

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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BHI HOTLINE

לע"נ הרב אהרן בן הרב גדליהו ע"ה

Submitted by the Beis Hora'ah

CHIPS FOR TAKING?

The yeshiva dormitory bustled as *talmidim* returned for the new *zman*. Suitcases and bags filled the hallways as boys carried their belongings to their rooms. Chaim headed towards his room. He spotted a small, unopened bag of potato chips near his doorway.

"Whose chips are these?" he wondered. "They probably fell out of someone's bag."

Chaim entered his room and put down his suitcase. He was greeted by his

roommate, Eliezer.

"There's an unopened bag of potato chips outside our room," he said. "Do you think I can take it?"

Eliezer shook his head.

"You should ask around or put up a sign asking if anyone lost a bag of chips," he said. "Maybe someone is looking for it."

"But there's no *siman*," Chaim argued. "It's just an ordinary, unopened bag of chips. How could anyone identify it? Without a *siman*, the owner presumably has *yei'ush*."

"That's not clear here," Eliezer replied. "Everyone is still unpacking; the person who lost it might not even realize yet that it's missing."

Chaim considered this.

"But how long am I supposed to wait?" he asked. "I can't possibly know when the owner realizes it's gone."

"Exactly," said Eliezer. "So maybe you shouldn't take it for yourself."

"Since there are no *simanim*, though, the owner will eventually have *yei'ush*," Chaim argued. "So, what's the point of leaving it there meanwhile?"

"That's a complicated issue," responded Eliezer.

Chaim decided to leave the chips until he had an answer, but was intrigued by the halachic question, even though he brought plenty of food. He went to the *Beis Midrash* and approached Rabbi Dayan:

"Can I take the bag of potato chips for myself?"

"When a person loses an item with no identifying *simanim* or where most passersby are gentile, we presume *yei'ush*, so that the finder can keep the item," replied Rabbi Dayan (C.M. 259:3, 262:3).

"However, we rule that *yei'ush shelo mida'as* – when the owner is not yet aware of his loss – is not considered *yei'ush* (B.M. 21b-22b). Therefore, if you took the item before the owner was aware of his loss and had *yei'ush*, you cannot keep it even after he subsequently became aware and had *yei'ush* (*ibid.*).

"Ketzos (259:1), based on the Ramban (*Milchemes Hashem*, B.M. 26b), explains that when you pick up the item before *yei'ush* with intent to return it to its owner, on account of the *mitzvah* of *hashavas aveidah* you automatically become a guardian (*shomer*) on his behalf. Once the item is now secure in your hands, the owner's subsequent *yei'ush* is not applicable, since *yei'ush* is not valid for something held in the owner's or guardian's hands or property."

However, *Acharonim* point out that Tosfos (B.K. 66a; B.M. 26b) seemingly dispute this rationale, and maintain that *yei'ush* can apply even to items sitting in the owner's property. Rather, according to Tosfos, the reason you may not keep the item after the owner's *yei'ush* is because you took it when it was still prohibited to take for yourself, so that a monetary obligation of *hashavas aveidah* towards the

CAMERA CANDOR

A group of girls in camp decided that rather than each girl taking her own pictures, they would share photography duties, using

one camera so that all the pictures would be stored on one SD card in chronological order. At the end of the summer, they would all copy the pictures onto their own memory cards. Sarah, one of the girls, offered her camera to the group, and each day she stipulated with whoever served as the photographer for the day that she would be responsible even for an *ones* (circumstance beyond a person's control) and would have to buy her a new camera if hers was lost or damaged.

One day, the camp took a trip to a park. Rivka was the designated photographer for the day, but at one point, she handed the camera to Rochel, a member of that group. It is unclear whether Rivka asked her to watch it for her, or whether Rochel asked for it because she wanted to look at the pictures. Either way, at some point Rochel got up and asked Leah to take it, but Leah refused. Rochel left the camera on the ground, and a short while later, a park employee came and told them they had to leave the area. They all left, and the camera remained behind. Before they could retrieve it, a park employee rode by in a vehicle, crushing the camera.

Which girl is responsible for the camera?

A. Leah is certainly absolved.

The most fundamental principle guiding the halachos of *shomrim* (guardians) is that a *shomer* must accept responsibility for guarding the object entrusted to him or her (*Shulchan Aruch, Choshen Mishpat* 291:2). Since Leah refused to accept the camera from Rochel, she never became a *shomeres*, so she is not responsible.

Rochel is certainly obligated to pay. Whether she accepted the camera for safeguarding — which would make her a *shomeres chinam* (unpaid guardian) — or she wanted to look at the pictures, in which case she was a *sho'eles* (borrower), she was obligated to ensure that the camera was kept safe, and her negligence (*peshi'ah*) in leaving it unattended makes her liable for the camera. Her liability is limited, however, to the

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CASE FILE

owner remains (*Terumas Hak'ri* 262:5; *Minchas Pittim* 259:1).

Accordingly, in a case where there is no obligation of *hashavas aveidah* and you took the item without intent to acquire for yourself yet, so that you did not incur any monetary obligation, and subsequently the owner had *yei'ush* – you can then acquire it.

