owner may not claim it before then. Thus, the *sho'ail* has certain rights.

In the event that the *shomer* cannot return the item, he is either liable to pay or replace, or to take an oath that he is not liable due to the *halachic* rules. He may agree to pay rather than take an oath of absolution. In our case, the borrower needed the chairs for an event or for use for a while. During this time, his children spilled food and stained them badly. Cleaning them might be more bother or cost more than replacing them. The issue is whether the staining of the upholstery is normal wear and tear. If it is, and the *sho'ail* is absolved of liability, he need not pay at all. The owner might claim that he wants the chairs back intact. The *sho'ail* might not be allowed to take them and replace them. This might make him a *ganav*. Normal wear and tear might depend on whether it was clear at the time of borrowing that children will be using them. If this is not normal wear and tear, he might still be liable to return them, but with compensation for the reduction in their value. May he undertake voluntarily to replace them, even if he did not stipulate this when he made his *kinyan*? What if the owner prefers to use them in their stained state and receive cash for the compensation?

We may assume that staining during normal use is included in wear and tear. If the owner knew that children would be using it, even major staining is included. Some poskim discuss whether one should repair a repairable item before returning it. Some items are always cleaned when they are stained. However, an item that is not usually cleaned (except at *Pesach* time, when it is not cleaned for appearance), will become more stained over time. Even if it is damaged, the *sho'ail* must return the damaged parts of an article to the owner. Or he can repair the damage. In our case, he may not decide to replace the chairs and keep the old ones, unless the owner agrees. It could be to the advantage of the owner to keep them. Their price might go up, or he might be able to clean them or to find a customer for them or for their parts on ebay. If the owner agrees, they should make a *kinyan* on the old chairs. Since the *sho'ail* has no right to them automatically, having them in his possession does not make him the owner. However, in this case, the owner may tell him to make the *kinyan* with his *chatzer*, and this is sufficient. Alternatively, when the original owner takes possession of the new chairs, they may agree that this effects a *kinyan* to the borrower on the old chairs. [See Baba Kama 11a 79a Baba Metzia 37a-38a 41a 42a 58 80b-81a 82b-83a 93a-94b 98b-99, Pokim. Tur Sh Ar CM 340-344 387 403, commentaries.]

In conclusion, the owner may insist on the return of the stained chairs. Depending on the convention, he may demand payment for their cleaning. If the owner accepts the new chairs, there is no issue of *ribis*.

Parshas Chayei Sara 5775 Vol. XVIII No. 6 בס"ד

HALOCHOSCOPE

This week's question:

A friend borrowed some chairs and stained them badly. Rather than return them in this condition and compensate for the damage, he replaced them with new ones. May the lender accept this 'gift'? Does the borrower have the right to unilaterally decide not to give back the stained chairs? May the lender insist on getting the original chairs back, with or without compensation?

The issues:

A) *Ribis*, the prohibitions against usury

B) *Sechirus*, rental; *agra upagra*, payment for rental and for wear and tear

***C) Shomer*, a guardian; *She'ayla*, borrowing utensils and a borrower's liability**

A) Ribis [mostly excerpted from Halochoscope XVI:30 and XVII:17]

A loan is a transfer of funds for a given time. The lender gives up any claim on that money for the agreed duration of the loan. In return, the borrower agrees to give other money back at the end of the loan period. Because the lender is deprived of the usage of his money, he would like to make up for potential gains or profits he could have made during this time. Simply put, this is payment or 'reward' for the fact that the lender's money is 'idle' – that is, it is unusable by him. Or 'reward' for waiting for the money to be repaid. A more complicated view would consider the money similar to durable goods. The lender would be renting the money to the borrower. One would pay for the usage of a rented tool or animal. This is payment for the usage or for the time. Similarly, interest is like paying for the usage of the money or for the time that the money is made available.

Usury involves several Scriptural and/or Rabbinical violations. A rate of interest or an amount stipulated at the time of the loan is known as *ribis ketzutza*, fixed interest. Both lender and borrower violate directly two Scriptural *mitzvos*. In addition, they both violate *lifnai ivair*, aiding one another in sinning. The scribe who writes up the document, any cosigners, and witnesses are all incriminated in some way. Some violations apply from the time the charge is made, agreed, written up, signed, the time the money is handed over, or collected, and often even if the interest is not paid in the end. Stipulating includes fixing an amount or a rate (e.g. a percentage per day), and according to some, even if no amount was agreed, but it was agreed that there would be some form of interest. *Ribis* applies to goods as well as cash. Once stipulated, it is forbidden to collect the interest at any time, whether before the due date of the loan, at the time of payment or later. If it was collected it must be returned, with the help of a *Bais Din* if necessary.

Avak ribis, the 'dust' of usury, is forbidden Rabbinically. The main type of *avak ribis* is forbidden because it resembles *ribis*. This need not be a 'visible' resemblance. If the transaction seems to have the flavor of *ribis*, or it seems to accomplish the same end as

ribis – to compensate the benefactor for unavailability of his own money. In *ribis she'aina ketzutza* nothing is stipulated, but a lender demands it or a borrower pays it voluntarily. *Ribis mukdemess ume'ucheress* is interest paid before a loan is granted or after it is paid (according to most poskim, this is forbidden Rabbinically. A minority consider it a type of Scripturally forbidden *ribis*.) *Derech mekach umemkar* is a purchase or sale based on interest. A merchant may not take an advance payment for goods as yet unavailable, if he grants a price reduction. He is rewarding the purchaser for the use of his money in the interim, like a loophole-type loan with interest. The Talmudic conclusion is that one who made forbidden gain through *avak ribis* may not be compelled to return it.

