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Restoring the primacy of choshen mishpat

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UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA



STORY LINE

Rabbi Meir Orlian

WHAT A VIEW!

Levi and his family were sitting on their deck, enjoying a summer afternoon. Their house overlooked the ocean — almost. Ari's house intervened, but they could look straight through his back yard. The children enjoyed watching the boats, while the parents would look at the sun and rippling

waves.

While the family was sitting there, they saw Ari walking around the perimeter of his property with a contractor. A few days later, the contractor put poles around the edge of Ari's property.

"What are you doing?" Levi asked Ari.

"We have no privacy," Ari replied. "We decided to enclose it with a six-foot-high fence."

"But that will block our view!" exclaimed Levi. "You can't do that!"

"What do you mean?" asked Ari.

"We like to look from our deck through your property at the ocean," replied Levi. "If you enclose your property with a fence, we'll lose that beautiful view."

"I understand that you enjoy the scenic view," replied Ari, "but that doesn't give you legal rights to our property. We're entitled to privacy in our yard!"

"But it's been this way for years," argued Levi. "We've established a chazakah (legal status quo) to view the ocean from our house!"

"Just because it's been that way until now doesn't mean I can't change it," retorted Ari.

Levi decided to summon Ari to a din Torah before Rabbi Dayan. "For many years we have been viewing the ocean from our deck through Ari's back yard," began Levi. "He now wants to build a six-foot fence in his property that will block the view. May he do so?"

"You cannot restrain Ari from building a fence on his property," answered Rabbi Dayan. "Our Sages restricted a person from building a wall directly in front of his neighbor's window, which would block light and air from entering. However, it does not seem that they restricted blocking the view" (Pischei Teshuvah, C.M. 154:8).

"It sounds like there's some discussion of the topic," said Ari.

"Yes, the Gemara (B.B. 7a) discusses the case of two sons who divided their father's estate; one received an airy building and one the garden in front of it," explained Rabbi Dayan. "Shortly afterward, the one who received the garden built a wall in it that blocked the airy building, and litigation arose. Rashi explains that the issue was blocking light; Rabbeinu Tam explains that the issue was blocking the view of his fields."

"What was the ruling in that case?" asked

DID YOU KNOW?

Paying a babysitter the next day, instead of when she completes her job, is a very serious halachic shaila.

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BHI HOTLINE

CAN THE LENDER BLOCK A SALE?

I lent Shimon \$100,000 to start a business. The business failed, so Shimon wants to sell his house. I heard that

Yehudah was purchasing the house. I contacted him and told him not to purchase it since I need the house to remain in Shimon's possession in case he cannot produce the funds to repay my loan. Yehudah ignored my request and is proceeding to purchase the house.

Q: If Shimon defaults on the loan will Yehudah be responsible, since I warned him not to purchase the house?

A: If you want to guarantee the availability of the property in case Shimon defaults, you should obtain permission from beis din to place a lien on the house. If you do not exercise this option you may not have recourse against Yehudah.

According to Shulchan Aruch, a lender has a lien (shibud) on the borrower's land so that if he defaults on the loan the lender can repossess any land that the borrower sold subsequent to receiving the loan. However, this right is limited to documented loans with witnesses, because it is expected that they will publicize the fact that a loan was issued and the purchaser should have researched whether the house has a lien on it. When a loan is not issued in the presence of witnesses, it is not public knowledge and the buyer is not expected to know he was purchasing encumbered property. Therefore, his purchase is protected and the lender may not repossess that property for collection of the loan (C.M. 39:1, 69:2).

Today, the manner of encumbering property has changed. It is no longer the presence of two witnesses that encumbers



STORY LINE

Levi. "According to Rabbeinu Tam that case sounds exactly like ours!"

"The dayan upheld the brother's right to build the wall within his property," replied Rabbi Dayan (C.M. 154:27). "Nonetheless, your case is not so simple."