"To avoid this questionable circumstance, *Poskim* advise that when you encounter an item for which there is no requirement of *hashavas aveidah*, but it is unclear whether the owner was already aware of the loss and had *yei'ush*, you should pick it up conditionally, intending neither to acquire it until the owner has *yei'ush* nor to return it unless you find the owner. Thus, after time passes that you can safely presume the owner became aware had *yei'ush* – you can keep the item (*Pischei Choshen, Aveidah* 2:12[23]; *Hashavas Aveidah K'halacha* 5:4[19]).

"Regardless," concluded Rabbi Dayan, "even when there already was *yei'ush*, if you can ascertain the owner, it is proper *lifnim mishuras hadin* to return the item" (*C.M.* 259:5; *Shulchan Aruch Harav, Hilchos Metziah* #18).

Verdict: A person who took a lost item before the owner had *yei'ush* may not keep it even after the owner had *yei'ush*. in a case where there is no obligation of *hashavas aveidah*, but it is unclear whether the owner was aware of his loss, you should pick it up conditionally, intending neither to acquire until the owner has *yei'ush* nor to return unless you find the owner.



MONEY MATTERS

MONEY MATTERS
Onaas Devarim, Falsehood
and Geneivas Daas #15
Insincere Invitation

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: Relatives from abroad are visiting our city; they always stay in a hotel when they travel. Is it appropriate to invite them to stay with us, even though we are not really set up for them, relying on the fact that they will not come, anyway?

A: One example of *geneivas da'as* is inviting someone insincerely, cajoling him to visit when you know that he will not come, since thereby you mislead him to appreciate your outwardly expressed hospitality towards him (*C.M.* 228:6)

Nonetheless, it is only prohibited to cajole, repeating the offer several times, but to extend an invitation once or twice, as a courtesy, is permissible. Otherwise, not inviting could be taken as distancing and disrespectful, and others might not realize that you are not inviting them because they won't come (*Sma* 268:8).

Moreover, if extending the invitation is itself a means of honoring them, such as if the relative is a Torah scholar, it is permissible, even if not a realistic offer (see *C.M.* 228:7).

Regardless, if you are genuinely happy to have the relatives to stay with you, you may even cajole them, although you know that they will not take you up on the offer in practice (*Shulchan Aruch Harav, Ona'ah* #14).

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value of a used camera in similar condition to Sarah's at the time it was destroyed, because no one stipulated with her that she would have to replace the camera with a brand-new one if it was damaged.

The question is whether Rivka has any liability here, since she was the one who took the camera from Sarah on that day, implicitly agreeing to return it intact or replace it with a new one. Her potential liability raises two questions: First, if Rochel refuses to pay, may Sarah demand the full value from Rivka? Second, even if Rochel pays the value of a used camera in similar condition, must Rivka pay the difference so that Sarah can buy a new one?

The halachah is that if a *shomer* gives the object deposited with him to a different *shomer* without consulting the owner first, the first *shomer* is liable for it. If, however, the owner often leaves objects of the same value with the second *shomer*, then the first *shomer* is absolved.

In our case, since Rochel is part of the original group of girls Sarah trusted to guard her camera on her designated day, Rivka's transfer of the camera to Rochel was permitted, so Rivka should be absolved. But this halachah applies only if the second *shomer's* liability is identical to that of the first *shomer*. If the second *shomer* is less liable, he or she is not considered as good a *shomer*. Therefore, the first *shomer* (Rivka) is obligated to pay at least the amount the second *shomer* (Rochel) was not obligated to pay (*ibid.* 291:26, with *Shach* 46, *Ketzos* 12, and *Nesivos* 31).

If Rochel does not have money to pay, whether Sarah may demand full payment from Rivka is the subject of a dispute between the *poskim* (*ibid.* 291:24, *Sma* 72:96 and *Shach* *ibid.* 124).

In reality, we cannot obligate Rivka to pay the difference so that Sarah can buy a new camera, because the original agreement between the friends was flawed.

A *shomer* can obligate himself, with words alone (i.e., without a *kinyan* formalizing his agreement), to a higher level of *shemirah* [i.e. a *shomer chinam* can obligate himself to have the same liability as a *sho'el*] (*Choshen Mishpat* 291:27). Some *poskim* infer that a person can similarly accept to pay for more than the value of the object he agreed to guard. Therefore, if someone gave a silver coin to a *shomer* and stipulated that if he loses it, he will have to pay back a gold coin of the same size, and the coin gets lost, the *shomer* is obligated to pay a gold coin, in accordance with the agreement (*Chida, Chasdei Avos* 5:1). Others argue that while the obligation with words alone does take effect, a commitment to pay more than the value of the object does not take effect without a *kinyan* (see *Chiddushei R' Akiva Eiger* 291 loc. cit. and *Kovetz Kol Torah* 71, p. 354). Since this matter is subject to dispute, we cannot obligate Rivka to pay more than the actual value of the camera at the time it was damaged.



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