Restoring the Primacy of Choshen Mishpat

BUSINESS HALACHA *in the* CLASSROOM

Bava Metzia

Perek Ches

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Borrowing it Back

Bava Metzia 94a - Shoel

As Mr. Nathan walked home, he saw his neighbor's son Effy fixing his bike. It was quite old and rusty, with dents in many places. One of the spokes was broken.

"Shalom. How are you?" Mr. Nathan asked Effy. "It seems that almost every time I walk by, you're fixing your bike."

"Baruch Hashem, I'm fine," replied Effy. "The bike, however, is in really poor condition."

"Maybe it's time to get a new bike," suggested Mr. Nathan.

"I'd love to," said Effy, "but we just can't afford it."

Mr. Nathan walked home thoughtfully. He had a good bike that was almost never used; it was many years since he had last rode it. His grandchildren rode the bike when they visited, but they had moved to Israel the previous year.

The following day, Mr. Nathan invited Effy over.

"I have a bicycle that I don't use anymore," Mr. Nathan said to him. "Our grandchildren sometimes used it, but now that they've moved to Eretz Yisrael, I'd be happy to give it to you. The only thing is, if they ever come to visit, I'd like to borrow it back while they're here."

"That's very nice of you," said Effy. "Of course I'd be happy to lend it back to you if your grandchildren come." He thanked Mr. Nathan and took the bike home.

The following summer, Mr. Nathan's grandchildren flew in for a visit.

"Zeidy, where's your bike?" they asked. "We'd like to take a ride in the park."

"I don't use it anymore," answered Mr. Nathan, "so I gave it to Effy, the boy next door."

"Oh! Then we can't ride anymore?" they asked.

"Don't worry," replied Mr. Nathan. "I arranged to borrow the bike back when we needed it. I'll give Effy a call."

Mr. Nathan called Effy.

"Hello, Effy," he said. "Our grandchildren are in for a visit. Could we have the bike for the week?"

"Sure, with pleasure," said Effy. "I'll bring it over in a few minutes."

Effy walked the bike over and the grandchildren rode it to the park to play ball.

Borrowing it Back, cont.

When it was time to return home, the bike was missing. It had been stolen!

A week after the grandchildren left, Effy politely asked for the bike back.

"I'm sorry," said Mr. Nathan, "but the bike was stolen."

"What do I do now?" lamented Effy dejectedly. "I sold my other bike as scrap. Now your grandchildren lost my bike and I have none at all…"

Later that evening, Mr. Nathan met Rabbi Tzedek.

"Do I owe Effy anything for the bicycle, which I gave him as a gift in the first place?" he asked.

"You are liable for the bicycle at its current value," said Rabbi Tzedek, "unless Effy is willing to forgo that amount as a token of gratitude."

Rabbi Tzedek then explained: "Although you gave the bicycle to Effy, once you gave it, it became his property. Therefore, borrowing the bicycle is no different than borrowing any other item from Effy, and you are liable for its theft (C.M. 340:1).

"When someone gives a gift, we evaluate his intention in giving, even if it is not stated explicitly," added Rabbi Tzedek. "There is not sufficient basis here to assume that you intended to be able to borrow the bike back without any liability (see 246:1)."

"How much would I owe?" asked Mr. Nathan.

"Since the bicycle is a number of years old, the liability is for its current worth," replied Rabbi Tzedek, "which depends on the condition of the bicycle, and is likely only a fraction of the initial cost (101:9)."

"Would Effy be justified in asking for payment, though?" asked Mr. Nathan.

"That would seem fair," answered Rabbi Tzedek. "However, beyond justice and fairness, Effy may choose to forgo his right to compensation for the bike as an expression of gratitude to you for having given him the bicycle.

"Alternatively, you could have lent the bike to Effy as a long-term loan, whenever you don't need it for your grandchildren," concluded Rabbi Tzedek. "Then you would have remained the owner and Effy would be responsible as a borrower."

The Flip Side

Bava Metzia 94a - Tnai Kaful

Benjy Braun was learning Parshas Matos with his father.

"This parsha contains a fascinating story about the tribes of Gad and Reuven," said Mr. Braun. "It emphasizes Am Yisrael's responsibility for each other, and especially for those in the Land of Israel."

Benjy read about the tribes of Gad and Reuven, who asked to settle the eastern bank of the Jordan River. Moshe consented to their request only on condition that they first cross the Jordan with their brethren and help complete the conquest of Canaan. He then instructed Elazar, Yehoshua, and the tribal leaders:

"If the children of Gad and the children of Reuven will cross the Jordan with you… give them the land of Gilad as a heritage. But if they do not cross over, armed, with you, then they will settle with you in the land of Canaan (Bamidbar 32:29-30)."

"Why was it necessary for Moshe to explicitly state the flip side of the condition?" Benjy asked. "Isn't it obvious that if they don't fulfill the condition, they don't get the Transjordan?"

Benjy's father looked in Rashi, but couldn't find an explanation. "That's a tough question," he finally acknowledged. "Let's ask Rabbi Tzedek on Shabbos."

On Shabbos, they approached Rabbi Tzedek.

"Benjy had a question on Parshas Mattos," Mr. Braun said.

Rabbi Tzedek looked at Benjy fondly. "What was your question?" he said.

"Why did Moshe have to state both sides of the stipulation with Gad and Reuven?" Benjy asked. "Isn't the flip side obvious?"

"Perhaps, but the Gemara (Kiddushin 61a; Gittin 75a-b) derives from these verses important principles about the proper formulation of legal stipulations," answered Rabbi Tzedek. "These are referred to in halacha as 'the stipulation of bnei Gad and bnei Reuven.' For this reason, the Torah was very specific in its wording of Moshe's stipulation."

"Oh," said Mr. Braun. "I wasn't aware that there was a specific formulation."

"Yes, a stipulation must be formulated with four elements to be legally binding," explained Rabbi Tzedek. "Otherwise the stipulation is invalid and the transaction is upheld as if there were no stipulation (E.H. 38:2).

"The first, and most obvious from the verse, is the need to spell out both sides of the stipulation (tenai kaful)," continued Rabbi Tzedek. "That is, if the condition is fulfilled, the transaction will carry through; if the condition is not fulfilled, the transaction is nullified. This is parallel to the case of bnei Gad and Reuven, in which Moshe spelled out that if they would go forth in battle, they would be granted the eastern bank of the Jordan; if not, they would be settled on the western side."

"What is the second criterion?" asked Mr. Braun.

"The order of these two clauses: the positive side of the condition must be stated first, and then the negative (hen kodem l'lav)," replied Rabbi Tzedek. "In this case: 'If they will cross…,' and afterwards, 'If they will not cross....' The stipulation should not be formulated in the opposite order: 'If they do not cross…; If they will cross....'"

"And the third criterion?" asked Benjy.

"The conditional 'if' clause must precede the transaction statement, not the other way around (tenai kodem l'maaseh)," explained Rabbi Tzedek. "In this case: 'If they will cross the Jordan, they will receive…,' and not: 'They will receive… if they cross.'

"And finally, the condition must be something possible to fulfill (davar she'efshar l'kayemo)," added Rabbi Tzedek. "In this case, it was possible for them to cross the Jordan and do battle. However, if a person stipulates a certain transaction if the person jumps to the moon, the stipulation is disregarded and the transaction is upheld."

"Does that mean," asked Mr. Braun, deep in thought, "that if I sold something on condition, but the precise formulation was not followed — the sale is binding without fulfillment of the condition!"

"This formulation is required for stipulations in marriage and divorce," explained Rabbi Tzedek. "There is extensive discussion whether this formulation is also needed in monetary law (C.M. 207:1)."

Part II on next page

If Yes, If No

Bava Metzia 94a - Tnai Kaful

The Brauns were negotiating the purchase of a house. However, the roof leaked in numerous places and needed a thorough sealing. The owner did not want to invest money in the repair unless he had a definite buyer, whereas Mr. Braun was equally insistent he would not buy until the roof was repaired satisfactorily.

"Perhaps we can close the sale," suggested the seller, "and add a clause in the sales contract making the purchase conditional upon repairing the roof within three months?"

"That's acceptable to us," said Mr. Braun.

The lawyers drafted a sales contract, including this clause: "The seller agrees to repair the roof and seal it within three months; both parties acknowledge that this is a material term of the sales contract."

Mr. and Mrs. Braun told their children that they had purchased a house, but it was not final because they had stipulated that the roof be repaired first.

"We just recently discussed with Rabbi Tzedek the proper formulation of legal stipulations," said their son Benjy.

"That's right," said Mr. Braun. "He said that we derive from the stipulations of bnei Gad and Reuven four criteria: It is necessary to spell out both sides of the stipulation — if yes… if no... (tnai kaful); the positive, 'yes,' side must be stated first (hen kodem l'lav); the conditional 'if' clause must precede the transaction statement (tnai kodem l'maaseh); and the condition must be something possible to fulfill (davar she'efshar l'kaymo).

"So I guess," mused Mr. Braun, "that the proper formulation is: 'If the roof is repaired within three months, the sale is valid; if not repaired, the sale is void.'"

That Shabbos, Mr. Braun approached Rabbi Tzedek. "You mentioned that the proper formulation of stipulations is essential for marriage and divorce agreements. Is this formulation also necessary for monetary stipulations?"

Rabbi Tzedek answered, "There is a major dispute on this issue among the Rishonim. The generally accepted halachic ruling is to make reference to it in real estate transactions, although it is likely not necessary nowadays when drafting a legal contract."

"Logic would require it for monetary stipulations," observed Mr. Braun, "since we derive this formulation from the stipulation regarding Gad and Reuven's heritage on the eastern bank of the Jordan!"

"Indeed, the Shulchan Aruch, citing the Rambam (Hil. Ishus 6:14) and Tur, requires this formulation for monetary matters as well," replied Rabbi Tzedek. "However, the Raavad and other Rishonim disagree and maintain that this formulation is not required for monetary issues where clear understandings generally suffice (C.M. 207:1; 241:12; Gra 241:36).

"In addition," continued Rabbi Tzedek, "the Rosh rules that it suffices to state in the contract that the stipulations are 'in accordance with the stipulations of bnei Gad and Reuven,' or, 'in accordance with the institutions of our Sages' (E.H. 38:3; C.M. 241:12)."

"How do the other Rishonim square their opinion with the case of bnei Gad and Reuven?" asked Mr. Braun.

"They understand that, in principle, we do not follow Rabi Meir, who requires this formulation," answered Rabbi Tzedek. "We only consider his opinion in marriage and divorce stipulations because of their severity (Aruch Hashulchan 207:4)."

"What did you say is the accepted ruling?" asked Mr. Braun.

"The Nesivos (207:1) and other Acharonim cite the practice that we do not require this formulation for movable items," said Rabbi Tzedek, "and to write 'in accordance with the stipulation of bnei Gad and bnei Reuven' for real estate.

"Some authorities suggest, though, that a legal contract nowadays does not require this formulation even for real estate transactions. They maintain that this formulation is needed to strengthen the stipulation and indicate that it is meant sincerely; in a recognized legal contract, the stipulation is clearly meant sincerely.

"In addition, since nowadays the practice is not to use this formulation, but to rely on the legal requirements, it is comparable to the practice mentioned by the Nesivos. Thirdly, perhaps the agreements formulated in a legal contract are binding on the basis of situmta, common commercial practice (Tel Talpiot, vol. 62, pp. 306-309)."

A Drill for a Saw

Bava Metzia 94a - Shemira BeBaalim

Betzalel was a "fix-it" man who enjoyed carpentry as a hobby.

As he drilled into a thick piece of lumber one day, he hit a knot in the wood. The bit caught and stalled; the drill fell silent, and a burnt smell began to waft from the motor. "The motor went," he said sadly. "I'll have to get another drill."

