



Parsha Encounters

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Parshas Noach – Rabbi Moshe Rosenstien

It Takes a Thief

In this week's Parsha, the Torah tells us "*Vatimalei ha'aretz chamas*, And the land was filled with *chamas*." [Bereishis 6:1] Rashi explains that "*chamas*" refers to thievery. Many *meforshim* indicate that this was a more insidious form of stealing - one in which it was either not possible or not the accepted custom for the victim to recoup his loss from the thief.¹ It was for *this* reason that HaShem was "compelled" to destroy mankind - not only were people stealing, but they were doing it in a devious way so as to avoid any consequences for their actions.² The Torah teaches us through this narrative the extreme caution we must take when it comes to recognizing what property is ours, to do with what we want, and what belongs to others and is off limits to us.

In a fascinating *teshuva*, the *Chavas Yair* rules that even if a group of merchants all "forgive" each other in advance for any stealing or otherwise illegal business practices that may take place amongst them, this arrangement is not halachically binding and does not lift the prohibition from upon them. So integral is the respect that one must have for another's property, and so contrary to the way HaShem desires for the world to run is such an arrangement, that it simply cannot hold. The *Chavas Yair* points to our Parsha to exhibit how egregious is even "petty" stealing in the eyes of HaShem. [Teshuvos #163]

In this week's Parsha Encounters we will *BE"H* examine an area of the laws of "stealing" that can come up in our day to day lives.

It is not uncommon for one to find himself in a situation in which it would be beneficial for him to use an item that belongs to a friend. If the friend is available, there is no question that the would-be borrower would ask his friend for permission to use the item. The question that often arises is what the *halacha* is in a situation where the owner is not available to be asked.

The Halachic Background

The *Shulchan Aruch* states clearly that "It is prohibited *min haTorah* to steal even a tiny amount - and this is forbidden even if done as a joke and even if the intention is to return the item."³ Furthermore, the *Shulchan Aruch* rules, "Even one who borrows something without the knowledge of the owners is called a thief."⁴ This would seem to address our question clearly and definitively. One could suggest, however, that our question is somewhat different - what if the one taking the item *knows for sure* that the one he is

borrowing from would gladly let him take and use this item?

The Gemora in Bava Metzia⁵ relates an incident where a sharecropper brought out fruit for Rav Ashi and Mar Zutra to eat. Mar Zutra abstained from eating the fruit until the owner of the field, Mari Bar Issak, came home. *Tosafos* points out that even though Mar Zutra was certain that Mari Bar Issak would be pleased if they ate his fruit, even without his permission, this was nonetheless prohibited. They explain as follows:

There is a famous dispute between Rava and Abaye regarding the halachic status of "*ye'ush shelo mida'as*." The standard case that this dispute revolves around is when one finds a lost item *before* the owner of the item realizes that he has lost it. Under normal circumstances, once the owner realizes that his item is lost, he gives up hope of ever finding it, thus allowing the finder of the object to claim ownership of it when he picks it up. However, if the finder picks up the object *prior* to the owner's realization of its loss, then the item actually still belongs to the owner at the time it is picked up. The owner is only "*miya'eish*" (gives up hope) *after* the finder has already picked it up. It is in this case that Rava and Abaye have their dispute. Rava maintains that since, in the end, the owner gives up hope, it is permissible for the finder to keep and use the item despite the fact that when he found it, the owner was not yet aware of its loss. The halacha, however, follows the ruling of Abaye. He maintains that all the while the original owner does not know that his item was lost, we can not consider "*yeiush*" to have "kicked in." Therefore, if the finder picked up the item prior to the owner's realization of loss, the finder can not use or keep the item. Even after the owner is truly *miya'eish*, it is too late. *Yeiush* must take place *prior* to the finder picking up the item.

Tosafos likens the case of Mar Zutra eating Mari Bar Issak's fruit to the case of *yeiush shelo mida'as*. Even though Mari Bar Issak would be very happy to learn that Mar Zutra had partaken of his fruit, this is like a case of *yeiush shelo mida'as*. At the actual time of eating, he did not yet know that his fruit was being eaten. *Tosafos* therefore rules that it is not permissible to partake of someone else's food under these circumstances, all the while the owner does not know that his food is being consumed.

While this specific case mentioned by *Tosafos* is not explicitly discussed in the *Shulchan Aruch*, it is discussed extensively amongst the *Acharonim*.

Halacha Encounters

The *Shach* would like to disagree with the assertion of *Tosafos* above.⁶ The *Shach* does not accept that the ruling of *Abaye* regarding *ye'ush shelo mida'as* should be applicable to a scenario where one borrows an item from someone he knows will not mind. The difference is that when it comes to the case of *ye'ush*, even after the original owner does in fact give up hope, that is not because he *wants* to relinquish his claim to the lost item - it is merely out of a realization that he has no choice. The item is lost. That is why we view the item arriving in the hands of the finder as arriving "*bi'issur*." In our case, however, when the owner realizes what happened to his item or food, on the contrary, he is happy to know what it was used for and has no misgivings regarding its use. Therefore, it is considered as having come into the hands of the borrower retroactively, with full permission of the owner.

Many *poskim*, however, strongly disagree with the ruling of the *Shach* on this issue.

What is the Halacha?

It is important to note that we are only discussing situations where the borrower, based on his relationship with the owner, feels that he "knows" the owner would not mind his borrowing the item. These rules do *not* apply to a case where the borrower is unsure of the owner's attitude towards his using or borrowing the item.

