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HaRav Chaim Kohn, shlita



Restoring the Primacy of Choshen Mishpat

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STORY LINE

by Rabbi Meir Orlan

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Luck of the Draw

Chaim and Zev had been roommates in yeshiva for a number of years. They had purchased, often jointly, many pictures of Gedolim (great Sages) to adorn their walls. When the time came to head their separate ways, they divided the pictures that they had jointly bought. They were able to agree about all of the pictures except for a beautiful drawing of Harav Yosef Shalom Elyashiv, zt"l, which they both desperately wanted, and two other photos.

"I don't see any way out of this other than a lottery," said Chaim. "One will get Rav Elyashiv's picture, and the other will get the other two photos."

Zev was not thrilled about this arrangement, especially since he had found the picture of Rav Elyashiv and suggested that they buy it, but he didn't have a better way of deciding the issue.

The two cast a lottery, and Chaim won the picture of Rav Elyashiv — but Zev grabbed the picture and refused to hand it over.

"You know that for something to be legally binding, there needs to be a kinyan, an act of acquisition," he said. "A lottery is just a convenient means to help decide, but does not carry any legal validity until you take the item. I'm retracting my agreement to decide by lottery."

"What do you mean that a lottery does not carry any legal validity?" asked Zev. "A lottery is often used to determine respective shares, especially between partners. Even Eretz Yisrael was divided by the tribes through a lottery."

"There, Hashem decreed that the Land should be divided through a miraculous lottery," said Chaim. "But that doesn't mean that a lottery between you and me carries

legal weight!"

"Once the lottery is cast, it's over!" argued Zev. "Please give me the picture."

"I'm not giving it to you until we speak with Rabbi Dayan," said Chaim.

"Agreed," said Zev. They walked over to Rabbi Dayan's beis midrash.

"We agreed to divide our joint Gedolim pictures by lottery," explained Chaim. "Zev now refuses to honor the lottery. Isn't a lottery legally binding?"

"We find, regarding the division of Eretz Yisrael to the tribes, that a lottery has legal consequence," said Rabbi Dayan. "Although there were additional factors there — such as the Urim V'Tumim — any lottery carries validity, since the two partners are mutually interested in dividing in this manner (B.B. 106a)."

"Does that mean that, after the lottery, I

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Hotel Hesitation

I won a week-long stay at a hotel in a raffle. I offered to sell the prize at a discount to a friend who often vacations there. My friend informed me that he had been in touch with the hotel, but hadn't yet paid a deposit to reserve a place and would be thrilled to purchase my prize. When the hotel discovered our arrangement, they questioned whether I may sell my prize to my friend who'd intended to stay as a full-paying guest and suggested that I ask the following questions.

Q: May I sell my rights to a friend who intended to pay the hotel's standard rate, denying the hotel the profit they make from a paying guest? If I hadn't known that he was planning a stay and sold him my prize, would that violate a prohibition?

A: Although the hotel did not yet earn your friend as a customer since he didn't pay a deposit, nevertheless, Chazal (Kiddushin 59a) teach that when Reuven attempts to ac-

quire something and Shimon precedes him, acquiring it for himself (ani hamehapech b'chararah), Shimon is considered wicked. Even though Reuven never acquired the object, the fact that he was attempting to acquire it restricts others from acquiring it for themselves. Therefore, if your friend already decided to stay at the hotel, you may not offer him your prize, thereby denying the hotel a paying customer, even though he had not yet confirmed his reservation. Even if your

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already owned the picture?" asked Chaim.

"This is disputed by the Rishonim," answered Rabbi Dayan. "The Rambam, cited by the Shulchan Aruch, rules that a lottery confers ownership; thus, Zev has no legal ability to retract. The Rosh, cited by the Rema, however, maintains that the lottery just decides the shares. It enables each party to go ahead and possess his respective share without explicit agreement of the other, but does not confer ownership until an act of acquisition is made on the respective share. According to this opinion, Zev is able to retract until you acquire the picture (C.M. 173:2)."

"Whom does the halacha follow?" asked Zev.

"Shevus Yaakov (3:162) considers the issue unresolved," replied Rabbi Dayan. "However, Maharsham (3:186) rules like the first opinion, that a lottery confers legal ownership. He

adds that if there was a formal kinyan sudar beforehand to divide based on the lottery, or the two parties signed a contract to that effect, the lottery would certainly confer ownership (Pischei Choshen, Shutfim 3[72])."

"What about a lottery that is meant only to determine who gets to choose first?" asked Chaim.

"That kind of lottery certainly does not confer legal binding to the arrangement," responded Rabbi Dayan, "since it is not similar to the division of Eretz Yisrael. This lottery does not clarify the shares and certainly does not confirm ownership. Therefore, either party has the legal ability to retract (Pischei Teshuvah 173:2)."

"I must add, though," concluded Rabbi Dayan, "that even where there is a legal possibility to retract, it is usually considered untrustworthy and morally reproachable (C.M. 204:7)."

friend and the hotel were negotiating terms but had not reached an oral agreement, it may be prohibited. Although Rema (C.M. 237:1) rules that the prohibition is violated only when the two parties have reached an oral agreement, Perishah (cited in Pischei Teshuvah 237:3) maintains that if the two parties would reach an agreement it not for the interference of the third party, the prohibition is violated.

The Gemara (Kiddushin 59a) relates that Rabi Abba purchased property that Rabi Gidal was attempting to acquire. Rabi Yitzchak Nafcha asked Rabi Abba about one who violates the prohibition of ani hamehapech b'chararah. The response: he is considered wicked. Rabi Yitzchak Nafcha then asked Rabi Abba why he violated the prohibition, and he answered that he had not known that Rabi Gidal was negotiating the purchase of that property.

Rabi Yitzchak Nafcha instructed him to deliver the property to Rabi Gidal.

Some authorities cite this incident as proof that one who inadvertently violates this prohibition must give the object to the one attempting to acquire it (Divrei Geonim 27:8 in the name of Knesses HaGedolah citing Raanach and Igros Moshe, C.M. 1:60). Others contend that Rabi Yitzchak Nafcha advised Rabi Abba to act piously, but technically there is no obligation to give away the property since the prohibition was violated unintentionally (Pischei Teshuvah, C.M. 237:2; Divrei Geonim ibid. and Imrei Yosher 2:72).

In your case, since you became aware that your friend was negotiating with the hotel before he actually vacationed there, all opinions agree that you should refrain from selling him your prize.

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Lost and Found #1

Q: What is the source of the mitzvah of hashavas aveidah, returning lost property?

A: When we encounter a lost item, there is a mitzvah to safeguard it and attempt to return it to its owner:

"You shall not see the ox of your brother or his sheep or goat cast off, and hide yourself from them; you shall surely return them

to your brother. If your brother is not near you and you do not know him, then gather it inside your house, and it shall remain with you until your brother inquires after it, and you return it to him.... So shall you do for any lost article of your brother that may become lost from him and you find it; you shall not hide yourself (Devarim 22:1-3)."

The primary mitzvah is the positive command:

"Hashev teshivem" — return them, and there is an added prohibition not to ignore a lost item, "Lo suchal l'hisalem" — You shall not hide yourself (B.M. 26b). If a person unlawfully takes a lost item for himself, he also violates the prohibition, "Lo sigzol" — Do not steal (Vayikra 19:13).

B'eizras Hashem, we will explore the details of hashavas aveidah in the coming series.

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