Betzalel called his neighbor, Dan, and asked, "Do you have a drill that I can borrow?"

"Sure," said Dan. "I'll tell you what. I've been planning to make a small cabinet, but don't have a circular saw. I'll lend you my drill if you'll lend me your saw when you finish."

"Deal!" laughed Betzalel. "When I finish, I'll bring my saw together with your drill."

Two days later, Betzalel returned Dan's drill and brought his saw with it. Dan took the tools and put them in the shed in his yard.

During the night, there was a severe thunderstorm. A bolt of lightning hit a tree in Dan's yard, splitting it. One heavy branch landed squarely on the tool shed, flattening it. When Dan checked in the morning, he saw that Betzalel's saw had gotten crushed.

"I put the saw away securely in the shed," Dan apologized to Betzalel. "There's nothing I could do about the lightning and the tree."

"When you borrow, you are fully liable, even for such circumstances," said Betzalel. "That's the rule of a sho'el (borrower) (C.M. 340:1)."

"But why am I a sho'el?" said Dan. "I lent you my drill as payment for using your saw!"

"That wasn't payment; we both borrowed," argued Betzalel. "I borrowed your drill and you borrowed my saw! Had something happened to your drill, I would be liable; the tree fell on my saw — you're liable. It's that simple!"

"It's not simple to me!" cried Dan. "Let's ask Rabbi Dayan."

"Am I liable for the saw as a sho'el?" Dan asked Rabbi Dayan later.

"A person is considered a borrower (sho'el) only when the benefit is entirely his," answered Rabbi Dayan. "However, if the lender also has a tangible benefit from lending the item, the borrower is considered a renter (socher).

"Since Betzalel lent his saw in return for borrowing Dan's drill, each benefitted from

granting the loan," continued Rabbi Dayan. "Betzalel gained use of the drill and Dan gained use of the saw. Therefore, you do not have the rule of borrowers but that of renters (C.M. 305:6; Pischei Choshen, Pikadon 10:4-5)."

"What is the rule of a renter?" asked Dan.

"A renter is liable for negligence, and even theft or avoidable loss, but not for circumstances beyond his control (oness)," answered Rabbi Dayan. "Thus, since the saw was destroyed through oness, Dan is not liable for it as a sho'el but is exempt as a socher. Had the saw been stolen, though, he would be liable (C.M. 303:2-3)."

"I assume it makes no difference whether the drill and saw were borrowed on separate days or simultaneously?" inquired Betzalel.

"Actually, there is," replied Rabbi Dayan, "in cases such as theft."

"Really?" exclaimed Betzalel. "Why should that be?"

"It's a bit complicated," answered Rabbi Dayan. "When you borrow an item, you are responsible for looking after it, which may be a kind of service to the owner. The Rema cites two opinions whether we apply here the concept of shemirah b'baalim."

"What is that?" asked Dan.

"When the owner of the borrowed item is serving or employed by the borrower at the time of the loan, the borrower is exempt unless grossly negligent," explained Rabbi Dayan (C.M. 346:1-2). "Thus — according to the lenient opinion that considers borrowing from a borrower as shemirah b'baalim — had Dan borrowed the saw while Betzalel still had his drill, Dan would not have to pay if the saw were stolen, since Betzalel was 'serving' him by looking after his drill!"

[However, Betzalel could withhold the drill, in accordance with the stringent opinion that does not consider him as "serving" Dan, and does not view this as shemirah b'baalim.]

Dashed Dishes

Bava Metzia 96b - BeAlav Imo

Mrs. Wilk was straightening her house when the doorbell rang. "Oh good!" she exclaimed. "Shaindy's here."

Mrs. Wilk opened the door. "Good morning, Shaindy," she said to her cleaning woman. "I sure need your help this morning. There are lots of dishes left over from the party last night, and I haven't had a chance to wash them. We used Bernie's favorite set of china, the one with the royal blue swirl."

"That set is lovely," Shaindy acknowledged. She had washed that china numerous times.

"What's great is that the set came in service for 24, so we had enough for everybody," added Mrs. Wilk. "At least it used to have service for 24; over the years, we're down to 20."

"That happens," said Shaindy. "We're always breaking dishes in my house, too."

"I wouldn't say it happens all the time," said Mrs. Wilk, smiling. "I try to be very careful."

Shaindy put on a cleaning apron. "I'll get started with the dishes," she said.

Shaindy put a load of dishes in the dish washer, and then went to clean the house. An hour later she returned to unload the dishwasher and stack the dishes on the counter. As she was stacking the plates, one of them slipped from her hands with a loud crash!

Mrs. Wilk came running.

"I'm so sorry," Shaindy said. "'I was trying to be careful, but somehow the plate slipped."

"There's nothing to do now," said Mrs. Wilk, "but I know that Bernie will be very upset. He gets upset every time one of these dishes break."

When Mr. Wilk returned home that evening, he noticed the broken pieces of china in the garbage. "What happened to the china plate?" he asked his wife.

"Shaindy was stacking the dishes and one fell," Mrs. Wilk explained. "She was trying to be careful."

"I'd like to deduct $10 from her pay," said Mr. Wilk.

"That's not fair," said his wife. "It was an accident; she didn't mean to break the plate."

"She has to be more careful," insisted Mr. Wilk.

"There are times that we, too, break dishes when we wash them," protested Mrs.

Wilk. "That's life!"

"But we're paying her good money for cleaning," argued Mr. Wilk. "There's no point in paying her and then having dishes broken."

"It seems unreasonable to me to hold her accountable for each broken dish!" said his wife. "How about we ask Rabbi Tzedek what he thinks?"

"Great idea," replied Mr. Wilk. "I'll give him a call."

Mr. Wilk called Rabbi Tzedek. "Our cleaning lady broke a china plate while stacking the dishes," he said. "Is it fair to deduct $10 from her salary on account of the damage?"

Rabbi Tzedek replied, "In principle, the cleaning woman is responsible for what she damages during her work. However, the general practice is not to be particular about damage like this, unless it was through gross negligence."

Rabbi Tzedek then explained: "The Talmud Yerushalmi addresses the case of a wife who damaged her husband's property during the course of her household chores. It exempts the woman based on the rationale that otherwise, 'ain lecha shalom habayis.' If the husband would be able to insist on payment, it would undermine the relationship between the husband and wife (Even Ha'ezer 80:17).

"The implication of this statement is that, in principle, the woman is legally responsible for the damage, even though it occurred through fulfilling household chores. The reason is that the wife has the legal status of a shomer sachar, a paid guardian, because she fulfills these chores in return for the husband's responsibilities and obligations towards her. As such, she should be responsible for the items that she handles – unless they are broken through circumstances beyond her control (oness) – were it not for the concern of shalom bayis."

"This refers to a wife, though," noted Mr. Wilk. "What about a cleaning woman?"

"Obviously, the exemption of shalom bayis does not apply to her," replied Rabbi Tzedek. "Therefore, a cleaning woman should be liable for what she damages in the course of her work. The same is true for other professionals who damage (with the exception of porters, who have another exemption; see C.M. 304:1).

"Nonetheless, since it is commonplace that dishes get broken occasionally in the course of household chores, the practice of most homeowners is not to be particular with their cleaning help over small items, unless they were grossly negligent (Pischei Teshuva C.M. 331:1; Aruch Hashulchan 331:7)."

Partner Guardian

Bava Metzia 96b - BeAlav Imo

Yosef Mashbir and Menashe Meilitz served as corporate financial advisors. Their work often took them from their office to give presentations at their clients' premises.

"We've got a meeting scheduled this afternoon with representatives from Israel Food Importers," Yosef said to Menashe. "It's been years since we've met with them."

They packed up their presentation equipment – laptop, projector, cables and portable screen – in Yosef's car and drove to the meeting, which went well into the evening.

"We have a meeting tomorrow morning with Regal Silver," said Yosef when they finished. "I'll take the equipment with me and bring it to the meeting tomorrow." Menashe helped return the equipment to Yosef's trunk.

When Yosef pulled into his driveway, he took his attaché case out of the car trunk.

"What about the rest of the equipment?" his wife asked.

"I'm going to leave it in the trunk," Yosef answered. "We're meeting with Regal Silver early tomorrow morning, and it will just delay me getting out. I've got to get up at the crack of dawn. It should be safe overnight in the trunk; there haven't been any break-ins in the neighborhood recently."

The following morning, Yosef got up for the 5:30 minyan. He came home, grabbed his attaché case, and went out to the car. As he went to open the trunk, he noticed with alarm that it had been pried open during the night. The computer and projector were gone!

"I don't believe this!" he exclaimed. "Someone must have spied on us last night!"

Yosef met Menashe at Regal Silver. "I left the equipment in my trunk last night," he said. "Someone broke in and stole the computer and projector. I have the presentation on my flash drive, though."

"Does our insurance cover this?"

"I don't think so," said Yosef. "It wasn't on the business premises. Car insurance doesn't cover theft of items in the car. And business property is not included in our home insurance."

"That was a brand new laptop and an expensive projector," said Menashe. "You should pay for it; you were watching it for the night."

"Why should I have to pay?" said Yosef. "I simply agreed to take it home. I didn't accept responsibility for it."

"You should have taken it into the house," said Menashe.

"I thought it would be safe overnight," replied Yosef. "I never dreamt this would happen."

"We'll have to discuss this with Rabbi Tzedek after the meeting," Menashe said.

Rabbi Tzedek ruled: "Partners who take turns tending to shared property are considered shomrei sachar, paid guardians, for each other. However, if the partner is not required to watch the property, he is considered, at most, a shomer chinam, unpaid guardian. Therefore, Yosef is not responsible for the theft."

Rabbi Tzedek then explained, "An unpaid guardian is responsible only if the item is lost or ruined due to negligence (p'shia). A paid guardian is responsible also for theft or loss (geneiva va'aveida) that is not due to negligence (C.M. 291:1; 303:2)."

"I wasn't being paid to watch the equipment," said Yosef. "I didn't even accept responsibility for it."

"That is true," said Rabbi Tzedek. "However, since you and Menashe are business partners, there is often a mutual expectation to watch the property on behalf of each other. The Gemara (B.B. 42b) teaches that a business partner is considered a shomer sachar."

"Then why is Yosef not responsible for the theft?" asked Menashe.

"The Rama writes that this applies only when the partnership arrangement is that each party will take turns tending to the shared property," replied Rabbi Tzedek. "However, if the partner is not obligated to tend to it, he is considered only a shomer chinam and not responsible for theft. Some authorities maintain that if the partner just held the property for his convenience and did not accept responsibility for it, he would not even be considered a shomer chinam (C.M. 176:8; Shach 176:16; Pischei Choshen, Shutfim 1:29)."

"But is it acceptable to have left the equipment in the trunk?" asked Menashe.

"In most places, keeping something locked in an opaque trunk would not seem to be considered negligence, especially if the car was parked in a private driveway," answered Rabbi Tzedek. "Furthermore, since partners have a mutual responsibility to work for one another, it is usually considered b'alav imo, which is reason to exempt even when there was negligence involved (176:8; 291:28)."

The Keyboard in the Cupboard

Bava Metzia 96b - BeAlav Imo

"There will be a small office party next Tuesday," Mr. Storch announced to his workers. "We're celebrating the five-year anniversary of Storch Studios."

"Congratulations!" they chorused.

"I heard that you play beautifully on the keyboard," Mr. Storch said to Jay Farber, a freelance worker there. "It would be nice to have some music."

"I have another job that day," replied Jay, "but I'd be happy to lend my keyboard to you if someone else can play."

"Actually, I can play," Mr. Storch said. "Please bring it with you when you come to work on Monday, so it will be available for the party."

