or partners split *metaltelin* (movable assets) they originally owned jointly, and one of them realizes that he was the victim of *ona'ah* (price exploitation) of more than a sixth (the minimum necessary to void a sale), or that the assets were incorrectly evaluated due to an error in weighing, measuring, or counting them, the split is void, and the assets must be redivided (*ibid.* 227:37). Each brother or partner is considered to have sold his portion of the jointly owned assets in exchange for the portion he received, so the rules of *ona'ah* and *mekach ta'us* apply as they would to any sale.

Applying these precedents to our case, it may seem that when the manuscript the older son selected was exposed as a forgery, the division should be considered a *mekach ta'us* (a mistaken transaction),

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CASE FILE

defendant's local *beis din* is likely more effective in forcing him to pay if found liable (*Knesses Hagedolah, Hagahos Hatur* 14:21).

Nonetheless, *Acharonim* rule that when both parties initially lived in the same city and conducted business there, and afterwards the defendant moved to a distant location, the dispute should be adjudicated in the city where they lived and conducted the business. In this case, the clear understanding between the parties is that any dispute will be settled there (*Maharashdam C.M.* #103).

Moreover, some maintain that when a business is based in a certain city, disputes regarding the business should be adjudicated there, even if the defendant did not initially live there. Here, also, the presumed intent is that disputes should be settled in the place of business. Furthermore, the necessary factual investigation and witnesses are likely located there (*Divrei Malkiel* 3:167).

Accordingly, when someone rented an apartment, and the tenant moved elsewhere, should a dispute arise, the tenant is required to return to the landlord's locale. In the case of a short-term rental, though, such as a summer home or weekend rental, where it is initially known that the renter will return to his hometown, it is questionable where the dispute should be adjudicated (*Seder Hadin, Derbermedikar* 2:24[56]).

"Thus," concluded Rabbi Dayan, "your case should be adjudicated in Mr. Rubin's locale."

Verdict: The general practice is that plaintiff follows the defendant. However, when the parties lived in the same city and conducted business there and the defendant moved, he must return to the plaintiff's locale.



MONEY MATTERS

MONEY MATTERS

Onaas Devarim, Falsehood
and Geneivas Daas #14

Geneivas Da'as

Based on writings of Harav Chaim Kohn, shlita

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

Q: What is the prohibition of *geneivas da'as*?

A: *Geneivas da'as* is misleading another through action or speech to mistakenly think that you gave him something, did him a favor or honored him; he will thereby feel indebted to you more than he should be.

This prohibition is similar to theft since you "steal" the other person's mind. For this reason, *geneivas da'as* of a gentile is also prohibited, just as theft of a gentile is prohibited (*C.M.* 228:6-9; 348:2).

Some Rishonim (*Sefer Yere'im* #124; *Ritva Chulin* 94a) include *geneivas da'as* in the Biblical prohibition of "You should not steal" (*Vayikra* 19:11), but others maintain that the prohibition is rabbinic (*Sma*"K #262). Some differentiate that when there are monetary ramifications the prohibition is Biblical, whereas when only generating feeling of indebtedness it is rabbinic (*Shulchan Aruch Harav, Ona'ah* #11-12).

Rabbeinu Yonah explains that *geneivas da'as* is severe, even if it does not cause tangible loss, because it entails falsehood, whereas we are instructed about truthfulness, which is a fundamental character trait (*Shaarei Teshuva* 3:184).

Accordingly, some suggest that *geneivas da'as* is primarily a prohibition between man and G-d, rooted in bad character traits, so that gentiles are not commanded about *geneivas da'as*, even though they are prohibited to steal; others maintain that non-Jews are also commanded (*Machazeh Avraham* 1:15; *Hisorerus Teshuvah* 1:118).

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and the remaining manuscript should either be sold and the proceeds split evenly, or they should resolve the matter through *gud oh eigud*, with one brother buying out the other's share.

This is not actually the halachah, however, because the brothers did not split the estate, including the manuscripts, between themselves. Rather, their father gave each one a separate gift, independent of the gift he gave the other. The fact that the older brother's gift turned out to be worthless therefore gives him no claim against his younger brother, whose gift did prove valuable.

There is another factor to consider, however: There is a presumption (*umdena*) that the father gave the manuscript to the younger brother assuming that the one he had given the older brother was valuable. If he were still alive, he would presumably want to redistribute the gift if he was permitted to do so. Therefore, even though he is not alive, the older brother should be entitled to challenge his brother's gift now as well.

But for *beis din* to rule this way, they must be absolutely certain that the father would, indeed, have wanted to void the gift if he were alive. This point is discussed at length by the *poskim* (see *Choshen Mishpat* 246:1 & 207:4 with *Sma* 10 and *Be'ur HaGra*, who discuss whether an *umdena* to void a gift must be obvious to all).

It seems that in the above case, there is no clear *umdena* that the father would have voided the younger brother's gift. Furthermore, the father's *gilui da'as* — i.e., his statement that he was giving this manuscript to the younger brother against the one given to the older (see *C.M.* 207:3 and *Business Weekly* #680) — is insufficient to establish an absolute *umdena* that the gift was contingent on the older brother's receiving a valuable manuscript. Such an assertion can void a gift only when it is expressed as an explicit *tenai* (condition).

It is possible that once he gave the gift, even if he later discovered that the manuscript selected by the older brother was forged, he would not have insisted that the younger brother return the genuine manuscript, especially after considerable time had passed.

The older brother therefore has no right to demand any sort of recompense from his younger brother.



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