

RIETS PRACTICAL HALACHAH: ROSH HASHANAH

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FROM THE RABBI'S DESK – A QUESTION OF FORGIVENESS

Question: Ten years ago, Shimon borrowed \$10,000 from Binyamin. The loan was due one year after the date of the loan. When the loan came due, Binyamin asked Shimon for the money, and Shimon responded that he was aware of the debt, but he simply did not have the money yet. Binyamin was patient and understanding. Every six months thereafter he would check in with Shimon asking for payment of the loan. Each time Shimon would simply say that he did not have the ability to pay back the loan. After years of no payment, and as the Yamim Noraim were approaching, Binyamin decided that he was uncomfortable with Shimon having to face the days of judgment with such a large debt, reasoning that the failure to pay may impact Shimon's *din* in Shamayim. Therefore, on Rosh Hashana, just before davening, Binyamin said, "I am *mochel* the debt that Shimon owes me. Hashem, just as I have forgiven Shimon, please forgive me for anything I may have done improperly." After Yom Tov, Binyamin was going through the mail that had arrived over the last few days, and found an envelope sent by Shimon that contained a check for the full amount of the debt. Binyamin asked if he may deposit the check, or if he must inform Shimon that he had already forgiven the debt.

Answer: When I first received this *shaila*, I presented it to Moreinu v'Rabbeinu, Rav Hershel Schachter shlit"a, and also to Rav Yitzchak Zilberstein shlit"a (who subsequently published his response in *Sefer Chashukei Chemed* on *Nedarim* daf 65b).

In order to answer this question, we must discuss two topics. First, it is important to understand whether the *mechilah* (forgiveness) granted by Binyamin, without ever being

expressed to Shimon, is in fact binding. Second, even if we were to ascertain that the *mechilah* is in fact binding, it is possible that we will still allow Binyamin to deposit the check, if we can be certain that Shimon wants Binyamin to do so.

Mechilah b'Lev

The *Shulchan Aruch* (*Choshen Mishpat* siman 12) discusses whether one must perform an act of *kinyan* to effect a *mechilah*. The *Ketzos Hachoshen* cites the *Misgeres Hashulchan* who holds

that even a *mechilah b'lev*, forgiving a loan in one's mind, is a valid and binding *mechilah*, even if the fellow still has a *shtar* (loan document). The *Smag* proves this position to be correct based on a Gemara (*Kesubos* 104a) that says that a woman who never asked for *kesubah* payment, even many years after her husband's passing, is assumed to be *mochel* at a certain point, apparently even if she never said she was *mochel*. This Gemara seems to indicate that she was

I would like to dedicate this article l'iluy nishmas Rabbi Hy Arbesfeld z"l,
whose integrity, generosity and passion for enhancing our beloved yeshiva was a daily inspiration.

only *mochel b'lev* and it is nevertheless binding.

The *Ketzos* disagrees and says that we never find that *mechilah* works with just *machshava* (our thoughts). As far as the Gemara in *Kesubos*, perhaps when it is abundantly obvious that the person is *mochel*, there is no need for a *mechilah*. Therefore, according to the *Ketzos*, in our case the *mechilah* would be invalid.

Moreinu HaRav Schachter shlit" a paskened like the *Misgeres Hashulchan* because the *Nesivos Hamishpat* paskens this way, and we would therefore view this *mechilah* as binding. In our case, though, Binyamin actually verbalized his *mechilah*, thereby making the entire discussion of *mechilah b'lev* moot.

Verbal Mechilah

More relevant to our discussion is whether a verbal *mechilah* is binding. It would seem from the preceding discussion that it certainly is binding. However, in a case where there is a loan document that the lender still possesses, the discussion is further complicated.

The Rama (*Choshen Mishpat* 241:2) writes that if somebody verbally forgives a debt, the verbal forgiveness is binding, even if the lender is still holding on to the loan document. However, the *Shach* (s" k 4) writes that whether a verbal *mechilah* is binding is subject to a dispute in the Talmud Yerushalmi and therefore remains an unresolved issue. The *Sm" a* (ibid 21) rules that so long as the borrower still has the loan document, the *mechilah* is not binding, even if it were verbally expressed to the borrower. Only a full-fledged *kinyan* would affect a binding *mechilah*. Indeed, the *Nesivos Hamishpat* (ibid 14) writes that since

this is an unresolved dispute, the fellow who owes the money may say that he will abide by the opinion that holds the *mechilah* is binding (*kim li*).

However, in our case, it is possible that all would agree that the *mechilah* is not binding, even though Binyamin had verbalized it. The *Aruch Hashulchan* (*Choshen Mishpat* 241:4) writes that if the borrower had not received word of the *mechilah*, even if it were already verbalized to others, the *mechilah* may still be retracted. Since Binyamin did not express his *mechilah* to anyone other than Hashem, he can be confident that Shimon did not know about it. Consequently, Binyamin still has the right to cancel his *mechilah*.

Mechilah b'Taus

Another mitigating factor in our case is that the *mechilah* may have been made based on a false premise, which would make it no longer binding (see Rama, *Choshen Mishpat* 241:2). Moreinu HaRav Schachter pointed out that had Binyamin known at the time of the *mechilah* that the check was already in the mail, he would not have been *mochel*, and it is therefore a *mechilah b'taus*. If, however, the *mechilah* happened a few days before Yom Tov, then the *mechilah* is binding and the fellow may not cash the check. Rav Yitzchak Zilberstein, though, said that there is still room for leniency, for many reasons:

First, Binyamin did not really forgive the debt, just the punishment that Shimon would have received on account of this debt. Clearly, Binyamin's persistently and diligently asking for repayment of the loan over many years, and the timing of his *mechilah* (during davening on Rosh Hashana when Shimon wasn't even present), indicate that Binyamin was interested in getting paid back, but

simply didn't want to be the cause of Shimon's negative judgment in heaven.

Second, Rav Yitzchak Zilberstein argues, it was a mistaken *mechilah* even if the *mechilah* preceded the writing of the check, because Shimon must have been working toward saving such a significant sum for some time. Had Binyamin known that Shimon was working toward paying back the loan, he would never have forgiven the loan.

The Borrower's Desire to Pay

Even if the *mechilah* was binding, Rav Zilberstein presents two additional reasons that Binyamin may deposit the check.

First, Rashi, *Kesubos* 86, says that paying back a loan is a mitzvah because a person must keep their word. Therefore, Shimon has a mitzvah to pay the money back in order to fulfill his obligation to be honest and keep his word.

Second, even if the *mechilah* was binding, we may assume that Shimon *wants* to pay back the loan in order to maintain his good name in business. The Gemara (*Bava Metzia* 15a) suggests that even in particular situations in which the halacha would suggest that there is no binding transaction, the desire for a person to maintain his good reputation will allow a transaction to be binding.

Halachic Ruling

As a matter of practical halacha, Moreinu HaRav Schachter shlit" a ruled that Binyamin may deposit the check since we can be certain that had he been aware that the check had already been written at the time of his *mechilah*, he never would have forgiven the debt.