On Monday, Jay Farber brought his keyboard and gave it to Mr. Storch. "Here it is," he said. "Please take care of it."

"Thank you very much," said Mr. Storch. "I'll put it away in the cabinet till tomorrow."

The next morning, when Mr. Storch opened the cabinet to set up the keyboard, he saw that it was not there.

"This is really bad," said Mr. Storch. "I guess we'll have to use music CDs for the party."

When Jay Farber came to work the following day, Mr. Storch told him, "I'm awfully sorry about your keyboard. I put it in this cabinet, but it wasn't there when I came in yesterday morning."

"You're kidding me!" said Jay. "I've been playing on this keyboard for the past three years, and I love its feel! It costs $500 to get a new one."

"It's three years old, though," Mr. Storch pointed out. "Its value as a used item is only half that."

"That doesn't help me," said Jay. "I need to buy a new one to continue playing."

"You can buy one second-hand," suggested Mr. Storch. "Besides, I know I locked the cabinet. It's really strange that it got stolen."

While they were debating the issue, another worker piped up: "This sounds like a question from the Business Weekly. Go ask Rabbi Dayan!"

Mr. Storch and Jay said, "Great idea!"

They asked Rabbi Dayan if they could meet with him.

"Is Mr. Storch responsible for the keyboard?" Jay asked. "How much does he have

to pay?"

"A person who borrows an item is responsible for it, even if it's damaged or lost through circumstances beyond his control, and certainly for theft (C.M. 340:1)," said Rabbi Dayan. "However, when borrowing or damaging a used item, it is not necessary to replace it with a new one. The loss or damage is evaluated at the item's current worth, taking into consideration its depreciation."

"So he owes me $250, then," said Jay Farber.

"Actually, in this particular case," continued Rabbi Dayan, "Mr. Storch is not legally responsible for the borrowed item, based on the principle of b'alav imo (the owner is with him)."

"What's that?" asked Jay.

"The Torah states regarding one who borrows: 'If the owner is with him,' the borrower is not responsible," explained Rabbi Dayan. "The Gemara (B.M. 94a) interprets this to mean that if the owner of the item is in the employ or service of the borrower, the borrower is not responsible for the item."

"Why is that?" asked Mr. Storch.

"One of the rationales offered for this law," answered Rabbi Dayan, "is that when the owner of the item is in the service of the borrower, there is an expectation that the owner will continue to keep an eye on it. Therefore, the Torah granted an exemption (Sefer Hachinuch #60)."

"But I wasn't working that day," asked Jay Farber.

"The owner must be in the service of the borrower at the time that he borrowed the item," replied Rabbi Dayan, "since that is the point at which the borrower assumes responsibility for it. Even if the owner is no longer in his employ at the time that the item is lost, the borrower remains exempt (C.M. 346:1)."

"What if the item was lost through negligence, such as if I hadn't locked the door?" asked Mr. Storch.

"There is a dispute about this in the Gemara (95a)," answered Rabbi Dayan. "Most authorities rule that it is not possible to make the borrower pay, and he remains exempt. However, if the borrower actively damaged the item, he is responsible for it as any other person who damages (see 301:1; Pischei Teshuva 176:13)."

"This is the halacha," concluded Rabbi Dayan. "However, Mr. Storch should take into consideration interpersonal decency and gratitude."

Pesach Cleaning

Bava Metzia 96b - Meisa Machmas Melacha

"Pesach is just around the corner!" was Mrs. Adler's motto. Pesach cleaning started well in advance, and its star was her trusted Hoover canister vacuum cleaner. It was expensive, but its powerful suction and versatility made it worthwhile for Pesach.

One morning, while Mrs. Adler was vacuuming, the doorbell rang. "C'mon in, Sally," she called to her closest neighbor, Sally Baum, who lived down the hall.

"How's Pesach coming along?" asked Mrs. Baum.

"So far, I've managed to keep on schedule," replied Mrs. Adler. "I hate the last minute rush!"

"I just wish I had a better vac," lamented Mrs. Baum.

"Mine is great," glowed Mrs. Adler. "You can borrow it tonight."

In the evening, Mrs. Baum sent her son to pick up the vacuum. Armed with the vacuum, she went around the edges of the rooms, poked with the crevice tool behind the cabinets, and started to clean the couch.

"Hi, Sally," she heard her husband's voice.

Mrs. Baum looked up. "Welcome home," she replied. "You know that Mrs. Adler always says, 'Pesach is just around the corner!' Well, now it really is, and she was kind enough to lend us hers for the evening. Come have supper."

After supper, Mrs. Baum continued vacuuming. Without warning the vacuum suddenly sparked and the electricity blew! "What happened?" called out Mr. Baum. "I'm not sure," answered his wife. "It seems that the vac blew the fuse."

Mr. Baum unplugged the vacuum and replaced the fuse. "That was strange," he said. "We never have problems with the electricity."

"Back to work," hummed Mrs. Baum as she plugged the vacuum in. She pressed the button … but nothing happened. She pressed again, with no response. She tried a different outlet; still nothing.

"The motor died," groaned Mrs. Baum. "How am I going to face Mrs. Adler? She relies on this machine like anything!"

"We'll have to buy her a new one," said her husband. "We can't afford this now, but we have no choice." Mrs. Baum walked down the hall to the Adlers with the broken vacuum and $500.

Pesach Cleaning, cont.

Mrs. Adler greeted her, "Finished already, Sally? You're fast!"

"I'm really sorry, but the vacuum broke," said Mrs. Baum.

"Please tell me you're kidding!" said Mrs. Adler. "I'll never manage without my vac."

"Really, it's broken," said Mrs. Baum. "I was using it and it just went. But I brought you money to buy a new one."

Mr. Adler walked over. "Is there a chance that you overtaxed the machine? Sucked up something that clogged the airflow?"

"No," said Mrs. Baum. "I was using it normally. But what's the difference? When you borrow something, you're responsible, no matter what."

"That's usually true," said Mr. Adler. "However, I remember learning that if the item breaks or dies through normal usage the borrower is exempt. I'll ask Rabbi Dayan at the Daf tonight."

After the Daf, Mr. Baum walked home with Rabbi Dayan and asked about the vacuum. "You are correct," replied Rabbi Dayan. "When you borrow something you are responsible even for freak accidents, but if it dies or breaks on account of the work for which it was borrowed – you are exempt. This is called meisa machamas melacha." (C.M. 340:1)

"Why should this be?" asked Mr. Baum.

"The Gemara (B.M. 96b) explains that the owner lent the item with the understanding that it be used; therefore, he accepted the consequences of this usage," answered Rabbi Dayan. "However, there are two caveats. First, the borrower is exempt only if he used the item for the purpose for which it was lent, but if he used it in even a slightly different manner he is responsible. He does not need to buy a brand new machine, though, but only to pay for the actual loss. (344:2)"

"The second caveat," continued Rabbi Dayan, "is that the borrower must prove with witnesses or take a severe oath in Beis Din that the item broke during the course of work to be exempt, unless the lender completely trusts him." (344:1)

"Thus, if you trust Mrs. Baum that the vacuum died during routine use, she is exempt," concluded Rabbi Dayan. "If she wants to pay something as a neighborly gesture, that's fine, but it's important to know the halacha!"

Wheels to Borrow

Bava Metzia 96b - Meisa Machmas Melacha

"Shaul, are you almost ready for the wedding?" Mrs. Halperin called upstairs to her husband. "It's not far, but we can't be late!"

"I'm ready," answered Mr. Halperin. "I just hope that the car won't give us problems; it's been acting up recently."

"Maybe check it now," said Mrs. Halperin.

Shaul went out to the car and turned the ignition, but heard only some clicking. He knocked on his neighbor's door. "Hi, Label. I'm sorry for troubling you, but our car needs a boost and we have a wedding tonight."

Label maneuvered his car into position and connected the cables, but to no avail.

"I guess the battery finally died," said Shaul. "I don't know how we'll get to the wedding!"

"You can borrow our car," said Label.

"Thanks," replied Shaul appreciatively.

Mr. Halperin took the keys. "We couldn't get the car to start," he told his wife, "but Label offered to lend his car."

"That's very nice of him," she said. "I don't like borrowing cars, but we need to get to the wedding."

The Halperins were driving home from the wedding when they heard, "thump, thump."

"What's that noise?" Mrs. Halperin asked with alarm.

"Sounds like something with the tires," said Shaul. "I'd better pull over and check."

He got out and examined the tires. The front left tire was low on air and producing a hissing sound. Mr. Halperin located a large nail protruding between the ridges. "Must have been a nail on the road," he said. "I'll have to put on the spare."

"Shaul, do you think they can patch the tire?" his wife asked.

"I don't know," he replied. "It's a big nail and made quite a gash. The tire may have to be replaced."

"I wasn't planning on spending $100 to get to the wedding," lamented Mrs. Halperin. "We could have taken a car service there and back for half the price!"

"I wonder if we're actually responsible to pay," said Mr. Halperin. "We weren't negligent at all; we had no control over this."

Wheels to Borrow, cont.

The next morning, Shaul met Rabbi Dayan in shul and related what had happened.

"Are we responsible to replace the tire even though it was not our fault?" he asked.

"The Torah describes four types of shomrim (caretakers): unpaid, hired, a renter, and one who borrows," answered Rabbi Dayan. "A person who borrows an animal or item is responsible for it, even if it is ruined through uncontrollable circumstances. For example, had lightning knocked a tree down on the car while you were at the wedding, you would have been responsible (Choshen Mishpat 340:1). However, our Sages taught that if the item is ruined or damaged through routine usage, the borrower is exempt. This is called in halacha, 'meisa machamas melacha' – died on account of usage (C.M. 340:1)."

"What is the basis for this exemption?" asked Shaul.

"It is based on logic," Rabbi Dayan explained. "The item was not borrowed to sit idle; it was meant to be used. Therefore, the borrower is exempt from damage that results from usage (B.M. 96b). Some explain that this exemption includes any uncontrollable damage that ensues from routine usage, and here the nail was a result of routine driving (C.M. 340:3 and SM"A 340:8). Others, however, explain that the exemption applies only if the item malfunctioned, such as if the tires had worn out and burst, in which case the lender is considered partly at fault for having lent an item unfit for normal tasks (Shach 340:5-6)."

"What is the halacha, then?" asked Mr. Halperin.

"You are legally exempt, based on the first explanation," said Rabbi Dayan. "Nonetheless, you might want to pay, at least partially, for the tire, out of appreciation to your neighbor for having lent you the car. On the other hand, if you already replaced the tire out of pocket, you cannot ask the lender for reimbursement, since you are responsible according to the second explanation.

"Of course, the borrower is exempt only if he used the item properly, in the manner for which it was lent," Rabbi Dayan concluded. "Had you driven through a junkyard and blown the tires, you would have been responsible. Similarly, if the nail made a small hole that could have been patched and you continued driving until the tire got completely ruined, you would be responsible to replace the tire according to both opinions."

Benny's Bogus Bill

Bava Metzia 97b - Aini Yodea

"Benny, please buy some chickens on your way home this afternoon," his mother said.

"Sure," he responded. "How many?"

"Two should be fine," said his mother, rummaging through her pocketbook. "I've only got a $50 bill, though."

Benny stopped off at Mendel's Meat Market that afternoon. The two chickens came to $20.

"That's $30 change," Mendel said, handing him a $20 and $10 bill as change. Benny put the money in his pocket.

That evening, when Benny's mother returned home, she asked, "How much were the chickens?"

"They were $20," Benny said, reaching into his pocket. "Here's the change."

Benny's mother took the money. "This $20 bill looks funny," she said, "Mendel gave it to you?"

