

## Loans & Collections: Part IV

Rav Yitzchak Grossman

Usually, a debt ends when it is paid off by the borrower; however, there are several other ways that a debt can be concluded.

### SHEMITAS KESAFIM:

The Torah says that the *shemittah* year cancels all debts from loans. This halacha is actually of limited practical ramification today for a few reasons.

First of all, the Minhag Ashkenaz is to follow the opinion of the Poskim who say that *shemitas kesafim* does not apply in *chutz la'aretz*.

Secondly, the widespread minhag is for everyone to write a *pruzbul*, which is a very simple document to fill out that allows for debts to be collected even after a *shemittah* year.

(Although we technically follow the *minhag* that holds that *shemitas kesafim* does not apply in *chutz la'aretz*, the common custom is to write *pruzbuls* here as well as an extra *midas chasidus*.)

### MECHILAH:

Another way to end a loan is if the lender forgives the borrower and cancels the debt.

If the loan was given without a written *shtar*, it can be forgiven orally. If it was given with a *shtar*, there is a *machlokes* whether an oral declaration of forgiveness is sufficient or if a *kinyan* is needed.

There is another *machlokes* regarding if thinking in one's mind that he forgives the debt is enough, or if the declaration needs to be made out loud. There is a general rule that "*devarim sheb'lev lo hava devarim*", which means that thoughts are not binding. Some Poskim apply this rule to forgiving a loan and say that just thinking it is not enough. Others argue and say that *devarim sheb'lev* are only not valid if one makes a verbal statement that contradicts his thoughts. If there is nothing contradicting the thoughts, then the mental declaration is

binding. These Poskim posit that since the lender says nothing to contradict his unspoken forgiveness of the loan, the *mechilah* is valid.

In any event, for thoughts of forgiveness to be valid, we would have to know exactly what the lender thought in his mind in order to determine if he made a statement that constitutes a clear and unequivocal *mechilah*, which may be hard to do.

Practically speaking, if the lender admits he forgave the loan in his mind, but says that he wants to retract that forgiveness, the borrower may have the upper hand because he is the *muchzik* on the money, and he may be able to rely on the opinion that a mental *mechilah* is valid and he doesn't have to pay his debt.

### YEI'USH:

The concept of *yei'ush* is found regarding numerous halachos – most prominently regarding lost objects.

If someone loses an object and makes a declaration in which he despairs of ever finding it, he loses his ownership of the object. If someone else finds it after he declared his despair, the finder can keep it. If, however, someone found it before he gave up hope of retrieving his item, the finder must return it because his obligation of *hashavas aveidah* came into effect when the owner still owned the item.

There is a *machlokes* whether *yei'ush* works to cancel a debt. The Maharik rules that it depends on the situation. If the situation is one where one would assume that a normal person would despair of ever retrieving his money, then *yei'ush* does work for money owed from a loan. If the situation is one where most people would assume that a lender would not give up hope of getting his money back, then he says that *yei'ush* would not work to cancel the debt. The Ketzos Hachoshen agrees with this opinion.

The Chacham Tzvi, Nesivos Hamishpat and other Acharonim disagree. If a person finds a lost object before the owner despairs of finding it; even if the owner is subsequently *meya'esh* the item must be returned. Here too, the borrower had his obligation to repay the debt before the lender

expressed his *yei'ush*; therefore, they opine that *yei'ush* would not work to cancel a debt.

## STATUTES OF LIMITATIONS:

---

In modern law, statutes of limitations apply in certain situations, which annul a loan if the lender doesn't try to collect it before a specific amount of time.

Nothing like this is found in halacha. According to halacha, even if a lender doesn't attempt to collect his money for decades, the loan is not cancelled.

On the other hand, there is a rule in halacha of *dina d'malchusa dina* (the law of the land is binding) and another rule of *minhag hamakom* (the prevalent local custom is recognized as binding). The Pischei Choshen discusses whether or not either of these doctrines could give halachic validity to a statute of limitations in a place where common law sanctions it. He seems to be inclined to say that these rules do not apply and the statute of limitations would not be recognized by halacha.

