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HaRav Chaim Kohn, shlita



Restoring the Primacy of Choshen Mishpat

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STORY LINE

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Purchasing Agent

"Yossi is getting married next week," Moshe said to Yehuda. "He mentioned that if a few friends wanted to chip in, he would be happy to receive a microwave as a wedding gift."

"How much will it come to?" asked Moshe. "\$100-150 a person, depending on how many people chip in," replied Moshe.

"That's fine," said Yehuda. "Put me down." A few days later, Yehuda's wife showed him an embroidered challah cover.

"I planned ahead and ordered it for the new couple," she said.

"That's great," Yehuda replied, "but a few of us chipped in for a microwave."

"The challah cover has their name embroidered on it already," she said. "We can't return it."

Yehuda called Moshe, but there was no answer. "This is Yehuda," was the voice mes-

sage he left. "We got our own gift for Yossi and do not want to participate in the purchase of the microwave."

Meanwhile, that same day, Moshe bought the microwave. When he came home, he checked his voicemail.

Moshe called Yehuda back. "I didn't get your message until after I bought the microwave," he said. "So it's too late; you'll have to pay. It comes to \$120 for each of five people."

"What's too late?" asked Moshe. "You were buying it anyway; just divide the cost into four instead of five."

"But you were on the list when I made the purchase," said Moshe. "It's not fair to make the others pay more."

"I called to cancel beforehand," pointed out Yehuda, "but you didn't answer."

"The truth is," said Moshe, "by the time you

called, I may have bought the microwave already."

"Even so, I'm going to give another gift," reasoned Yehuda. "I won't benefit from the microwave."

"Whether you give another gift or not is your own issue," said Moshe flatly. "I bought the microwave for you, as well, so you have to pay!"

"Not unless Rabbi Dayan says I have to!" said Yehuda.

The two went to Rabbi Dayan's beis horaah. Moshe explained what happened and asked, "Does Yehuda have to pay his share in the microwave, or can he back out?"

"You have to check the message and see what time Yehuda called to cancel," said Rabbi Dayan. "Once you bought the gift on behalf of those who signed up, they cannot retract."

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Level of Liability

I am traveling to Israel soon. My neighbor asked if I could deliver an electronic device to his son who is learning there. I agreed. Later, he told me that I was welcome to use it while traveling.

Q: Does permission to use the device impose on me the liability of a borrower (shoel), of a paid custodian (shomer sachar), or neither of the above and I remain an unpaid custodian (shomer chinam)?

A: The answer depends upon a number of factors. If at the time your neighbor asked you to take the device, he granted you permission to use it, you would be categorized as a shomer sachar. It is as if he is paying you for performing the job of a custodian by granting you permission to use it (Shach 72:30; Machaneh Efraim, Shomrim 28).

However, if he gave it to you initially without permission to use it and subsequently granted you permission to use it, you would be

categorized as a shoel and are liable even if something happens to the device due to circumstances beyond your control (oness). The reason is that once you initially agreed to watch his device without expecting any sort of remuneration, subsequent permission to use it is not part of the original custodial agreement, and you become a borrower. In this case, where the custodian is given subsequent permission to use the object in his care, there is a debate at what point

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“Why is that?” asked Yehuda. “When people signed up, they became partners in the purchase, and Moshe was their agent to buy the microwave,” explained Rabbi Dayan. “She-lucho shel adam k’moso — a person’s agent is like him (Kid-dushin 41b). Thus, when Moshe purchased the microwave, he did so on behalf of all those who had signed up, so you were already a partner/owner in the gift (C.M. 182:1; 200:12).” “What about the fact that Moshe used his own credit card to buy the microwave?” argued Yehuda. “Isn’t it like he bought it, and we’re now buying it from him?” “That’s irrelevant,” said Rabbi Dayan. “Even when an agent uses his own money to purchase something, the transaction is credited to the owner. Moreover, any halachic kinyan (act of acquisition) done by the agent — whether hagbahah, meshichah, chalifin, etc. — is binding on behalf of the owner

(C.M. 183:4).” “What if it turns out that I called to cancel before Moshe completed the purchase?” asked Yehuda. “Then you would not have to pay,” continued Rabbi Dayan, “since Moshe was no longer your agent.” “Even though I didn’t know that he canceled?!” asked Moshe. “It would seem so,” replied Rabbi Dayan. “In principle, a person can cancel an agent even when not in his presence. However, when this causes a loss, e.g. it is not possible to return the item, the owner usually remains liable for the loss, since he undertook responsibility for the purchase (arev).” “Here, there was no loss, since Moshe was going to buy the microwave for the group regardless. Thus, if Yehuda called before Moshe finalized the purchase, he would not have to share in the payment (see Nesivos 182:3).”

he has the liability of a shoel. According to one approach, as soon as the owner grants the custodian permission to use it he is liable as a shoel — even before he actually uses it (Shach 72:31). Others maintain that though as soon as the object is deposited in the care of a borrower, he is liable as a shoel, in this case he does not become liable as a shoel until he actually uses the object. The reason for the distinction is that in normal circumstances, the shoel is the one who benefits from the relationship (kol ha’hanaah shelo). In this case, at the outset of the relationship, the owner was the beneficiary of the relationship since he had someone guarding his object for free. When the owner subsequently grants the custodian permission to use it, he becomes a paid custodian; when he actually uses the object he becomes a shoel (Machane Efraim ibid.; Tumim 72:19; see also Sema 292:16). Some suggest that even after the custodian uses it for per-

sonal benefit, he only has the liability of a paid custodian since permission to use it is in exchange for the custodian’s agreement to protect the object. Even though permission is given after the custodian took possession of it, because permission to use it is given in consideration of him serving as a custodian, his liability is that of paid custodian and the owner cannot impose on the custodian the liability of a shoel (Tumim, ibid.). According to all opinions, the custodian’s liability does not increase unless he accepts the privilege to use the object. If the owner authorizes the custodian to use it but the custodian rejects the privilege, he remains an unpaid custodian. In the event that the custodian responds to the offer with silence, it is unclear whether or not he accepted the offer and whether he becomes liable as a shomer sachar or shoel; consequently, he cannot be forced to pay more than what an unpaid custodian would have to pay (Nesivos 72:18).

Lost and Found #25

MONEY MATTERS

Q: What should a gabbai do with items left in shul?

A: Items left in shul should usually be left in place, as the shul is considered semi-secure; most likely the owner will return there to look for the item. If the shul is not secure [or if there is a need to clean the place] the items should be moved to a se-

cure and designated lost and found area (Igros Moshe, O.C. 5:9). The same is true for a beis medrash, mikveh, etc.

If the item is left there for a long time and seems abandoned, we can assume that the owner abandoned hope of reclaiming it (yei’ush) and anyone can take it, even if the item has a siman. However, the shul or beis medrash does not acquire the lost item

automatically through chatzer (see C.M. 262:5; M.B. 154:59; Pischei Choshen, Aveidah 9:13).

Current Poskim recommend that the shul post a noticeable sign that anything left in the shul beyond a certain length of time becomes hefker and the gabbaim will do as they please with it (see Igros Moshe, C.M. 2:45b; Hashavas Aveidah K’halachah 7:1-4).

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