Mechzi keribis is a commercial transaction that does not involve *avak ribis*. However, money, rather than goods, were exchanged, and there was a net gain. For example, one put down money for goods when they were cheap, intending to take delivery in the expensive season. Then, he did not take delivery, but sold them back at the higher price, gaining the difference. This Talmudic debate has varying rulings by the poskim.

Ha'aramas ribis, trick usury, includes cases where the equivalent of the interest is earned quickly, by means of a double-deal. A lender loans goods to a desperate borrower, worth the value of the requested loan. He then buys the goods back from his 'customer' at a lower price. He will still be paid in full for his original loan, but has contrived to save himself money through the loan. This is forbidden Rabbinically. A borrower may not do favors for the lender that he would not normally do, nor even greet him specially. Some consider this *ribis mukdemess*, since it is done at times other than the payment. [See Baba Metzia 60b-75b etc., Poskim. Tur Sh Ar YD160-161 163:3 175:6 etc., commentaries.]

B) Agra upagra

The Talmud discusses whether a renter can violate the laws of *ribis*. In general, a renter has the right to charge for use of the item. There is some debate when the rent is due, at the beginning or at the end of the period of rental. If it is due at end, charging less at the beginning is fine. If it is due at the beginning, charging more at the end touches on *ribis*. Another debate relates to our case. Say a renter stipulates that he will also borrow money at the time of the rental to invest in the item he rents, so that he makes a bigger profit, and he will pay a higher rate of rent in return. This is basically *ribis*. He agrees to pay more rent in return for the loan of the money.

The Talmud goes on to debate *agra upagra* or *agra velo pagra*. If one rents out a boat, may he stipulate that the renter pays for wear and tear? Does basic rental money take into account wear and tear? By evaluating the current price of the boat and charging it to the renter, the owner made it into a money loan. The rent being charged seems like ribis! Even if he gives back the boat intact, the agreement should be forbidden. We follow the opinion that it is permitted. The rent is paid for the usage. The damage is paid for the wear and tear. However, this only applies to items that usually wear and tear. Items that do not usually wear and tear are like money.

In our case, a borrower may return an item that is worth more than the item he borrowed. Thus, he may increase its value by cleaning it, or he may even pay for it if it breaks with normal use. As we shall discuss, the borrower is not really liable for this. Nonetheless, it is not considered *ribis*. However, they should not stipulate this liability,

as this might touch on *ribis*. *[*See Baba Metzia 69b-70a, Poskim. Tur Sh Ar YD 176:2-3, commentaries. Bris Yehuda 29:11, note 27. Nesivos Shalom (Ribis) 176:3:14.]

C) Guardianship

The Torah details the laws of four types of guardian: ***Shomer chinam*** is an unpaid guardian. He is liable for negligence, but not for theft or loss, or unpreventable *oness*, circumstances beyond control. ***Shomer sachar***, a paid guardian is liable for theft and loss, but not for *oness*. ***Sho'ail,*** a borrower of an item is liable for *oness*, since he has all the benefit of the item. He is not liable for death of an animal while it was being used for the work it was loaned for. A ***sochair,*** a renter, who pays for the use of an item, is treated the same as a paid watch. [This is debated by the Talmud, but we follow this view.]

Those who have an item for use may use it in accordance with the terms of the arrangement they made with the owner. Those who are being entrusted to watch the item may not use it at all. Unlawful usage is known as *shlichus yad.* When the *shomer* uses it in this way he becomes liable for anything that a thief would be held liable for. A *sho'ail* is not liable for death by usage, in the case of a borrowed animal. The same applies to breakage of a tool or other item while using it in the normal manner. A *sho'ail* may not use the article in a way that was not agreed on at the time he borrowed it. Just as a *shomer sachar* or a *shomer chinam* who uses the article for personal use becomes a *ganav*, so too, a *sho'ail* who misuses it becomes a *ganav.* They must return the article intact or replace it, which is the rule for any *ganav.* This could have a bearing on our case.

A renter could be considered owning the item for the duration of the rental, in certain respects. A borrower is merely using something belonging to the owner. He is liable for other types of damage, but not for breakage or death in normal use. However, in may respects, he is also a temporary owner, with certain rights of ownership. Indeed, in certain respects, the *sho'ail* is the same as a *sochair*, but without paying for it. The *sho'ail* must feed a borrowed animal with his own food. To become a *shomer*, one makes a formal *kinyan*, act of acquisition. This does not mean that the article belongs to him, but that it is in his sole care. Nonetheless, the very act shows that he is considered an owner in some respects. At the time of *kinyan*, when he formally accepts responsibility for the item, the *shomer* or the owner may apply conditions and provisions limiting or increasing liability in the event of damage or loss. Usually, both sides agree to this. In some instances, there is implied consent, due to circumstances.

Usually, a *shomer* is responsible for the article until it is returned to the hands of the owner. However, this depends on the terms of the *shemirah. She'ayla* depends on the time limit. After the time of the loan passes, the *sho'ail* becomes a *shomer sachar.* He is less liable than a *sho'ail*, but more than a *shomer chinam*, and he may no longer use the item. His earlier benefit from using the itme without being charged is considered payment for watching it later. If there is no time limit, he may continue using it until he decides to return it. At that time, he must ensure that the owner receives it. If the owner is away, he may deposit it with Bais Din, who will then entrust it to a third party. The *sho'ail* is then absolved of future liability. The *sho'ail* may keep the article until he needs to use it. However, he may not claim to be a *shomer chinam* during that time. If no time of loan was agreed, the lender may claim it at any time. If a time limit was agreed to, the