"Yes," said Benny, looking at it; the paper seemed somewhat different than the other bill. "I guess I got a counterfeit bill," he said. "I'll take it back to the store tomorrow."

Benny returned the next morning to the store. "I was here yesterday and you gave me this $20 bill as change," he said. "It seems counterfeit."

Mendel looked at the bill. "You're right that it's counterfeit, but how do I know that you got it from me? Maybe you got it from another store?"

"I definitely got it from you," said Benny in a raised voice. "I didn't go anywhere else!"

Just then, Rabbi Dayan entered the store. "What are you arguing about?" he asked good-naturedly.

"I received a counterfeit bill as change yesterday," said Benny. "Mendel should replace it!"

"Who says it's from me?" said Mendel. "Even if it is, I got it from some other customer."

"If you believe Benny that this counterfeit bill is from you, you must replace it, even if you received it unaware from another customer," said Rabbi Dayan. "The fact that you were cheated does not allow you to cheat others (Rama C.M. 232:18)."

"But I don't know if he's telling the truth," said Mendel. "Anyone can come with a counterfeit bill and say he received it as change!"

"This is then a case where the plaintiff makes a definite claim and the defendant is

uncertain," said Rabbi Dayan. "In general, if the defendant is unsure whether he borrowed (aini yodei'a im lavisi), he cannot be made to pay, although he must swear that he does not know, but has a moral obligation to pay. If he borrowed, but is uncertain whether he repaid (aini yodei'a im perasicha), he is obligated to pay, because his status quo is one of debt (75:9)."

"What about a case similar to ours, where he borrowed and repaid, but the lender later claims that the payment was counterfeit?" asked Benny.

"The Taz (C.M. 75:25) was asked this question and ruled that it is considered questionable debt," replied Rabbi Dayan. "Since the loan was presumably repaid with good coins, as most coins are not counterfeit, there is no status quo of debt anymore; the demand to replace the counterfeit money is considered a new, questionable, claim. He cites the Rama (232:18), who similarly rules that if someone sold a ring that was ostensibly solid gold and the customer returns later holding a bronze ring with only gold plating and the seller does not trust that it's his, he can swear that doesn't know and is exempt.

"However, the Shach (232:15) concurs with Maharashdam who considers the case of possible counterfeit payment as a case of questionable repayment, so the borrower must replace the bill.

"Later authorities continue to dispute the issue, so it remains unresolved," said Rabbi Dayan. "Therefore, we invoke the rule of hamotzi meichavero alav ha'reaya (the burden of proof is on the plaintiff) so that Mendel is exempt from paying."

"So if Mendel doesn't trust me, I'm stuck?" asked Benny.

"In practice, he may be obligated to swear that he does not know that he gave a counterfeit bill, and he still has a moral obligation to pay," concluded Rabbi Dayan. "Therefore, it is recommended that the borrower pay up to a third as a compromise (Aruch Hashulchan 75:35)."

"Here, though, there are additional reasons to exempt Mendel. Some authorities maintain that the obligation in a case of questionable repayment is only when there was a clear status quo of debt, such as a borrower. Here, although Mendel owed Benny the change, he gave it immediately - there was never a status quo of debt. Also, if the counterfeit bill looks almost genuine, Mendel is not expected to know whether he gave a counterfeit bill (Pischei Teshuva 75:27)."

Filled Up and Forgotten

Bava Metzia 97b - Aini Yodea

"We are pleased to announce that we have been donated a car for communal use," read the sign in Kollel Mishpat. "The car gemach (loan service) will be run by Dani."

"I have an appointment next Tuesday," Yossi said to Dani. "Is the car available then?"

"Yes," said Dani. "The charge is fifty cents per mile to cover gasoline and wear and tear, due immediately upon returning the car. If you fill up with gas, the gemach refunds that amount."

Yossi picked up the keys on Tuesday afternoon. "I should be back in about five hours," he said.

"There's not much gas in the car," said Dani. "You'll probably have to add gas on the way home."

Yossi drove to his appointment 30 miles away. On the way home, he pulled into the gas station.

"How much gas should I put in?" Yossi thought to himself. He checked his wallet. "I've only got $40 cash. Should I put in $10, $20, or $30?" After some deliberation, he paid the attendant and proceeded to the pump.

Yossi returned just before Mincha. He gave the keys to Dani, and said, "I've got to run to mincha now! We'll settle later."

A month later, Dani called Yossi. "I was reviewing the car log," he said. "You drove 60 miles, which is $30, but no payment is listed."

"You're right," Yossi apologized, "I forgot to take care of it, but I purchased gas."

"That's fine," said Dani. "How much did you put in?"

"It's funny, but I don't remember anymore," said Yossi. "I remember debating, though, whether to put in 10, 20, or 30 dollars." He tried unsuccessfully to jar his memory.

"It's a pity you didn't pay on time, like you were supposed to," said Dani. "Then we wouldn't have had this problem. Ask Rabbi Dayan how to deal with this!"

Yossi called Rabbi Dayan. "I owe the car gemach $30, but purchased gas on the way home," he said. "I don't remember, though whether I added $10, $20 or $30. Should I assume the least, most, or middle amount?"

"This issue seems to be an intricate dispute between the Ketzos Hachoshen and the Nesivos Hamishpat," said Rabbi Dayan, "although there is an additional factor here."

"Oh?" said Yossi. "I didn't think it would be so complicated."

"In general, when neither the lender nor the borrower remembers whether the loan was repaid," explained Rabbi Dayan, "the person cannot be made to pay in beis din, and there is even a dispute whether he has a moral obligation to pay, latzeis yedei shamayim (see Taz 75:10; Shach 75:65-67; Pischei Teshuva 75:21)."

"This seems to be our case," said Yossi. "Neither of us knows whether I repaid the loan by purchasing the gasoline."

"It seems so at first," said Rabbi Dayan, "but our case is somewhat different. You have a definite obligation of $30 for using the car, which you did not repay, and there is a possible counter obligation of $10-30 for the gas you bought," said Rabbi Dayan. "The Ketzos Hachoshen (75:5) differentiates between a possible repayment and a counter obligation. When there are two counterclaims, the Ketzos reasons that we treat each obligation independently. The obligation of $30 is clear, whereas the counter obligation for the gasoline is questionable, so that we have to assume the minimal amount of $10. As such, you remain obligated to pay $20."

"You mentioned that the Nesivos argues?" said Yossi.

"Yes. The Nesivos Hamishpat (75:5) reasons that the counter obligation is considered a form of repayment," said Rabbi Dayan. "As such, this case is also considered one of possible repayment where neither party knows, so that there remains, at most, a moral obligation.

"Nonetheless, in this particular case, there is an additional reason to obligate you," concluded Rabbi Dayan. "This is because the uncertainty arose because of your negligence. In a normal situation where neither the borrower nor the lender remembers whether the loan was repaid, both parties are equally at fault. It is understandable that people sometimes forget. Here, however, had you paid in a timely manner according to the rules, you would have known how much you spent on gas. Only because you delayed so much did the doubt arise, so you cannot hide behind the veil of forgetfulness.

"Therefore, you can assume only the lower amount of $10, and must repay the remaining $20 (see Pischei Choshen, Halva'ah, ch. 2, note 78; Nesivos 75:5)."

Not Listed

Bava Metzia 97b - Aini Yodea

Yitz came home all excited, "We'll be having a class barbecue next month," he said. "I was chosen to say one of the divrei Torah."

"That's wonderful," said his mother. "Who's arranging the food?"

"Dan and two other boys were designated to buy the food," answered Yitz. "Everyone has to chip in $10."

Yitz's mother gave him $10, which he stuffed in his pocket.

"Please don't lose it!" his mother warned him.

A week later, a group of boys were playing ball together. One of them gave Dan his $10. "This is for the barbecue," he said.

"Thank you," said Dan. "Let me jot you down." He fumbled through his pad and wrote the boy's name on his list.

Dan looked over the list. "Yitz, according to my list, you still didn't pay," he said.

"That's strange," said Yitz. "I seem to remember giving the money to you or one of the other boys, but I don't remember clearly. Are you sure that I didn't pay?"

"You're not listed," said Dan. "It's possible, though, that you gave the money to one of the other boys and they forgot to tell me, or that I didn't write your name down when you paid me."

"What should we do?" said Yitz. "Neither of us remembers whether I paid or not."

"What should we do?!'" Dan smiled. "We should ask Rabbi Dayan!"

Dan and Yitz went over to Rabbi Dayan. "We collected money for a class party. Yitz is not listed as having paid, but has a recollection that he might have paid. Neither of us remembers clearly, though. Does he have to pay?"

"There are three issues to consider here," said Rabbi Dayan. "First, whether this case is considered a definite obligation or not. Second, whether Dan's list is reliable. Third, what is the halacha when both parties are in doubt?"

"What do you mean by a definite obligation?" asked Yitz.

"There is a difference between someone who is unsure whether he borrowed in the first place, and someone who definitely borrowed, but is unsure whether he repaid," explained Rabbi Dayan. "If neither party is sure whether there was a loan in the first place, there is generally not even a moral obligation to pay (C.M. 75:17; SM"A 75:22)."

"We already ordered the food," said Dan, "and everyone is expected to chip in for

it."

"If so, this would seem to be considered a case of definite obligation and questionable payment," said Rabbi Dayan. "So there may be some obligation."

"But is it 'questionable payment' if Yitz is not listed as having paid?" asked Dan.

"This brings us to the second issue," said Rabbi Dayan. "How reliable is your list?"

"Does that make a difference?" asked Yitz. "Can someone's own record ever be considered a proof?"

"It certainly makes a difference," replied Rabbi Dayan. "The Rosh writes in his responsa that if a storeowner is meticulous with his ledger and no mention of payment is recorded, although it's not considered absolute proof, he can claim in a definitive manner that the debt was not paid. However, if the storeowner sometime neglects to record transactions, he cannot claim definitively on the basis of his ledger (see C.M. 91:5 and commentaries)."

"It's possible that I missed his name," acknowledged Dan. "There was another boy who I know paid me and his name was not recorded. It's also possible that Yitz gave the money to one of the other boys in charge, and they forgot to mention his name."

"If so, this should be considered as doubt on both sides," said Rabbi Dayan. "This brings us to the third, and final, issue. What happens if someone definitely owed, but neither side remembers whether he paid?"

Dan and Yitz listened attentively.

"In this case, there is definitely no legal obligation to pay," continued Rabbi Dayan. "There is a dispute between the authorities whether there is a moral obligation to pay. Some maintain that even though there was a definite obligation, when the plaintiff is also unsure whether he was repaid, there is not even a moral obligation to pay (Taz 75:10). Others argue that there is a moral obligation to pay, or at least compromise with the other party (see Shach 75:65; Pischei Teshvua 75:21)."

"What should we do?" asked Yitz.

"While not obligatory, I would recommend compromising," replied Rabbi Dayan. "Paying a third of the amount would certainly seem sufficient, since it is not even clear that there is a moral obligation."

Sealed Envelope

Bava Metzia 98a - Mitoch SheAino Yachol LeShava

Mr. Meyers scurried around the wedding hall, making sure that everything was properly in place; his son was getting married.

"Could you please watch this envelope?" he asked his close friend, Mr. Koenig.

"Sure," Mr. Koenig answered, taking the envelope.

Toward the end of the wedding, Mr. Meyers asked his friend for the envelope. Mr. Koenig reached into his shirt pocket for it, but found nothing.

"I put the envelope in my shirt pocket," he said. "It must have fallen out during the dancing. What was in it?"

"There was over $3,000 in cash to pay tips and other expenses," Mr. Meyers said.

"You're kidding me!" exclaimed Mr. Koenig. "You didn't tell me there was money in the envelope."

"I didn't think it was necessary to tell you what it contained," said Mr. Meyers. "Anyway, I assumed you would realize it was money."

