Parshas Shoftim 5775 Vol. XVIII No. 45 בס"ד

HALOCHOSCOPE

This week's question:

Is one responsible to replace money designated for *tzedakah* that was stolen? If he knows the thief, and he is a poor man, may he consider it as though he gave the man *tzedakah*?

The issues:

A) *Shomer,* guardianship

B) Who owns the money?

C) Poor thief – forgiving money to a thief as *tzedakah*

A) Shomer

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. For our purposes, this means for *oness*. The basic theory for this is that it is as though the thief has taken possession of the item and must replace it if he cannot return it intact. There are debates about the time that he assumes this liability, whether when he decides to appropriate it, when he actually does so, when it breaks, or a combination of these, depending on the circumstances and changes in cost or value.

The Talmud discusses the status of money entrusted to a *shomer.* It is not an item. It is not a commodity. A commodity can vary in quality and can have a sentimental value to the grower. Money is not inherently valuable, but is a vehicle to trade goods and services. Its sole purpose is to be spent. Therefore, it stands to reason that the owner does not care so much about the actual money he entrusted. Thus, while money might need more careful watching due to its usefulness, the rules of its *shlichus yad* might be different.

In former times, currency could be good or bad, based on the condition of the coins. The coins were made of specific metals with specific weights. Many of these were universally agreed on, by international conventional practices. The coins could be spoiled, due to corrosion or wear and tear. Accordingly, it was possible that the owner would be particular about the specific coins that he deposited with the guardian. If this were the case, the guardian could not take the liberty of using them for himself. On the other hand,

since coinage was not unique in its uses, there could be an assumption that one who had the guardianship for a time period could use the coins during that period. He would then assume the role of a borrower of some kind. His liabilities might then change.

As a rule, money could be wrapped up or loose. If the money was wrapped up in a special manner, one assumed that the depositor cared about the specific coins. If it was loose, it depended on the type of guardian. If the guardian was a banker or money-changer, the owner must have assumed that the guardian would use it together with his own funds. If the guardian was an ordinary homeowner, the assumption is that he will not use it for personal needs. Nonetheless, if one is entrusted with tzedakah money, the poskim debate whether he is considered a shomer chinam or a shomer sachar, and thereby liable for theft. One who sets aside *tzedaka* money is liable like a *shomer chinam*, unless he uses the money himself. Many poskim consider a *gabai* a *shomer chinam*, unless he uses the money for personal use. [See e.g. Baba Metzia 43a, Poskim. Tur Sh Ar CM 72 121:6 292, commentaries. Igros Moshe VIII:33. Tzedaka Umishpat 7:18 8:8 10:, notes.]

B) Who owns the money?

If the money belongs to the victim of the theft, it would be his own loss. However, there is a question on the ownership of money once it is set aside for *tzedakah.* This could depend on whether the person stipulated when he set it aside, that he should be able to borrow and replace it. If it was not designated for a specific pauper or organization, it has the status of *mamon sheain lo tovin*, money that has no-one who can claim it as his own. This means that in the event that someone would try to extract the money legally, he would lose. The owner/donor might have transferred ownership to the collective poor. However, any pauper who comes to claim it could be told to prove it. Even if it has transferred to the ownership of a *tzedakah*, we have discussed the possibility that the victim is liable as a guardian. In our particular case, the money was taken from a pocket. The poskim discuss similar cases, most of which refer to money taken from a pushka, or *tzedakah* collection box. Sometimes, the box is specifically designated for an organization. Other times, it is a generic repository for the donor to collect and distribute later at his own discretion. This is the same as money in an envelope marked *tzedakah*.

The pushka is based on the '*shofar*' – a conical container used in the *Bais Hamikdash* to collect funds. These were compulsory tithes for communal offerings, or voluntary donations, including personal offerings. Who owns the money in the *shofar*? Has it left the domain of the donor? To effect a transfer to *hekdesh*, the consecrated domain of the *Bais Hamikdash*, one need not make a *kinyan*, formal transaction. Stating that one donates it transfers ownership to "Hashem's treasury", which is anywhere the item happens to be. One can also donate it to *hekdesh*, as the Israelites did when donating to the *Mishkan.* It was given to those charged with handling it. What if one designates a coin for something, but does not state his intent, nor does he hand it over?

Tzedakah is treated like *hekdesh* in some ways, though it is forbidden to declare something real *hekdesh* nowadays. [If this was done, one must consult a *rav* to decide how to deal with it. A distinction must be made between *tzedakah* for the poor and the public property of a *shul. Shul* items have *kedusha*, sanctity, that forbids their mundane use. The sanctity carries over to the money raised by their sale.] The *gabai*, treasurer of

the funds, can have the status of being an agent of the poor. Because he represents them, money given to him is as though it has been given to the poor. That money cannot be taken back by the donor. If the money was already given to the poor, the donor has no say in how it is used. Once money has been separated to be used for *tzedakah,* it can also have this status. The owner might retain the discretion on which needy person receives it, as though he is a *gabai*. This is known as *tovas hana'ah*. However, this only applies to money that he has the discretion to distribute. Grain that must be left for the poor may not be taken by the farmer and given to the needy of his choice. The Talmud debates what he must do if he did take it. In one view he must give it to the first poor man he meets, and the other view allows him to decide. Nonetheless, in general, it is also possible that a donor who has only separated the money but has not handed it to the *gabai*, has not consecrated it. If he so stipulated, he might be allowed to 'borrow' it.

