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Restoring the Primacy of Choshen Mishpat

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DEDICATING THE **FLATBUSH**
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STORY LINE

by Rabbi Meir Orlan

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Capture the Candy

Rabbi Tzedek's family had gathered for Shabbos to celebrate the aufruf of his son, Zvi.

On Shabbos morning, the gabbai called the chassan up to the Torah: "Ya'amod, ya'amod, ya'amod hechassan Zvi ben Harav Meir, maftir."

When Zvi concluded the final blessings of the haftarah, the shul began singing "Od yishama..." and showered him with candies. The children scrambled about the bimah, collecting as many candies as they could grab and stuffing them into their bulging pockets.

Near the bimah stood Mr. Cohen. One candy landed on a fold in his tallis.

"Abba, there's a candy on your tallis!" exclaimed his son, Aharon. "Could you please give it to me?"

Meanwhile, another boy, Bentzi, saw the

candy and grabbed it from the tallis.

"Thief!" cried out Aharon. "That's our candy!"

"Please give the candy to Aharon," Mr. Cohen said to Bentzi.

"But I got it first," said Bentzi. "Why should I give it to him?"

"I intended to acquire the candy while it was on my tallis," replied Mr. Cohen. "So it was already ours."

"How did you acquire it?" asked Bentzi. "It was just sitting on your tallis and was going to fall off anyway. I could have picked it up afterward from the ground."

"I see we have a sharp little talmid chacham (Torah scholar) in the making," said Mr. Cohen. "Sounds like a case for Rabbi Tzedek."

After davening, Mr. Cohen went with Bentzi to wish Rabbi Tzedek mazel tov.

"We've also got a case for you," added Mr. Cohen. "Bentzi and I have a dispute over one of the candies that were thrown." He related what had happened.

"Even though the candy landed on Mr. Cohen's tallis," ruled Rabbi Tzedek, "Bentzi is legally entitled to keep the candy."

"Why is that?" asked Mr. Cohen.

"Candies that were thrown have the status of hekfer, ownerless property," explained Rabbi Tzedek. "It is necessary to make a valid kinyan (act of acquisition) to acquire them. Although the candy fell on your tallis, no kinyan was made until Bentzi picked it up."

"Why doesn't the fact that the candy fell on my tallis serve as a kinyan?" asked Mr. Cohen. "I learned that a person's vessels (keilim) can acquire for him."

"That is correct," replied Rabbi Tzedek. "A

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A Lender's Right

Submitted by N. G.

John, a gentile, borrowed \$100,000 on interest from Reuven and put a first mortgage on his home for the principal and interest. John needed another loan and borrowed \$50,000 from Shimon secured by another lien as a second mortgage. John eventually defaulted on both loans and Shimon asked Reuven to exercise his first mortgage so that he could collect his mortgage from the

remaining equity of the house. Reuven declined, as he prefers that the interest continue to accrue for the full equity of the house.

Q: Can Shimon force Reuven to collect his first mortgage to free up the equity?

A: It would seem that Reuven's first mortgage assigns to him the right to accrue interest to the full value of the house and ignore Shimon's second mortgage. On the

other hand, John has the right to pay off his debt to Reuven, which would remove Reuven's lien. If Shimon is entitled to take over this right, he may pay off John's debt by forcing Reuven to collect his mortgage. This will free the rest of the equity for the collection of Shimon's debt.

The latter argument is the opinion of the Rema (C.M. 86:1) who rules that Shimon may force Reuven to accept payment now, based on the principle of shibuda d'R' Nossan. According

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person's vessels acquire for him wherever he has permission to leave them, such as in his own property or in a semipublic area - but not in a fully public area, where he has no right to leave them. Once an item falls into his vessel, it is as if he picked it up or it was placed in his house (C.M. 200:3; Pischei Choshen, Kinyanim 8:7[18]).

"Similarly, the Gemara (Gittin 78a) teaches that if a man threw a get (divorce document) into his wife's lap or in her basket, she is divorced, if the basket was in a place where she was allowed to leave it (E.H. 139:10)."

"Why isn't falling on the tallis considered like falling into a basket?" asked Mr. Cohen.

"The basket must be a container that has an interior (see C.M. 273:13; P.C. 8:[19])," explained Rabbi Tzedek. "Therefore, falling on the tallis is not consid-

ered falling into a basket. Even if the candy fell into a fold in the tallis, it is not considered an interior, since the fold is of no permanent form and anything can easily slide off (see E.H. 139:15)."

"What if the candy had fallen into a pocket or tallis bag?" asked Mr. Cohen.

"That would be considered like falling into a basket, since it has an interior. However, it must be in a place where you are allowed to leave it, such as at your seat - but not, for example, in the aisle of the shul near the bimah, where you have no right to leave it (see Avnei Miluim, E.H. 30:8)."

"So the candy's mine," brightened Bentzi.

"Yes," said Rabbi Tzedek with a laugh. "But I see that your pockets are already overstuffed, so it might be nice to give the candy to Aharon anyway."

to this principle, if Reuven lends money to Shimon, who lends money to Levi, Reuven (the first lender) may collect from Levi (the last borrower) directly and may exercise all the rights that Shimon (the first borrower and second lender) had against Levi. Applied to our case, it means that Shimon, who currently has the right to collect from John, the delinquent borrower, is now considered the first lender, or first mortgage, on the equity that is not yet mortgaged to Reuven. He therefore takes over the rights of John to pay Reuven and to force Reuven to accept the payments by collecting his mortgage. This will release the part of the lien that amounts to the money that is owed to Shimon.

However, others disagree and assert that by his loan, Reuven acquired a lien on the entire house, including the equity that equals the principal and potential interest, as

long as the gentile does not repay the loan. Therefore, Shimon cannot force Reuven to accept early payment to his own detriment, although it will be to the detriment of Shimon (Shach C.M. 72:162, but see Tumim 86:4, Rabi Akiva Eiger to Shach, ibid.).

Since the matter is subject to debate, Shimon cannot force Reuven to collect his debt from the gentile. However, Shimon may file for collection in secular court from the gentile directly. Although this might result in a ruling of courts that will allow Shimon to collect his debt from the remainder of the equity in the house that is not at present indebted to Reuven, it is permitted. This is rooted in the principle that a Jew may exercise a right that he has to collect from a gentile, even though by doing so he indirectly causes a loss to another Jew (C.M. 194, see also Erech Shai 162).

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Shomrim: Guardians #14

Q: A shomer sachar (paid guardian) is liable for theft, but not for oness (circumstances beyond his control). What happens if theft occurred in a manner of oness, e.g. armed robbery or a guardian's sudden illness?

A: A shomer sachar is liable for theft, but he is exempt if it is armed robbery. Even if the guardian is also armed, the robber is more willing to risk his life. This circumstance is

not called theft, but rather nishbah (taken captive) (C.M. 303:3).

If a different uncontrollable theft occurred (e.g. from a secure vault), there is a dispute whether he is liable. Shulchan Aruch (303:2) cites an opinion that he is liable, since every theft has some element of oness unless the guardian was present and unable to prevent it. The Shach (303:4), however, sides with the opinion that the guardian is exempt if the theft was beyond his control. Others say that if the

object was stolen from a secure vault, the guardian is liable, but if an oness (e.g. sudden illness) prevented him from guarding, he is exempt (see RA"E 303:2). Aruch Hashulchan (303:7) rules that, out of doubt, the guardian is exempt. Furthermore, if the guardian acted in the customary manner or the owner knew that the guardian would not be present, even the first opinion would exempt him if stolen through oness, because the item was entrusted with this understanding.

LAST CALL

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