"I really had no idea what the envelope contained," said Mr. Koenig.

"What, you don't trust me?!" said Mr. Meyers. "I'm telling you there was over $3,000 in cash in there."

"I'm not denying what you say," apologized Mr. Koenig. "However, if you want me to pay, you need some evidence. Furthermore, I'm not sure that I have to pay the $3,000, since you never told me there was cash in the envelope!"

"I don't see why not," replied Mr. Meyers. "If you agreed to watch the envelope, you are responsible for whatever it contained."

"On the other hand, I'm a shomer chinam (unpaid guardian)," argued Mr. Koenig. "I'm not responsible for loss in any case."

"There are different kinds of loss," countered Mr. Meyers. "Listen, Rabbi Dayan is here; we can ask him."

When Rabbi Dayan saw them approaching, he greeted Mr. Meyers, "Mazel tov! What a beautiful simcha. May you merit to see true Yiddishe nachas from the couple!"

"Amen, thank you," replied Mr. Meyers. "I have an issue here with my friend, though. Maybe you can help us."

"Certainly," offered Rabbi Dayan. "Sit down."

The two sat down. Mr. Meyers related what had happened and claimed that Mr. Koenig owed him the $3,000 that was in the envelope.

"What a fascinating case," replied Rabbi Dayan. "Let's go through the issues one by one.

"Even an unpaid guardian is responsible if he lost the entrusted item through negligence," he said. "Placing the envelope in a deep, secure jacket pocket would seem acceptable under the circumstances. However, placing it in a shirt pocket, where it can easily fall out, is considered negligence (Pischei Teshuvah, C.M. 291:5, 8)."

"What about the fact that I had no idea what was entrusted to me?" asked Mr. Koenig.

"If the owner misrepresented the contents, the guardian only has to pay the value of what he agreed to watch," answered Rabbi Dayan (291:4). "For example, had Mr. Meyers told you it was just some receipts or a check, you would not have to pay the $3,000, even if he had evidence that it contained cash. However, if the contents were not specified, you accepted responsibility for whatever was inside."

"But how do I know what was actually inside?" Mr. Koenig asked. "There's no evidence at all! Do I have to pay without evidence?"

"If you trust the word of Mr. Meyers completely, you must pay even without evidence," said Rabbi Dayan. "If you doubt his word, the Shulchan Aruch rules that when the guardian was negligent, the Sages instituted that the owner should swear what was entrusted and collect that amount, if reasonable (90:10; see Shach 90:16)."

"Does this apply also if Mr. Koenig knew that there was money in the envelope, but didn't know how much?" asked Mr. Meyers.

"In that case, since the guardian admits partially and cannot swear about the remainder, some maintain that he must pay even without an oath by the owner, based on the rule of 'mitoch she'eino yachol lishava meshalem,'" replied Rabbi Dayan. "Others maintain that this principle does not apply, though, since the guardian is not expected to know how much was inside, so an oath by Mr. Meyers is still required (90:10; 298:1)."

Half the Truth

Bava Metzia 98a - Mitoch SheAino Yachol LeShava

Rabbi Dayan walked into his shiur (lecture).

"Today we will continue learning about oaths," he began. "Does anyone know the three cases in which the Torah imposed an oath in beis din?"

"We discussed only one," Sruli said, "an oath to contradict the testimony of a single witness."

"Very good," said Rabbi Dayan. "Can anybody tell me another case in which the Torah imposed an oath?"

"There's also something called modeh b'miktzas," Dani said, "a case in which there is a partial admission."

"What do you mean by a partial admission?" asked Sruli. "Either you admit, or you don't!"

"There's also a possibility of a partial admission," explained Rabbi Dayan. "Let's say that someone claims that he lent you $500. You admit that he lent you $200, but deny the remaining $300, and there are no witnesses. This is called a partial admission, since you admit to have borrowed $200 out of the $500. What is the ruling here? Can you help us, Dani?"

"Since you admit to $200 — part of the claim," answered Dani, "you require an oath to exonerate yourself from the remaining $300."

"Beautiful!" exclaimed Rabbi Dayan. "We suspect that you might have borrowed the full amount, but can only pay part and are trying to buy time to pay the remainder. The oath will force you to admit the full truth or confirm your claim (B.M. 3b)."

"And if I don't want to take the oath?" asked Sruli.

"Then you must come to a compromise with the plaintiff or pay the $300," said Rabbi Dayan.

Sruli sank into thought for a moment. He reminisced about an event that had just happened. Before Purim, a sefarim store had given him some boxes of sefarim (Jewish books), Megillas Esther with commentaries, to sell in his shul and yeshivah. He had picked up the sefarim and taken then home in a friend's car. He then moved the boxes to his room in the yeshivah, and from there to the shul. The sefarim store owner claimed that he had given Sruli ten boxes, 200 sefarim in all, but Sruli could only account for nine boxes.

"It seems that one box is missing," he told the sefarim store owner. "Are you sure that you gave me all ten boxes?"

"Absolutely," said the storeowner. "Why do you ask?"

"One box is missing. I'm not sure whether you made a mistake or if I lost one box somewhere along the way," replied Sruli. He tried to recollect whether he had initially counted nine or ten boxes, but didn't remember clearly.

The storeowner demanded that he pay for all 200 copies, but Sruli had refused to pay for more than the nine boxes.

"Prove to me that you gave me all 200 sefarim," Sruli insisted. "You have no evidence that you gave me ten boxes; it's your word alone. You can't make me pay just based on your word."

Sruli now wondered whether he was correct in his insistence. After all, he'd admitted partially to having received nine out of the ten boxes.

"What happens if the borrower can't swear because he doesn't remember whether he borrowed $500 or $200?" Sruli finally asked Rabbi Dayan. "Can he swear that he remembers only $200 and doesn't know about the remainder?"

"This touches upon a fascinating concept known as: mitoch she'eino yachol lishava — meshalem; since he is unable to swear — he must pay," replied Rabbi Dayan. "The partial admission gives credence to the lender's claim, which, if not countered with an oath, requires the borrower to pay in full. The same applies when there is a single witness; if the defendant cannot swear to contradict the witness's testimony, he must pay.

"This rule does not apply to an oath imposed by the Sages, though — only to a Torah-imposed oath. Thus, a person who admits partially, but does not remember clearly enough to swear about the remainder, must pay the amount claimed (C.M. 75:12-14)."

"I guess I'm going to have to pay for all the boxes," Sruli said to himself.

Appointing an Agent

Bava Metzia 98b - Shaliach

Moshe accompanied his father to shul on Sunday afternoon before Pesach to "sell their chametz." They waited as each person filled out the sale form with their local Rabbi, Rabbi Dayan, who was well versed in monetary law. After a while, Moshe asked his father with a puzzled look: "What does it help to sell our chametz to the Rabbi, he's also Jewish?!" His father laughed and said, "Usually, the Rabbi does not actually buy the chametz; he just serves as our agent (shaliach) to sell it to a non-Jew."

Moshe persisted. "But how does the Rabbi become our agent?"

"Watch carefully," his father answered knowingly. "As each person finishes writing which chametz he wants to sell, do you see that Rabbi Dayan gives him something to grasp (typically a handkerchief or pen)? This is called a kinyan sudar (handkerchief transaction). It usually symbolizes an exchange. The Rabbi gives us the item to grasp; in exchange, we give him the authority to be our agent."

"Very interesting," said Moshe. He watched intently as the person who just finished selling his chametz grasped the handkerchief that Rabbi Dayan offered him.

As their turn came close, Moshe suddenly asked:,"What if someone cannot come in person and grasp the handkerchief? Can he still appoint the Rabbi an agent to sell his chametz?"

"Hmm," thought his father for a minute. "You stumped me on this. We'll ask Rabbi Dayan when it's our turn."

When their turn came, Moshe's father filled out the form, and at the end grasped the handkerchief from Rabbi Dayan. He then said, "Rabbi, Moshe has a question for you."

Slightly blushing, Moshe spoke up. "If someone cannot come in person to grasp the handkerchief, can he still appoint you an agent to sell his chametz?"

"Excellent question," said Rabbi Dayan. "There is one other person after you, so if you wait a few minutes I would be happy to explain everything when I finish. Meanwhile, have a look here in Shulchan Aruch Choshen Mishpat." He pulled a large volume of the shelf, opened to the proper page, and directed Moshe's father to the relevant piece.

"Wow," exclaimed Moshe, "that a very large sefer. I don't think I've ever seen it before."

His father chuckled. "Indeed, the Shulchan Aruch is quite large because of all the commentaries printed around it. There are four parts to the Shulchan Aruch, the Jew-

ish Code of Law. The fourth part, Choshen Mishpat, deals with monetary law." He then began to read: "One who says to his agent, 'Go and sell this land or item for me, or buy for me,' can sell and buy and do his agency, and all his actions are valid. One who appoints an agent does not need a kinyan nor witnesses, but rather just a verbal statement alone between him and his friend (Choshen Mishpat 182:1)."

"Well, I guess we got our answer," said Moshe's father. "It clearly says that a verbal appointment is sufficient, and there is no need for a kinyan."

"But-" stammered Moshe, "but then why does the Rabbi bother to do a kinyan at all?"

"You've stumped me again," said his father. "It looks like the Rabbi is finishing now, though. We can ask him to explain."

Rabbi Dayan had just finished, and turned to Moshe and his father: "Did you understand the Shulchan Aruch? Do you have your answer?"

"Well, we did clearly see that it is possible to appoint an agent verbally, without a kinyan," said Moshe's father. "But now Moshe asks why you bother to make a kinyan anyway?"

Rabbi Dayan smiled and answered. "This law of the Shulchan Aruch is based on the Rambam in Hilchot Mechira (5:11-13). The Rambam explains that there are various things that do not actually require an act of kinyan, nor does a kinyan accomplish anything, such as appointing an agent. Nonetheless, the common practice is to make a kinyan to demonstrate sincerity, that the person is not joking but truly wants him to be an agent. The Rambam concludes, however, if a person were to sincerely state his appointment of an agent verbally - that would be sufficient."

He paused for a minute, "Do you understand?"

"Yes," said Moshe and his father. "It would seem, then, that if someone cannot come in person - it is still possible to appoint you an agent and arrange the sale over the phone?"

"Yes," said Rabbi Dayan. "Nonetheless, it is preferable to come in person to fill out and sign the form, and to uphold the practice of grasping the handkerchief and appointing the agent through a kinyan sudar, as the Rambam writes."

Moshe added, with a twinkle in his eye, "There is another advantage to coming in person. You have the chance to ask questions and learn new things!"

Borrowed Time

Bava Metzia 99a - Meshicha BeShomrim

After many years of living in the States, the Liebers decided to sell their house and move to Israel! The house was finally sold to the Blechs, and the closing was set for mid-May.

A month before the closing date, Mr. Lieber called. "Can we remain in the house for a few weeks after closing?" he asked Mr. Blech. "This will make it much easier for us to renovate our apartment in Israel before moving."

"Let me check when we will be ready to move in," answered Mr. Blech. Two days later, he called back. "We will not be ready to move until mid-June, so you can stay in the house until June 10th."

"Thank you very much," replied Mr. Lieber. "We really appreciate it."

A week after closing, Mr. Blech called the Liebers. "Our plans suddenly changed," he said. "I just switched jobs, and will have to start in the beginning of June. Because of this, we're going to have to move in by June 1st."

"That's a big problem," said Mr. Lieber. "We've built arrangements around staying till June 10th."

"What do you mean?" asked Mr. Blech.

"We arranged to load the lift June 9th," replied Mr. Lieber. "We also scheduled our flight for June 13th. It's going to be hard to live in transit for two weeks."