## BANKRUPTCY:

---

According to modern law, an insolvent debtor can file for bankruptcy, which allows him to pay off debts for pennies on the dollar, retain some or most of his assets, and cancel the rest of the debt. He is then allowed to start fresh, and even if he makes money later, he does not have to go back and pay the rest of his old debts.

While this concept is not mentioned at all in halacha, we must discuss whether it is recognized according to the above-mentioned rules of *dina d'malchusa dina* and *minhag hamakom*.

The question of *minhag hamakom* was discussed about 500 years ago by the Maharshach (Rav Shlomo Cohen), a great Sefardic *gadol*. The type of bankruptcy arrangement that he discusses is not exactly the same as the bankruptcy that we are familiar with today. In his time, if a debtor didn't have money to pay, certain arrangements were put in place to work out a payment schedule over a longer period in order to give him more time to come up with the money. He says that if most of society agrees with such a practice, then it would be recognized by halacha even though the lender never explicitly agreed to these terms. Over the following generations, many Sefardic Poskim agreed with the Maharshach and followed this *minhag*.

Discussions about the type of bankruptcy laws we have today, where a borrower who cannot pay has a good portion of his loan forgiven completely, began about 150 years ago. Some Poskim say that it did become the common custom for such laws to be recognized, which makes them valid according to halacha. Others disagreed and noted that *minhag hamakom* is only halachically valid if the custom is just and makes sense.

These Poskim say that allowing a borrower not to pay his debts is an unjust *minhag*, with some saying that it is simply theft from the lender; therefore, they say that such a *minhag* cannot be halachically binding.

Whether bankruptcy laws have any validity because of *dina d'malchusa dina* has been discussed extensively by the more contemporary Poskim. Their discussion is based on a dispute amongst earlier Poskim regarding the extent of *dina d'malchusa dina*. The Rema has a much broader interpretation of *dina d'malchusa* than other Poskim and says that it doesn't only apply to governmental prerogatives, such as taxation, but even extends to any laws the government enacts for the general good of society.

Based on the Rema, some Poskim say that bankruptcy laws are recognized by halacha because they are meant for the welfare of society. Without these laws, a debtor would be stuck in a cycle of never-ending debt for the rest of his life and would never be able to become a functioning member of society. The laws are also meant for the good of the creditor, as he is able to recoup at least a portion of the money he is owed. Accordingly, Rav Moshe Feinstein and other Poskim imply that bankruptcy laws would have validity because of *dina d'malchusa dina*.

Other Poskim reject this idea and take it for granted that *dina d'malchusa* cannot serve to legitimize bankruptcy. Rav Yaakov Breisch says that it is obvious that bankruptcy is unjust and is not good for society; therefore, he says that it would not be recognized by halacha even according to the Rema. The Minchas Yitzchok also dismisses the idea that bankruptcy laws would be valid because of *dina d'malchusa*.

Rav Osher Weiss has a long teshuva on this topic, in which he expresses the sentiment that bankruptcy laws are good for society because they save debtors from falling into a hole that they will be stuck in forever. He points out that these laws are supported by almost all of modern society, which he uses to prove that it would be unreasonable to refer to them as simple theft.

He does offer a suggestion that there may be a difference between a commercial loan and a loan given by a private person. When a bank or commercial loan operation gives a loan, it is working with societal laws such as bankruptcy, which are understood to be for the good for everyone; therefore, all such laws would apply. When a private person gives his friend a loan, however, it is a much less formal agreement that may not be expected to follow businesslike rules and may not be subject to bankruptcy laws.

To watch the video or listen to the shiur given by the Dayan, visit:

[www.baishavaad.org/yorucha-topics](http://www.baishavaad.org/yorucha-topics)

Or signup to receive them via whatsapp: [732.232.1412](https://www.whatsapp.com/channel/002997322321412)