"Why not?" asked Ari.

"Some Rishonim imply that he was allowed to build the wall only because the other brother did not yet establish chazakah. Where a person already established chazakah to look through his neighbor's property, Mahara Sasson maintains that Rabbeinu Tam would not allow the neighbor to block the view.

"However, Maharalbach questions this understanding of Rabbeinu Tam," continued Rabbi Dayan. "Furthermore, he writes that even with a chazakah, a person might be able to restrain his neighbor only when he had a particular need to look through his property, such as to guard his fields, and had a window clearly for this purpose, but not when blocking a scenic view."

"How do we rule in this dispute between Mahara Sasson and Maharalbach?" asked Levi.

"Maharsham (3:376) writes that when the wall was already built, the neighbor can maintain it," answered Rabbi Dayan. "Moreover, he writes elsewhere that as long as a person builds in his own property, he has the upper hand. Thus, he can follow the lenient opinion of the Maharalbach (kim li).

"Therefore, Ari is entitled to build the fence," concluded Rabbi Dayan. "However, to uphold proper neighborly relations, it would be appropriate to strive for a mutually beneficial solution" (see Emek Hamishpat, Shecheinim #19).



BHI HOTLINE

property. Liens are created only through legal means. This is partly because in the time of Chazal the function of witnesses was to publicize the loan so that potential buyers could protect themselves. Nowadays, people are very private about loans and great effort is invested to assure that others do not become aware of it. Accordingly, authorities write that a lien is generated only by recording a lien with the borrower's permission or with beis din's authorization, rather than what is written in Shulchan Aruch (Erech Shai 60:9; Igros Moshe, C.M. II, 62; Hayashar V'hatov VI, 33).

In your case, since you informed Yehudah that you lent money to Shimon, perhaps he does not deserve the protection afforded to buyers who did not know that the seller had borrowed money and you should be able to repossess. However, Poskim (Chavos Ya'ir 64, cited in Pischei Teshuvah 104:2) write that the halachah that a lender may not repossess land sold by the borrower of an undocumented loan applies in all circumstances (lo plug).

Even when the lender informed the buyer that he lent money to the seller and has supporting evidence but the buyer proceeded to purchase the property, nonetheless, the lender has no recourse, since Chazal made an unconditional rule that a lender may not repossess land sold by the borrower of an undocumented loan. In such a case the only option the lender has is to ask beis din for permission to freeze the borrower's assets to prevent him from selling the land (see C.M. 73:10). (Some authorities disagree with Chavos Ya'ir — see Paamonei Zahav 113, but see also C.M. 117:3, which seems to follow Chavos Yair's position).

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MONEY MATTERS

COPYRIGHTS AND PATENTS # 2

Q: Does Halachah recognize ownership of intellectual property, such as Torah thoughts, musical works, computer programs or professional techniques, beyond the physical entity of a book or disk?

A: This fundamental question regarding copyrights and patents remains a significant dispute among the authorities.

The Maharsham (2:202) explicitly maintains that a person does not have ownership over a professional technique he developed because it is intangible. Thus, once a book or disk is sold, the creator has no further ownership over the inherent content to prohibit copying it. This position is indicated also by the Chasam Sofer (C.M. #79:41; 6:57). It is also implied by many other Gedolim whose approbations (haskamos) on Torah works included a prohibition against competing publishers that was based on other reasons, not simply on the creator's ownership.

On the other hand, the Sho'el U'meishiv and others, including many contemporary authorities — e.g., Harav Moshe Feinstein, zt"l (O.C. 4:40[19]) and Harav Y.S. Elyashiv, zt"l — maintain that a person has ownership of his intellectual property. According to this opinion, while the customer bought the book or disk, he did not buy the intellectual property itself; one who copies against the creator's will is stealing the latter's property (see Emek Hamishpat, Zechuyos Yoztrim, Intro. pp. 1-3).

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