"I know it's inconvenient," responded Mr. Blech, "but we need to move in."

"I really don't know if it's possible at this point," said Mr. Lieber. "I told you, we ordered the lift for June 9th, and there's no way we can move out without packing the lift."

"See if you can arrange to make it earlier," said Mr. Blech. "But regardless, we also have constraints and need you out by June 1st."

"It will be extremely hard for us to pack so quickly," said Mr. Lieber, "but I'll speak with the shippers."

An hour later, Mr. Lieber called back. "I spoke with the shipping company and they said that there's no way they can come by June 1st. Maybe two days earlier than planned, but not by June 1st."

"I'm really sorry," said Mr. Blech, "but there comes a point we when have to say, 'Enough.' We already closed and now it's our house. We were happy to let you stay

there until we were ready to move in – mind you, we let you stay for free – but we really must move in by June 1st."

"We really appreciate your graciousness," insisted Mr. Lieber, "but you did agree to let us stay on until June 10th. We could have left by the closing date, but at this point, we simply cannot leave by June 1st."

"We insist that you leave by June 1st so that we can move in for my new job," said Mr. Blech. "You can move everything into short-term storage or find another shipping company."

"That's not reasonable," retorted Mr. Lieber. "You agreed that we can stay until June 10th, and you can't suddenly change the date!"

"You leave me no option but to summon you to a din Torah with Rabbi Dayan," said Mr. Blech flatly.

Mr. Blech and Mr. Lieber came before Rabbi Dayan's beis din and presented the case.

"Lending a property or movable item is a mutual legal commitment, just like renting a property," ruled Rabbi Dayan. "Once the borrower takes possession of the borrowed property, such as by living there, he acquires rights to use it for the duration of the loan. Conversely, he assumes responsibility for safekeeping a borrowed item. Therefore, since Mr. Blech agreed to allow the Liebers use of the house until June 10th, he has no right to evict them earlier (Choshen Mishpat 341:1; see Nesivos Hamishpat 192:6)."

"What if we hadn't specified a date?" asked Mr. Blech.

"An unspecified monetary loan is assumed to be for thirty days," Rabbi Dayan answered. "However, the accepted opinion is that if an item was lent without a time frame, the lender may demand it back at any time (C.M. 341:1). Until he asks for the item to be returned, the borrower may continue to use it and remains responsible for it (Pischei Teshuva 341:1). Some maintain that when lending use of a house, 30-day notice is normally required (see C.M. 312:6ff; Pischei Choshen, Sechirus 5:11).

"If no date was stipulated, but the item was borrowed for a specific task or event, such as to pack the lift," concluded Rabbi Dayan, "the lender cannot demand it back until the borrower has done the task (341:2,5)."

Summer Plans

Bava Metzia 99a - Kinyan Sechirus

Mr. Blank worked through the summer, so his family stayed in the city.

"It would be nice to get away to the country at least for a weekend," his wife suggested.

"Great idea!" Mr. Blank replied. "See if you can find a place."

Mrs. Blank searched the ad section of the Jewish newspaper.

"Here's one," she said. "Summer home available for weekends. Call Mr. Zimmer for details."

Mr. Blank called Mr. Zimmer. "Is your summer home available for the last weekend in August?"

"It's available, and it costs $500 for the weekend," replied Mr. Zimmer.

"Then we are interested in reserving the house for that weekend," Mr. Blank said.

"Excellent," said Mr. Zimmer. "Payment is due when you arrive."

A week later, Mrs. Blank received a call from her sister. "We're invited to a bar mitzvah at the end of August," the sister said. "Our summer home is available that weekend if you'd like to use it."

"That's so nice of you!" exclaimed Mrs. Blank. "We actually reserved a summer home for that Shabbos, but if yours is available, that would save us the expense!"

Mrs. Blank turned to her husband. "My sister just offered us her summer home for the last weekend of August," she said. "Can you call Mr. Zimmer and cancel the reservation?"

Mr. Blank called Mr. Zimmer. "We reserved your summer home for the end of August," he said, "but we do not need it now and would like to cancel the reservation."

"But you already confirmed the reservation," said Mr. Zimmer. "You can't just back out now — that's dishonest."

Mr. Blank was troubled. He saw Rabbi Dayan in shul that evening and asked if it was permissible to cancel the reservation.

"Just as a sale requires an act of acquisition (kinyan) to make it legally binding, so too, a rental agreement requires a kinyan to make it legally binding," said Rabbi Dayan. "Therefore, although you reserved the bungalow over the phone, since no kinyan or payment was made, you have the legal ability to cancel the reservation.

To prevent this, it is wise for landlords to demand a deposit payment (195:9; 315:1)."

"Words alone mean nothing?!" Mr. Blank asked, astounded.

"Words are meaningful, and a person has a moral obligation to honor his verbal commitments," replied Rabbi Dayan. "One who does not uphold his word is called mechusar amana, lacking in trustworthiness, and possibly even wicked (204:7)."

"So it is wrong to cancel the reservation?" asked Mr. Blank.

"It would be if you hadn't received the offer from your sister-in-law," replied Rabbi Dayan. "There is a dispute whether a verbal commitment is morally binding when there was a change in market conditions. The Rema (204:11) cites both opinions, and favors the opinion that one should not retract even in this case. However, later authorities lean toward the lenient opinion (Pischei Choshen, Kinyanim 1:[5])."

"The Chasam Sofer (C.M. 102) writes," continued Rabbi Dayan, "that a change of circumstances, when another unit was already received for free, is certainly like a change in market conditions and is not considered a breach of integrity."

"What if I wasn't offered the other bungalow for free, but found a better deal?" asked Mr. Blank. "Would that also be considered a change in market conditions?"

"The Sm"a (333:1) indicates that is so," answered Rabbi Dayan, "but this is questionable unless there was some new development in the market, so one who is scrupulous should be careful (Emek Hamishpat, Sechirus Batim 9)."

"What if Mr. Zimmer had turned away other potential renters meanwhile?" asked Mr. Blank.

"That's a different story," replied Rabbi Dayan. "If he turned away other potential renters on your account and cannot find others, this might be considered sufficiently direct damage (garmi) to require compensation, as we find regarding workers (333:2; Sm"a 333:8). On the other hand, it is not actual damage, only lost profit (grama), so it is proper to compromise (see Pischei Choshen, Sechirus 10[10]; Pischei Teshuvah 312:4)."

Repair Refusal

Bava Metzia 101a - Yored LeSdei Chaveiro

When Yisrael opened his garage on Friday morning, Eli was waiting there.

"I'm driving to Baltimore for Shabbos," Eli said, "but funny things have been happening with the car recently. Can you check the battery and brakes?"

"Sure," Yisrael told him. "Come back in two hours."

Yisrael examined the car. The battery and brakes were fine, but there was a problem with the alternator. He tried calling Eli to ask whether to replace the alternator, but Eli was unavailable.

"It's dangerous to drive to Baltimore like this," Yisrael reasoned, "but if I wait until Eli returns, it will already be too late to order the part and install it."

Yisrael ordered the alternator and began working. As he was finishing, Eli returned.

"I'm just about finished," Yisrael said. "The battery and brakes were fine, but I had to replace the alternator. I tried reaching you, but you were not available."

Eli looked uncomfortable. "Thank you," he said, "but I didn't want the alternator replaced!"

"But you needed it replaced," said Yisrael. "It wasn't safe to drive to Baltimore like this."

"I only asked you to check the battery and brakes," Eli insisted. "I didn't ask for any other work and do not want to pay. If you want, you can put the old alternator back in."

Yisrael rolled his eyes. "It's already been opened and installed," he said. "It's not worth my time taking it out. But it's not fair of you not to pay; the part was faulty and had to be replaced."

"How you can do work without authorization and expect to be paid?" said Eli.

"I always ask, and did try reaching you," Yisrael replied. "You were in such a rush this morning, though, that I was sure you would want me to fix whatever was necessary to get to Baltimore."

"I can't talk now," said Eli, "but I'm willing to discuss this with Rabbi Dayan after Shabbos."

"Agreed!" said Yisrael. "We can see him Sunday evening."

The following week, Yisrael and Eli met with Rabbi Dayan. "I replaced a faulty alternator in Eli's car before I had a chance to contact him," Yisrael said. "He refuses to

pay for the repair."

"This case relates to an intricate topic called 'yored l'sedei chaveiro shelo bir'shus,' one who plants trees in another person's field without authorization," said Rabbi Dayan. "The Gemara (B.M. 101a) teaches that the owner has to pay if the work was beneficial. If the field was intended for trees, the owner has to pay to going rate for such work; if the field was not intended for trees, the owner pays a lesser amount (C.M. 375:1; SM"A 375:2)."

"What if the owner of the field says that he did not want the trees planted?" asked Eli.

"The Geonim rule that the owner can say that he does not want the trees," replied Rabbi Dayan. "He can tell the planter to remove them and does not have to pay. There is a dispute, however, whether this applies also to a field intended for trees. The Shulchan Aruch indicates that he can say so even if the field was intended for trees, whereas the opinion of the Rama is unclear (C.M. 375:2,7; SM"A 375:4,14; and GR"A 375:2,17).

"The Chazon Ish (B.B. 2:3) explains that, in principle, everyone agrees that the owner does not have to pay if he truly does not want the trees," continued Rabbi Dayan. "The dispute exists when the owner does not seem to have a valid reason: Is he simply looking for an excuse to evade fair payment for the benefit he received? The Aruch Hashulchan (375:11) suggests a similar rationale to explain the opinion of the Rama; it depends on whether he has a valid reason for not wanting the work."

"But if it was dangerous to drive with the faulty alternator and it needed to be replaced," asked Yisrael, "shouldn't Eli have to pay for it?"

"The Rama rules that if someone repaired an abandoned house, the owner must pay him for essential repairs," was the reply. "However, he can refuse to pay for repairs that were not essential and that he doesn't want (375:7).

"Therefore, if the repair was essential for the car, Eli has to pay the going rate even if he did not ask for it to be done," concluded Rabbi Dayan. "If the repair was not essential, but appropriate, it would be comparable to a field intended for trees that he can refuse to pay if he offers a valid reason."

Snow Job, Part I

Bava Metzia 101a - Yored LeSdei Chaveiro

Mr. and Mrs. Winter were spending a lovely Shabbos with their children. "It's starting to snow again!" exclaimed their granddaughter, Shoshana, during lunch.

The rest of the family looked out the window. "I heard that there might be another storm coming," said Mr. Winter.

By the time Shabbos was over, there were five inches of snow on the ground. "Snow will continue through the night and will taper off at dawn," the weatherman reported.

"I guess we'll stay," Mrs. Winter announced. "By mid-morning they should have the roads cleaned."

In the morning, the Winters built snowmen and sledded with the grandchildren. Afterwards, they packed up and headed home.

When the Winters arrived home, they were met with a pleasant surprise. The sidewalk, walkway to the house, and entire length of the driveway had been shoveled!

"Wow!" exclaimed Mr. Winter. "I wonder who did that!"

He pulled into the driveway and unloaded the car. As he opened the door to the house, he saw a note, left by two boys from around the corner: "Since you were away, we shoveled your snow. We charge $40 for the job. Zvi & David."

"It was nice of them to shovel," said Mr. Winter with a huff, "but I never agreed to pay them! Who asked them to shovel?!"

"They did help us," his wife replied calmly. "Lots of people pay boys to shovel snow."

"But those people hire them," Mr. Winter responded. "If the boys do work they weren't hired to do, how can they ask for payment?"

"You might check with Rabbi Dayan before you decide by yourself," his wife suggested.

Mr. Winter called Rabbi Dayan and asked whether he had to pay. "There are numerous factors to consider," said Rabbi Dayan, "but if it is common to hire boys to shovel, they are entitled to charge you in many situations."