If a person saves money for a designated sacred use, the question arises what to do with the surplus. Depending on the exact language used when it was placed in the jar or box, it might be presumed holy or mundane. This depends on an estimation of his mentality when designating the coins, and on the known possible uses of the surplus. When placing coins in a pushka, the presumption is that every coin is being designated for the *tzedakah.* In some cases, the *tzedakah* is very happy to empty the pushka and take the exact coins. In other instances, the assumption is that the donor will count the coins and redeem them with a check. In the former case, it could be argued that the pushka actually belongs to the *tzedakah.* It could then be argued that the pushka makes a *kinyan* on behalf of the *tzedakah*, even in the domain of the donor. The concept of using a vessel to effect a *kinyan*, and especially in the domain of the giver or seller, is subject to Talmudic and Rabbinic debate. If the *tzedakah* expects the donor to redeem his coins with a check, it could be argued that they do not wish to take possession of the coins at all. The pushka is a tool to help people put aside money that will eventually be transferred to the *tzedakah* in the form of a check. Currently, it belongs to the donor.

By designating funds, the donor made a vow to give this money. He may not unduly delay giving it. The poskim debate the status of the money if it were stolen. If the *tzedakah* owns the funds, the homeowner is a *shomer chinam*, unpaid watchman. If he undertook to donate money, he is liable to replace it, regardless of whether the *tzedakah* owned it. Since it had not yet reached its desired destination when it was lost, he owes it. If he undertook to donate a specific coin, he is not liable for its loss.

Many poskim assume that the *shofar* belongs to the *tzedakah*. The discussion revolves around two issues. The standard *kinyan* with a vessel is a form of *kinyan chatzer, kinyan* made by a person's property. This could be viewed as an extension of himself, or as an agent. The Talmud debates this, and the poskim debate the final conclusion. If the *shofar* is placed in a *shul* area, it cannot be considered a privately owned *chatzer*. If it is placed in a home, it is assumed to belong to the *tzedakah* organization. The issue is then whether the vessels of the recipient can effect a *kinyan* on the property of the donor. This depends on how one views this issue. Some say, if the donor gives the recipient permission to put his vessel down, the recipient can make a *kinyan* through it. Others maintain that the donor must specifically tell the recipient to use it for a *kinyan.* The poskim debate

whether the stringent view would consider the *tzedakah* as having been given specific instructions by the homeowner to use their *shofar* to acquire the coins.

The second issue is whether the coins are acquired immediately on behalf of the poor, or whether the *tzedakah* acquires them, then holds them until they are distributed to the poor. If the *tzedakah* is an independent collector, it is possible to consider the funds still the property of the donor. The *tzedakah* could be viewed as an agent of the donor. Since the money does not yet belong to the poor, the *tzedakah* has a lot of discretion. One difference could be seen when a few pushkas spill. The poskim discuss whether one may put money back into any pushka without knowing where it came from. This depends on the assumed discretion and waived rights of the *gabaim*. Another example of where this makes a difference is when the *tzedakah* is defunct. If the money already belonged to the poor for whom they collected it, it may not be transferred to another *tzedakah* at the discretion of the donor. It might need to be 'left until Eliyahu comes'. [Eliyahu will reveal who owns it.] On the other hand, an owner may change the designation of the *tzedakah* before he gives up ownership. If the *tzedakah* is considered a *gabai* with discretion, there might be certain changes permissible as well, even though the '*gabai*' has now abandoned his position. [See Peah 4:9 8:7 Shekalim 2:3-5 3:2 7:1 8:5 Rosh Hashanah 6a Megilah 25b-29a Baba Kama 36b Baba Metzia 78b Baba Basra 8b-9a 85a-86a Erchin 6a-b, Poskim. Tur Sh. Ar. OC 153-154 YD 256:1-4 257:1-6 258 259, commentaries. References to Section A. Kol Hatorah 47 p. 251. Avnei Yashpeh II:115. Tzedakah Umishpat 7: 7 10 etc. 8:5 7 8 9 *note 25.* Maaser Kesafim (Burstien) 8:2.]

C) Poor thief

In our case, the money had not been designated to a specific *tzedakah.* Specific money was set aside. Accordingly, based on our discussion, the donor is not liable. May he consider his money a *tzedakah* donation to the thief by forgiving him?

One may give *tzedakah* by loaning money to a poor man and then forgiving him. It may be deducted from the *maaser* tithing obligation. However, in that case, the loan was collectible. Furthermore, the poskim debate whether one can do this without stipulating it with the pauper at the time of the loan. If a thief is caught and found liable, forgiving him is the same as giving the money to him. If the thief cannot be compelled to pay, the question becomes whether the outstanding claim that was not forgiven can be considered the property of the victim. From the perspective of the thief, he owes the money. From the perspective of the owner, he cannot prove it. Moreover, while it is in possession of the thief he has no jurisdiction on it. He could not designate it to *tzedakah.*

The poskim debate a poor borrower who refuses to pay. Can forgiving him be counted as *tzedakah*, and deducted from his *maaser* obligation? In our case, the owner is not liable. He need not replace the money, even if it were *maaser*. Therefore, by forgiving it, he can certainly claim to have fulfilled a *mitzvah* of *tzedakah*. [See Tur Sh Ar YD 257:5, commentaries. Tzedakah Umishpat 5:13, note 50. Maaser Kesafim (Burstein) 9:5-10.]

In conclusion, the donor is not liable. Forgiving a thief may be considered *tzedakah.*