Parshas Vaera 5773 Vol. XVI No. 14 בס"ד

HALOCHOSCOPE

This week's question:

In many *shuls* there are private *shtenders*, book-stands, on the tables or freestanding. May one use such a stand without the permission of the owner?

The issues:

A) Shoel shelo midaas, borrowing without permission is stealing

B) *Nicha lai le'inash detaiavid mitzvah bemamonai,* one is pleased to have a mitzvah performed with his property

A) Shoel shelo midaas

Generally, when one wishes to use an article belonging to another person, he must ask permission. If the owner is unavailable, the potential user might be tempted to take it anyhow. He will justify taking it by thinking that he intends to return it immediately after use. Thus, he will not see himself as a thief, but as a borrower. The Talmud discusses cases of borrowing an object without the knowledge of the owner. The question is whether to consider the borrower a *shoel*, *halachically* borrowing, or a *gazlan*, *halachically* a robber. The difference between the two views is whether the borrower assumes the liabilities and responsibilities of a gazlan.

A *gazlan* must fulfill *hashavah,* the *mitzvah* to return the item intact to its owner. This requires him to place it in the owner's possession, and possibly to notify him about the return. [This depends on how secure the place it was returned to.] If it is a borrowed item, it may be returned to the place from where it was borrowed. This is, even if that place is not the possession of the owner, nor is a secure place. Let us assume that one borrowed an item from the child of the owner. If he is considered a *gazlan,* he is required to return it directly to the father. If he is a *shoel,* he may return it to the child.

In addition, the liabilities as guardian can vary, based on the status of the user. A *shoel* 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 *gazlan* is always liable. The difference is that a *gazlan* has virtually taken possession of the item. [For example, he would not be liable to pay for usage. A renter would be liable. If the owner loans it, he is waiving the rental fee.] He must return it intact. 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.

The Talmud concludes that the borrower without permission is indeed a *gazlan.* The poskim conclude that, accordingly, it is forbidden to 'steal' it, that is, to take it in this fashion. This is cited as an example of how stealing can be forbidden without intending to keep it. Even when done for fun, or with intent to give it back, it is forbidden.

In our case, an additional factor must be dealt with. When using the *shtender,* one

might remove it to a different spot in the *shul* or *bais medrash.* In that case, one has 'taken' it, by moving it. He has made what is known as a *kinyan shomrim* or a *kinyan gezailah*, act of transition of ownership. He might use the *shtender* on the same spot where it is standing when he finds it. Does this mean that he is not even considered a borrower or robber? In fact, the poskim discuss the point at which the borrower assumes liability. A borrower assumes this liability the moment he takes possession of the item, as does a guardian. However, a regular guardian may not use the item under his guardianship. If he does, he turns into a thief. This change takes place the moment he uses it, and does not necessarily work retroactively to the time that he took charge of it. A borrower without permission who never uses the item might not become a *gazlan* until he uses it. The intent alone might not render him a *gazlan.* On the other hand, if he uses it without a *kinyan gezailah*, some say he is automatically considered a *gazlan*.

The poskim debate using something without permission if it is known or may be assumed that the owner does not mind. This is the same as borrowing with permission. The debate centers on interpreting a Talmudic passage. A few people are sitting on a bench, presumably long enough for all of them. A new person comes and sits down and it breaks. The question is, who is liable, all of them, or only the last person? The Talmud says that if the last person was unusually heavy, he is liable for the damages. The poskim discuss why this is the case. In one view, it is because he makes it hard for the others to get up. In another view, the bench is by its nature an item that is left out for others to use, or 'borrow'. If it would break under normal use, no-one is liable for the damages. However, the owner is indeed *makpid*, particular, about heavy people using it.

Based on this view, many poskim permit usage of an item that is presumed to be left out for public usage. Unless it is known that the owner is *makpid*, there is implied permission. Incidentally, this very case seems to mirror our own. At the very least, it does not seem that there is a *kinyan.* Yet, the item is considered borrowed. Likewise, in our own case, if the *shtender* is not moved, it would still be considered borrowed. Moreover, having left it out in the open, the owner must assume that it could be used by the public, and has implicitly given permission. However, if the owner puts a sign on the *shtender* that openly limits usage, he has clearly restricted his permission. Furthermore, the case of the heavy person indicates that the implied permission is limited to normal usage. If the stand is meant for light books, or is not made to be leaned on, this limits the implied consent for usage. [See Baba Kama 10a-b Baba Metzia 41a 43b Baba Basra 87b-88a, Poskim. Tur Sh Ar CM 359:5 363:5 188:2 381, commentaries. Pischei Choshen IV:7. Halochoscope IV:29.]

B) Nicha lei leinash detaiavid mitzvah bemamonei

Using a stolen item for a *mitzvah* is known as *mitzvah haba'ah ba'avairah*. Hashem finds this unacceptable, for obvious reasons. The Navi describes a period in history when the offerings made were unacceptable for various reasons, among them, stolen animals.

There is much discussion on whether the *mitzvah* can technically still be attributed to the performer, based on various factors. In our case, the real question is whether the *mitzvah* usage can justify taking the *shtender* without permission. Thus, whether or not one will be able to fulfill his obligation is only secondary to the question of permissibility

beforehand. However, if indeed the *mitzvah* could be fulfilled, this might affect the permissibility. If one can claim that he will be fulfilling a *mitzvah*, the owner might actually be pleased to allow him to use it. If he will not be able to fulfill his *mitzvah*, the owner might feel that it is unfair for others to take advantage of his item.