"On what basis?" asked Mr. Winter.

"The Gemara (B.M. 101a) addresses the case of yored l'sdei chaveiro, a person who planted trees in another person's field," explained Rabbi Dayan. "If the land owner decides to keep the trees, he has to pay the person who planted them for his efforts. If the field was a'suya lita (suitable for planting trees) the owner has to pay the planter

the going rate for such work; if the field was not suitable for trees, the owner has to pay only a minimal amount (C.M. 375:1-2)."

"But why should the owner pay if he didn't hire the person to plant?" asked Mr. Winter.

"Since the owner received a benefit and financial gain that he would normally pay for, he must pay the planter for providing that benefit," said Rabbi Dayan. "Furthermore, in a field suitable for planting trees, the planter is considered like an employee (po'el), since the owner is interested in having this work done (Ketzos Hachoshen 246:1; Chazon Ish B.B. 2:6)."

"I can understand this halacha when planting a tree, since the field is now worth more and the owner received a capital gain," argued Mr. Winter. "But I had no financial gain from having the snow shoveled!"

"Some make this distinction," said Rabbi Dayan. "Nonetheless, the Rama (C.M. 264:4) extends this law to any person who performs a service that benefits another, even if there is no actual capital gain (see Talmudic Encyclopedia 23:442). He also rejects the possible claim that the job was done as a favor since the person wasn't instructed to do it."

"You distinguished between a field that is suitable for planting and one that is not," said Mr. Winter. "How does this apply to shoveling snow?"

"The sidewalk and the walkway to the house, which everyone needs cleared, are comparable to a field suitable for planting," replied Rabbi Dayan. "The front part of the driveway and access to the street are also important for most people. The back of the driveway or a path around the side of the house, though, seem comparable to a field not suitable for planting."

"So I have to pay the going rate for the sidewalk, walkway, and front part of the driveway," said Mr. Winter. "But prices range from $30-50!"

"Since there was no price agreement," responded Rabbi Dayan, "you have to pay only the lower end of the range, $30 (Tumim 89:8; Rama C.M. 332:4)."

"I still have a question," said Mr. Winter. "I often shovel myself and would have shoveled when I came home, so why should I pay?"

"If you often shovel yourself, that's a different story," said Rabbi Dayan.

Snow Job, Part II

Bava Metzia 101a - Yored LeSdei Chaveiro

Mr. and Mrs. Winter had returned from Shabbos after a snowstorm, and found their sidewalk, walkway and driveway shoveled... and a note from two neighborhood boys, Zvi and David, asking for $40.

Mr. Winter felt that he shouldn't have to pay the boys since he hadn't hired them, but Rabbi Dayan explained that if it is common to hire people to shovel, he would have to pay, since he benefited from their service.

"It's not fair," Mr. Winter protested. "I often shovel by myself and would have shoveled when I came home!"

"That changes things," agreed Rabbi Dayan. "However, the issue is somewhat intricate, so it would be best that we all meet."

When they met, Rabbi Dayan told Zvi and David, "I previously explained to Mr. Winter that you are entitled to payment based on the law of yored l'sdei chaveiro. If a person plants trees in a field that was suitable for planting, the land owner has to pay the planter the minimum going rate for such work, since he provided the owner benefit. Here, Mr. Winter would have to pay you the minimum going rate for shoveling, $30.

"However, if the owner normally plants his own trees, he does not have to pay the planter for his professional services," continued Rabbi Dayan. "Since the owner does not need the work, this case is treated like a field that is not suitable for planting, so he has to pay only a minimal amount for having been spared the time and effort of planting (Rama 375:4; Aruch Hashulchan 375:8). Therefore, since Mr. Winter often shovels by himself, he has to pay you only a minimal amount, let's say $15, for sparing him the time and effort of shoveling."

"We learned in Yeshiva, though," said Zvi, "that even if the field is not suitable for planting, if the owner demonstrates that he wants the work, he has to pay the going rate (C.M. 375:3). Here, Mr. Winter pulled into the cleared driveway when he came home! Doesn't that demonstrate that he wanted the work we did?"

"I see that you remember what you learn," smiled Rabbi Dayan. "However, this only applies when the owner demonstrates willingness to pay or expends additional effort for the same benefit, such as widening the path."

"I still think that Mr. Winter should pay us the full rate," said David. "He didn't

come home until Sunday afternoon and could have gotten a fine meanwhile. Also, someone could have slipped on his sidewalk and he would face a lawsuit!"

"That touches upon a whole other topic called mavriach ari, one who chases away a lion," said Rabbi Dayan. "The Gemara (B.K. 58a) teaches that if a person lays out money of his own volition to spare his friend a possible loss, such as to ward off a lion threatening his flock, he cannot legally demand reimbursement (C.M. 128:1). Therefore, the fact that you spared Mr. Winter a potential fine or lawsuit is not sufficient grounds to obligate him (Nesivos 264:1)."

"How is this any different from the law of yored that we began with?" asked Zvi.

"In this case, the owner did not receive any positive gain; he was just spared a possible loss," answered Rabbi Dayan. "The obligation to pay a yored is for the gain that the planter provided (Tosfos s.v. e nami). Furthermore, Mr. Winter might not have gotten a fine anyway. Therefore, he has to pay for the gained benefit of having a clean, usable area, but not for being spared the potential loss of a fine or lawsuit."

"According to this," said Mr. Winter, "if I went away for the winter and someone shoveled the snow without my asking, would he not be able to charge me, since I received no benefit?"

"That seems correct," replied Rabbi Dayan, "although it would be irresponsible to leave for a long time without making an arrangement for someone to shovel the sidewalk."

"If Mr. Winter had hired someone else to shovel when necessary and we shoveled instead," David asked, "could we then demand payment since he indicated willingness to pay?"

"Certainly not," argued Mr. Winter. "You would be taking the job away from the person whom I hired!"

"You're correct that it is prohibited to encroach upon another person's livelihood and a person who does so is called 'wicked' (ani hamehapech b'charara)," said Rabbi Dayan. "However, if the boys wrongfully did so, Mr. Winter would have to pay the minimum going rate, since he indicated willingness to pay for the service (Rama C.M. 156:5)."

Rental Renewal

Bava Metzia 101b - Rental

The Gubers had been looking to rent a house in the area and reached an agreement with the Bomzers. They signed a rental lease reading: "The house is rented for one year at $3,000 a month."

Towards the end of that year, the Gubers notified Mr. Bomzer, "We would like to renew the lease and remain an additional year."

"Agreed," replied Mr. Bomzer. "We're happy to let you stay."

Although rental prices in the area had risen during the year, Mr. Bomzer did not mention anything to the effect of a price rise.

When it came time for the first rent check of the second year, Mr. Guber turned to his wife. "Mr. Bomzer never said anything about raising the rent," he said.

"If he didn't say anything," she replied, "we continue paying $3,000, like we did last year."

Six weeks later, Mr. Bomzer contacted the Gubers. "You know that rental prices in the area have risen during the past year by at least 5%," he said. "In accordance with the going rate, please add 5% to the monthly rental, including back pay for the previous two months."

"You didn't say anything about raising the rent at the end of the year," responded Mr. Guber. "We've already started the second year at $3,000. You can't decide to raise the rent now!"

"The lease only stated a price for one year," said Mr. Bomzer, "and there has been a 5% rent increase throughout the neighborhood. I'm willing to forgo the increase for the past months, but I am entitled to raise the rent for the coming months."

"Had we known that you would raise the rent, we might have considered looking into another house," argued Mr. Guber. "But even if not, once we began the year for $3,000 a month, you cannot raise the rent in the middle of the year."

"Be grateful that I didn't demand the increase right away!" bellowed Bomzer. "There's absolutely no reason, though, that I can't raise the rent for the remainder of the year!"

"Once we've renewed the lease and begun the second year without a rental increase," retorted Mr. Guber, "that remains the price for the year!"

A week later, Mr. Guber received an official letter from Rabbi Tzedek's beis din:

"You are hereby summoned to appear before the beis din in response to a claim by Mr. Bomzer to raise his rental fee."

Mr. Guber and Mr. Bomzer appeared before the beis din and presented their respective arguments.

Rabbi Tzedek conferred with the other dayanim and then ruled, "When a contract is renewed, the terms in force continue if not stated otherwise. Therefore, since nothing was said before the second year, Mr. Bomzer cannot demand the additional 5%, even for the remaining months.

"When a person rents a house for a set amount of time, the landlord cannot raise the rent for the duration of the rental, even if there is a rise in the real estate value (C.M. 312:10). If the tenant continues to live in the house past the time of the contract, the same price continues, until stated otherwise."

"I accept that I can't charge extra for the previous months," said Mr. Bomzer, "but why can't I charge an additional 5% for the coming months?"

"The Gubers asked to renew the lease," explained Rabbi Tzedek. "When a contract is renewed without any stipulation, whether a rental or an employment contract, the terms are presumed to remain the same (Rama C.M. 333:8 and Shach 333:44). Therefore, since you didn't notify about a rent increase before the beginning of the second year, the rental lease was renewed for another year at $3,000."

"What if the Gubers hadn't requested to renew the lease," asked Mr. Bomzer, "but simply continued living there past the original date?"

"Then, you could not charge the extra amount retroactively, but you could demand extra for the coming months," replied Rabbi Tzedek. "That rental would not be renewed for a set time, but rather continue on a per-monthly basis (see Shach 312:10)."

"What if the lease included an explicit option for a one-year renewal?" asked Mr. Guber. "Is the landlord allowed to raise the rent according to fair market value for the second year?"

"That depends on the minhag hamedina, common custom," replied Rabbi Tzedek. "In some places the option only gives priority to the tenant, but does not secure the price, whereas in other places it also secures the price if not stated otherwise in the lease."

Mezuzah Moves

Bava Metzia 102a - Removing Mezuzahs

Mr. and Mrs. Judah Fine had lived in the city for almost twelve years. Their two-bedroom apartment, which had seemed spacious when they first married, was becoming quite crowded. When child number five came along and the oldest had to be moved into the living room, Mrs. Fine declared, "It's time to look for a house!"

After many months of house hunting, the Fines found a suitable home. It took another month of intensive bargaining until they negotiated a price they could handle.

Finally, the deal was closed and a date was set for the move. A week beforehand, Judah met for the final time with Saul Eisner, the owner.

"Enjoy the space," Saul said. "You'll be able to give each kid his own room!"

"We won't do that," said Judah. "But we'll find use for each room."

"By the way, you're going to need a lot of new mezuzahs," Saul reminded him. "There are a total of twenty doorways and arches in this house."

The figure of $2,000 immediately flashed through Judah's mind. "I assumed you would leave the mezuzahs with the house," he said to Saul.

"Are you kidding?" said Mr. Eisner. "We replaced all the mezuzahs two years ago, and bought top-quality ones from the sofer. Each one cost $150! Some also have artistic cases that we received as special gifts."

"But I learned," said Judah, "that when you move out and another Jew is moving in, you're not supposed to remove the mezuzahs."

"I thought that I can take the mezuzahs with me if I put them in my new house," said Saul. "But even if you're right, you still would have to pay for the mezuzahs. Add $2,500 and I'll get new ones."

"I don't see why I should have to add," persisted Judah. "The mezuzahs go with the house. You sold me the house; the mezuzahs are included in the price."

"Absolutely not," said Saul. "The price was for the house, not the mezuzahs!"

"Why not?" retorted Judah. "If they stay as part of the house, they're included in the price!"

"Look, there's no point in arguing this," Saul said. "Let's ask Rabbi Tzedek."