- Items that the Borrower Consumes and Plans to Return a Different Item in its Stead:

Even though the *Shach* clearly permits borrowing an item and consuming it through its use (if the borrower assesses that the owner would not mind), a great many *poskim* who discuss this issue disagree with this ruling. The *Shulchan Aruch HaRav* writes, "Even if it is clear [to the borrower] that when the owner finds out that his item was taken, [the owner] will be happy and rejoice [at the fact that his item was used] due to their close friendship, still, it is forbidden to benefit from [the item] without the owner's knowledge... even if the owner is his close friend... since he does not know about [the borrower's taking the item] at the time of the taking, the borrower has benefited *bi'issur*... And this is something the masses should be informed about, as many people stumble in this [law] due to lack of knowledge [of this prohibition]."⁷ This is also the opinion of the *Ketzos HaChoshen*.⁸ Many later *poskim* also prohibit borrowing under these circumstances. This was the opinion of *HaGaon* Rav Shlomo Zalman Auerbach *zt"l*.⁹ This is also the ruling of Rav Binaymin Zilber *shlit"a*¹⁰ and Rav Yitzchak Zilbershtein *shlit"a*.¹¹

- An Item that is Borrowed and Returned "As Is":

Even though many *poskim* prohibit borrowing an item even if the plan is to return the item unchanged,¹² there are many *poskim* who are, under these circumstances, willing to rely on the *Shach* and permit this type of borrowing. The *Shulchan Aruch HaRav* seems to rule this way.¹³ This was also the opinion of *HaGaon* Rav Yosef Chaim Sonnenfeld *zt"l*¹⁴ and *HaGaon* Rav Shlomo Zalman Auerbach *zt"l*.¹⁵

An Item that People are not Particular About Lending to Others for Use

The above rulings apply only regarding an item that we have reason to believe the average owner would not be willing to lend to a stranger. That is when the question of whether the borrower's assessment of the owner's temperament is a valid *matir*. If, however, the item in question is the type that *nobody* would mind someone else's using - even a stranger - then the *halacha* is clear that it is permissible to use.¹⁶ For this reason, it is permissible for an average (i.e. not overly heavy) person to sit on a bench belonging even to a complete

stranger without first asking permission.^{17,18} But, this is only the case if one assesses that *no one* would mind if this item were used. If even a small percentage of people would not allow use of this item, then one is not allowed to use it without permission.¹⁹

If one Received Permission to Use an Item

Obviously, if the owner has granted permission for one to take or use an item, it is permissible for the borrower to take it. The *poskim* point out that unless the permission was granted specifically for a one-time usage, one does not need to ask every time he wishes to borrow an item. If this is an item that the borrower does not think the owner would mind lending again, the original permission suffices for future use as well.²⁰

Items Borrowed for Use for a Mitzvah

There is much discussion amongst the *Acharonim* regarding borrowing items for *Mitzvah* use - like a *siddur*, *sefer* or *tallis* - without the knowledge of the owner. There are varied views amongst the *poskim* and many cases where the practical halacha will change based on the circumstances.²¹ What is clear, however, is that if one has the opportunity to ask the owner, he must do so before taking the item.²²

¹ See, for example, *Ohr HaChaim* s.v. *Ha'aretz chamas*

² *Bereishis Rabbah* 31:5

³ *Choshen Mishpat* 348:1

⁴ 358:5

⁵ 22a

⁶ *C.M.* 358:1. Although the *poskim* commonly attribute this opinion to the *Shach*, it should be noted that the *Shach* himself prefaces his differing opinion with the words "*Et lav dimistafina, hayisi omeir...*"

⁷ *Hilchos Metziah U'Pikadon* 4

⁸ 262:1

⁹ *Halichos Shlomo* 19 note 13

¹⁰ *Az Nidbaru* 7:16 and 12:65:7

¹¹ *Sefer Aleinu Lishabeach* on *Bereishis* pg. 99. See also *Sefer Toras Hayoledes* 39:2 note 2

¹² See *Az Nidbaru* 7:16 who says that even though there are those who are lenient regarding this, "*yeish lihachmir b'issur gezel hachamur.*"

¹³ *Hichos She'eilah* 5. See, however, *Pischei Choshen* vol. 4, 7 note 4 who addresses this and discusses alternate ways to understand this ruling.

¹⁴ *Teshuvos Salmas Chaim* #764

¹⁵ *Halichos Shlomo* 19 note 13

¹⁶ *C.M.* 359:1

¹⁷ *Rema* 381:1. In such a case, even if the item breaks while being used, the borrower is exempt from paying, as a normal (i.e. fully permitted) borrower would be exempt due to *meisa machmas melacha*. See *Pischei Choshen* vol. 4, 7 note 4.

¹⁸ There are those that use this ruling to explain the *Mishna Berurah* in *siman* 1:2 regarding using someone else's water for *netilas yedayim* if he will be able to return other water in its place. Since water is not something people are particular about (if it will be replenished), according to this rule, it would be permissible.

¹⁹ This is due to the rule of "*ain holchin bi mamon achar harov.*"

²⁰ *Az Nidbaru* 11:41

²¹ See *O.C.* 14:4 and *M.B.* 16; *O.C.* 25 and *M.B.* 53; *Aruch HaShulchan O.C.* 14:11 and 13 and *C.M.* 72:1; *Salmas Chaim* #764 and *Halichos Shlomo* 19 note 13 who is only *meykil* to use a *siddur* or *sefer* if one knows for sure the owner is not *makpid* (like the *Shach* mentioned above).

²² *M.B.* 14:13

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