The Talmud cites the presumed thinking process of those whose items will be used in the performance of a *mitzvah.* If the *mitzvah* will need to be performed anyhow, people are anxious that it be performed with their own property. They feel that this is an elevated use of the item. For example, *bediaks chametz*, searching for *chametz* on *Erev Pesach*, is the responsibility of the dweller in the home. If one transacts a change of ownership or a rental before *Erev Pesach* arrives, the new dweller has the responsibility. If it is done on *Erev Pesach* itself, during the first moments of the night of the thirteenth of *Nissan* it is still under the old ownership. The seller of landlord is really responsible for the *bedikah.* What if one rented the home and then discovered that it had not been searched by the former dweller? Is he able to claim a refund or invalidate the transaction? The Talmud says that the new dweller would be happy to fulfill the *mitzvah* himself, despite the bother. Therefore, he may not claim later that he never wanted to buy or rent under these circumstances. This case raise a question. The new dweller is actively trying to invalidate the deal. Evidently, the advantages of owning property on which a *mitzvah* will be performed do not appeal to him! The answer is that he must have buyer's remorse for other reasons, and is using this as his excuse. The Rabbis were so certain of the presumed pleasure of the owner of an item, that it overrides the apparent protests of the same person. It goes so far that even if the local practice is to pay for the service of *bedikah*, the presumption is that the buyer would never have rejected the deal based on this.

Based on this, the poskim permit borrowing a *talis* found in *shul* for use for the *mitzvah.* Though *shoel shelo midaas* is usually called a *gazlan,* in the case of an item used for a *mitzvah,* it is assumed that the owner gives his consent. He would be happy to have another *mitzvah* performed with his *talis.* On the other hand, the Talmud discusses one who borrowed a *sefer Torah*, with full explicit consent. He may not loan it further, despite the concept of *nicha lei*. Therefore, the poskim maintain that this implied consent only works where the owner would have no special concerns. The *talis* must be replaced to the spot it was taken from. If it was folded nicely, it must be folded nicely after it is borrowed. It may not be borrowed from the owner's home and taken to the *shul.* It may not be removed from the *shul* to use elsewhere.

The issue of borrowing a *talis* without consent raises another question. Is this really a *mitzvah*? The Talmud says that a borrowed *talis* does not require *tzitzis* for the first thirty days. After that period, there is a Rabbinical requirement of *tzitzis.* What if one put tzitzis on the talis before the thirty days were up? Would he fulfill the Rabbinical *mitzvah*? Could he recite a *brocha*? The prevailing practice is not to recite a *brocha* on a *talis* that was borrowed for one *tefilah.* There is a way to transfer ownership, if the owner is present and consents to it. That is to give it as a gift, with the provision that it is returned immediately afterwards. If the user does not return it, the gift is invalid retroactively, and the user was considered a thief while using it as well. However, it is obviously difficult to view a *shoel shelo midaas* as one who is acquiring it as a gift. Therefore, the borrower

should not intend to acquire it, and will not recite a *brocha.* If so, is he indeed fulfilling a *mitzvah*? If he is not, why would we say that the owner is happy to let him use it?

Clearly, while the usage might not rise to the level that a *brocha* may be recited, and it might not be considered fulfillment of an obligation, it is still considered a *mitzvah* performance. Many *mitzvos* may be performed on a voluntary basis, known as *aino metzuveh ve'oseh*. The owner is happy with this as well. Furthermore, anything that will help in the performance of a *mitzvah* is also credit worthy. The owner will also be happy that his item is serving in this capacity. Based on this, the *nicha lei* theory should extend to other items that are also used, not necessarily as direct *mitzvah* items, such as a *sefer.* It is used for study, but no *brocha* is recited on its use. However, it is forbidden to use a *sefer* for another reason. On an item that will inevitably suffer wear and tear, there is no implied consent. The owner of a *sefer* will be *makpid*, unless he states otherwise. Though we mentioned that one is happy to pay for a *mitzvah* done with his property, that applies to the performer, and in a case where the payment is necessary for the *mitzvah.* One does not consent to monetary loss in order to get some credit for another person's *mitzvah.*

This actually raises an interesting point in our case. True, the *shtender* is used in the performance of a *mitzvah* of sorts. It is an aid in performing the *mitzvah* of Torah study or *tefilah.* However, it is not necessary. Nor is it a *mitzvah* item per se. Based on the concept of a borrowed *talis*, we may assume that the owner is happy that it is used to help in the *mitzvah* performance. The *shtender* is not the same as a *sefer*, which is essential for the *mitzvah*. However, it will enhance the performance of the *mitzvah.* It could be viewed as a utensil for *hidur mitzvah.* Depending on how this is viewed, this could itself be considered a *mitzvah.* It can certainly be assumed that the owner of an item would be happy to see his item enhancing the performance of a *mitzvah.*

Two other factors may be included for consideration. If one leaves his private possessions in a place which is unsecured, he must assume that people might use them. If the item is left out in a truly public place, it could be considered *avaidah midaas*, abandoned. That does not apply in a *shul*, but slightly mitigates the issue. Second, there is an issue of *kofin al midas Sedom.* In a situation where there is no wear and tear, and no monetary loss, an owner might be within his rights to restrict others from using something. Nonetheless, the rabbis sometimes force the owner to allow its use, as long as he is not using it himself. In limited situations, this is applied to an unused item. In our case, the borrower may not assume the role of a Rabbinical court to enforce this. However, it makes it easier to presume that the owner is not *makpid. [*See Psachim 4b Baba Kama 20a -21a Baba Metzia 29b Baba Basra 12b Bechoros 18a 58a, poskim. Yam Shel Shlomo Chulin 8:53. Tur Sh Ar OC 14:4, commentaries. Pischei Choshen IV:6:6-9.]

In conclusion, one may use the *shtender* with care, unless the owner forbids it.