They arranged to meet with Rabbi Tzedek, who ruled: "Unless stipulated by the sales contract, high-quality mezuzahs are not automatically included in the price of the house. Therefore, if the Fines will paint the house before they move in, which is

common, Saul may remove the mezuzahs when he leaves (Igros Moshe Y.D. IV:44). However, if the house will not be painted, Saul should not remove the mezuzahs when he leaves. Instead, Judah should either pay to keep them, or affix his own mezuzahs and then return these to Saul."

Rabbi Tzedek then explained, "The Gemara (B.M. 102a) teaches that a tenant who rents a house from a Jew should not remove his mezuzahs when he leaves. Doing so revokes the mitzvah and removes the Divine protection from the house. However, he is entitled to reimbursement for the mezuzahs (Rama Y.D. 291:2).

"If the incoming tenant or landlord refuses to pay, most authorities maintain that the outgoing tenant still should not leave the house without mezuzahs, but he can replace his expensive mezuzahs with simple, kosher ones shortly before leaving. Even if the incoming resident will affix his own mezuzahs instead, it is preferable that he – not the one moving out – should remove the existing ones and return them (Pischei Teshuva Y.D. 291:7; Yabia Omer Y.D. III:18).

"When selling a house, though, Binyan Zion maintains that the owner who moves out is not entitled to additional payment for the mezuzahs. Since they are attached to the house and are supposed to be left there, they are included in the sale price of the house (Pischei Teshuva Y.D. 291:8; C.M. 214:4).

"Shevet Halevi (II:129), however, argues. He maintains that although the mezuzahs are attached to the house, they are not part of the construction. Therefore, mezuzahs are not assumed to be included in the price of the house, especially if they are high-quality.

"It should be noted, however, that the standard New York State real estate contract stipulates that 'articles of personal property attached to … the premises' are included in the sale, unless specifically excluded. If this language is used, the mezuzahs would be included, unless specifically excluded."

Whose Tomatoes

Bava Metzia 102a - HaZevel

Eliyahu, a close student of Rabbi Dayan, came to visit him.

"An interesting Choshen Mishpat question recently came my way," Eliyahu said. "It's a humble question, involving just a few tomatoes, but I would be interested in hearing the halachic perspective on the issues involved."

"Go ahead," said Rabbi Dayan. "I'd love to hear!"

"I rented a house to an elderly couple for a year," Eliyahu began. "Towards the end of the rental period, the couple was away for while. I stopped by the house and noticed a tomato vine, with a few ripe tomatoes on it, growing in the backyard amongst the weeds. It seemed clear that the tomato vine was not planted intentionally, but grew accidentally from a stray seed.

"As I stood there admiring the plant, I began to wonder: To whom do the tomatoes belong? Perhaps they are hefker (ownerless) and anyone can take them, since they grew by themselves? Perhaps they are mine, since they grew in my property? Perhaps they belong to the elderly couple, since they rented the property?"

"That's a lot of questions for a few tomatoes," Rabbi Dayan chuckled. "Had a money tree grown instead of a tomato vine, it would have been a weightier question. Even so, the halachic question and Choshen Mishpat principles apply just the same to a tomato vine, a money tree, or anything else!"

"First, is the tomato plant hefker, because it grew from a stray seed," Eliyahu asked, "or does the property owner acquire the plant, because it grew on his property?"

"It is clear that the plant is not hefker," replied Rabbi Dayan. "First of all, what grows from the ground is considered an extension of the ground, a capital appreciation of the property. Furthermore, even if a hefker item, such as a loose twenty-dollar bill, lands in a backyard, the yard acquires it for the owner (B.M. 11a)."

"Who, though, is considered the 'owner' of the rented property regarding these tomatoes," Eliyahu asked, "me or the couple? On the one hand, the property itself belongs to the landlord. On the other hand, the tenant has the rights to use the property."

"Based on the halachic principle that a rental is considered a 'sale' for that day (B.M. 56b), it would seem at first glance that the tomatoes should belong to the tenant," replied Rabbi Dayan. "After all, he is considered the 'owner' for the duration

of the rental period. However, this issue is actually a subject of debate between the Rishonim."

"Oh, really?" said Eliyahu.

"The Gemara discusses the following analogous scenario," said Rabbi Dayan. "During the times of the Gemara, the organic waste of animals was considered a valuable product for use as fertilizer. When someone rents a house, who acquires the waste of stray animals that wander into the yard, the landlord or the tenant?

"The Gemara (B.M. 102a) rules that the fertilizer belongs to the landlord. However, Rashi explains that in the Gemara's case, only the house was rented, but not the yard. Had the yard also been rented, the tenant would acquire the fertilizer. Rambam, on the other hand, rules that the landlord acquires the fertilizer even if the yard is also rented. Shulchan Aruch (C.M. 313:3) cites the ruling of the Rambam."

"It seems, then," said Eliyahu, "that the tomatoes belong to the landlord!"

"It's not so simple," responded Rabbi Dayan. "Elsewhere, the Shulchan Aruch seems to rule like Rashi (C.M. 260:4). Later commentaries discuss this seeming contradiction at length and offer various, sometimes contradictory, resolutions.

"However, there is a major difference between a detached hefker item that falls into a property, such as the waste in the example above, and a plant that grows from and is attached to the ground," continued Rabbi Dayan. "Since the plant is part of the ground, the plant itself belongs to the landlord; the tenant cannot uproot it and take it with him when he leaves. Ownership of the fruit, however, depends on whether the tenant had permission to plant there according to the rental agreement or prevalent practice."

"The tenant had permission to plant there," said Eliyahu.

"Then the tomatoes belong to the tenant," concluded Rabbi Dayan. "However, since the couple is not around and will probably not use the tomatoes anyway, you can call and ask for permission to keep them."

"Seems like a quite a discussion for four ripe tomatoes," Eliyahu remarked, "but a Torah discussion is worth more than a money tree!"

Closed for Repairs

Bava Metzia 103a - HaMaskir Bayis

Dr. Brand took a sabbatical to do research in another city. He rented his house for the year to the Reichs.

The relationship between Dr. Brand and Mr. Reich began to sour when damage occurred in the house and they disputed who was responsible. Dr. Brand indicated that would be happy if the Reichs found another dwelling for the remainder of the year. Mr. Reich, however, didn't want to move.

Mrs. Reich was in the kitchen one day when she smelled smoke coming from the direction of the electrical service panel. A minute later, the smoke detector began to beep.

"Everybody out of the house immediately!" Mrs. Reich shouted. The family evacuated quickly and called the fire department.

Fire trucks arrived within minutes as smoke spread through the house and flames erupted from the wall near the service panel.

The firemen raced into action with chemical extinguishers. Fortunately, they were able to extinguish the fire before it spread. However, there was significant damage to the service panel and the wall.

Mr. Reich notified Dr. Brand of the fire. "It wasn't our fault," said Mr. Reich. "Something went wrong in the electrical box."

"We'll hear what the fire inspector says," Dr. Brand fumed.

The fire inspector confirmed that the fire was caused by a failure in the service panel. Dr. Brand notified the insurance company, who sent an appraiser. An electrician determined that the entire electrical service panel would have to be replaced and completely rewired. The wall also needed to be repaired.

"How long will the repairs take?" Dr. Brand asked the electrician.

"It could a few weeks to complete the repairs, during which time there will be no electric power here," the electrician said.

Meanwhile, the Reichs went to live with relatives. "This is good opportunity to encourage the Reichs to find another house," Mr. Brand thought.

"I'd like to wait on the repairs until I come to visit next month," he told Mr. Reich. "You might want to look for another house."

Mr. Reich, however, demanded that repairs be made immediately. Dr. Brand insisted, in return, that Reichs continue paying rent during the weeks of the renovation.

Closed for Repairs, cont.

"If I can't live there, I'm not going to pay!" Mr. Reich flatly refused.

When Dr. Brand returned, the two went to a din Torah before Rabbi Tzedek.

Rabbi Tzedek ruled: "Mr. Reich does not have to pay rent for the month of the renovations. Even if he prepaid the rent, Dr. Brand would likely have to refund the month's rental. When a person rents a house and it collapses or burns down, most authorities maintain that the owner is not required to rebuild the dwelling, and the tenant does not have to pay rent for the remaining months and should be refunded any extra payments. However, some authorities maintain that the tenant remains obligated to pay rent for the duration of rental period (C.M. 312:17; SM"A 312:34)."

"Why does the tenant have to pay rent if he cannot live in the house?" exclaimed Mr. Reich.

"This opinion views a rental agreement as 'purchasing' the rights to use the house for that time," explained Rabbi Tzedek. "Therefore, if the usage is compromised, the renter loses, just as if he had purchased something and it broke afterwards (see Chazon Ish B.K. 23:10). According to this opinion, the owner is also not responsible for maintenance. However, the common rental practice is to require the owner to make necessary repairs (Rama 314:1; GR"A 314:6; Emek Hamishpat, Sechirus #51)."

"How does this relate to rental payment during the month of renovation?" asked Dr. Brand.

"Rental payment for the month of renovation is similar to rental payment after a house collapsed," answered Rabbi Tzedek, "Therefore, in accordance with most authorities, Mr. Reich is not obligated to pay rent for the month, since he couldn't use the house during this time."

"What happens if the rent was prepaid?" asked Mr. Reich.

"We mentioned that some authorities require the tenant to pay the remaining rent," replied Rabbi Tzedek. "Furthermore, some suggest that if the contract calls for prepayment of the rental, both opinions agree that the usage rights are 'sold' and the tenant is not entitled to a refund (Nesivos 312:13; Pischei Choshen, Sechirus 6:7,15). However, the prevailing common rental practice in many places is that the landlord is fully responsible for maintenance, even to refund the month's rent."

Borrowing it Back

Bava Metzia 94a - Shoel

Dr. Brand took a sabbatical to do research in another city. He rented his house for the year to the Reichs.

The relationship between Dr. Brand and Mr. Reich began to sour when damage occurred in the house and they disputed who was responsible. Dr. Brand indicated that would be happy if the Reichs found another dwelling for the remainder of the year. Mr. Reich, however, didn't want to move.

Mrs. Reich was in the kitchen one day when she smelled smoke coming from the direction of the electrical service panel. A minute later, the smoke detector began to beep.

"Everybody out of the house immediately!" Mrs. Reich shouted. The family evacuated quickly and called the fire department.

Fire trucks arrived within minutes as smoke spread through the house and flames erupted from the wall near the service panel.

The firemen raced into action with chemical extinguishers. Fortunately, they were able to extinguish the fire before it spread. However, there was significant damage to the service panel and the wall.

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"We'll hear what the fire inspector says," Dr. Brand fumed.

The fire inspector confirmed that the fire was caused by a failure in the service panel. Dr. Brand notified the insurance company, who sent an appraiser. An electrician determined that the entire electrical service panel would have to be replaced and completely rewired. The wall also needed to be repaired.

"How long will the repairs take?" Dr. Brand asked the electrician.

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"I'd like to wait on the repairs until I come to visit next month," he told Mr. Reich. "You might want to look for another house."

Mr. Reich, however, demanded that repairs be made immediately. Dr. Brand insisted, in return, that Reichs continue paying rent during the weeks of the renovation.

"If I can't live there, I'm not going to pay!" Mr. Reich flatly refused.

When Dr. Brand returned, the two went to a din Torah before Rabbi Tzedek.

Rabbi Tzedek ruled: "Mr. Reich does not have to pay rent for the month of the renovations. Even if he prepaid the rent, Dr. Brand would likely have to refund the month's rental. When a person rents a house and it collapses or burns down, most authorities maintain that the owner is not required to rebuild the dwelling, and the tenant does not have to pay rent for the remaining months and should be refunded any extra payments. However, some authorities maintain that the tenant remains obligated to pay rent for the duration of rental period (C.M. 312:17; SM"A 312:34)."

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