

Gezel Akum - Part II

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INTRODUCTION

In the previous overview, we explained that actively stealing from another person or intentionally causing damage is always forbidden, regardless of the identity of the victim. Only *hafka'as halva'aso*, (not living up to a financial commitment made to an *akum*), is permitted according to the Rema. In the event of a potential *chilul Hashem* even that would be prohibited. In the current overview, we will analyze a ruling of the Rema regarding *gezel akum* within *Hilchos Kiddushin* and see how the various ways to understand it provide insight into *gezel akum* overall as well as into other areas of *Choshen Mishpat*.

GEZEL AKUM USED FOR KIDDUSHIN - THE RULING OF THE REMA

The Rema (E.H. 28:2) discusses a case where someone is *mekadesh* (betroths) a woman with a ring stolen from an *akum*. The Rema, citing the Mahari Weil (Siman 138), rules that the *kiddushin* is valid. The Rema explains that this is because the ring need only be returned to the owner due to the principle of *kiddush Hashem* (sanctifying Hashem's name), but in actuality, it did belong to the man who performed the *kiddushin*.

The Gra argues with the Rema and rules that the *kiddushin* is not valid. His logic is based upon the fact that most opinions hold that *gezel akum* is *assur de'oraisa*, in which case one would not be able to be *mekadesh* a woman with it, since it does not belong to him. The Gra explains that the Mahari Weil was referring to a case of *hafka'as halva'aso*, where the ring was borrowed from an *akum* and not returned. In that case, the only reason

to return the object is due to *kiddush Hashem*, thus the *kiddushin* performed using the ring is valid. But if the ring was actually stolen, then in the opinion of the Gra, the *kiddushin* is invalid.

EXPLANATION #1 OF THE REMA: CHELKAS MECHOKEK

Many Acharonim attempt to resolve the opinion of the Rema here. The first is that of the Chelkas Mechokek, who explains that the case of the Mahari Weil and Rema is where the ring had been entrusted to the Jew as a *pikadon* (deposit). The Jew took that ring and used it to be *mekadesh* a woman instead of returning it. According to the Chelkas Mechokek, not returning a *pikadon* that belongs to an *akum* is equivalent to *hafka'as halva'aso* – not living up to one's financial commitment to return a loan, which is permitted. Therefore, no *gezel* exists here, and because it was placed in his possession legitimately he is able to use it for *kiddushin*. The Nesivos HaMishpat (C.M. 194) also mentions a similar approach.

The Shulchan Aruch HaRav and the Gra (in *Even Ha'ezer* and *Choshen Mishpat*) reject this explanation of the *Chelkas Mechokek*. In their opinion, one who is entrusted with a *pikadon* by another is not considered to have ownership of that item. Rather, he is watching the object belonging to the owner, but never receives possession of the object. For example, if Reuven allows Shimon to park his car in Reuven's garage, Reuven does not gain ownership rights of the car while the car is there. Rather, Reuven simply takes responsibility to watch the car on Shimon's behalf. If so, taking such an item and using it as one's own, such as to be *mekadesh* a woman with it, is still considered *gezel* and not *hafka'as halva'aso*, since at that

moment, one is taking the item from the possession of the owner. According to the Chelkas Mechokek, though, the *pikadon* is considered to be in the possession of the one watching it, and using it has the status of *hafka'as halva'aso*.

A possible precedent for the approach of the Chelkas Mechokek may be found in the Gemara in the third *perek* of Bava Metzia. The Gemara seems to indicate that if Reuven is watching a barrel of wine for Shimon and takes some for himself, he is considered a thief based on *pesukim* other than the standard ones of *lo sigzol* and *lo tignovu*. The Rishonim question why a different *pasuk* is necessary to consider him a thief. Isn't taking some of the wine that belongs to Shimon considered *gezeilah* regardless of whether the wine is a *pikadon*? They answer that if Shimon entrusts Reuven with the wine as a *shomer*, then Reuven in fact possesses a certain amount of custodial ownership, and he may not be subject to the standard definitions of *gezeilah*. This is similar to the *chidush* of the Chelkas Mechokek that using an item for one's own purposes that was entrusted to him by an *akum* as a *pikadon* is considered *hafka'as halva'aso* rather than *gezeilah*. As mentioned, though, many others disagree with this understanding.

The Machaneh Efraim also seems to support an idea similar to that of the Chelkas Mechokek based upon a Gemara in the second *perek* of Bava Metzia. The Gemara states that if Reuven picked up a lost object with intent to return it to Shimon, but later decided that he would keep it for himself, he is not considered a regular *gazlan*. The *Machaneh Efraim* explains that in this case as well, the finder is holding onto the object in a permitted manner and then simply changes his intent as to what to do with it, like the case of the *pikadon*. Since he never engaged in an act of misappropriation, it does not constitute standard *gezeilah*. The *Machaneh Efraim* then extends the same principle to the case of the *pikadon* as well, similar to the Chelkas Mechokek.

However, the majority of Acharonim dispute the comparison between the case of an *aveidah* (lost object) and the case of a *pikadon*. They argue that in the case of an *aveidah*, the object was already removed from the possession of the owner when he lost it and is not "*birshuso*," meaning that his ownership status is weakened. For this reason, the owner is not able to consecrate the *aveidah* as *hekdesh*. In contrast, the owner of a *pikadon* retains full ownership rights when he intentionally entrusts someone to watch it for him. Accordingly, if the *shomer* then retains the item afterwards, it is considered

complete *gezeilah*, as opposed to *hafka'as halva'aso*.

Parenthetically, a practical ramification of this dispute concerning the ownership of a *pikadon* may arise in a case of a lawyer with a full escrow account (known in halacha as a *shalish*), where he is holding onto jewelry or money whose ownership is subject to dispute between two parties. If the approach of the Chelkas Mechokek is adopted, the lawyer may be considered the owner of the jewelry in a certain sense. Therefore, any claim or information he discloses about the ownership may carry more weight in Bais Din. The Nesivos HaMishpat (in *Hilchos Shalish*) seems to accept this approach. On the other hand, the Gra and Shulchan Aruch HaRav among others may hold that the lawyer is simply holding it for the true owner, and he is not considered the owner in any practical sense.

EXPLANATION #2 OF THE REMA: BAIS SHMUEL

The Bais Shmuel offers a second approach to resolve the opinion of the Rema. The Bais Shmuel suggests that the Rema is indeed discussing a case of actual *gezel akum* (as opposed to the Chelkas Mechokek, who interpreted the case as one of a *pikadon*). Yet the Rema is still justified in saying that *kiddushin* using the stolen object is valid because some hold that the prohibition of *gezel akum* is only *miderabanan*. If so, a rabbinic prohibition of stealing (which requires returning the object to its owner only due to a consideration of *kiddush Hashem*) will not disqualify *kiddushin* performed with the item on a *de'oraisa* level.

Other Acharonim, such as the Gra and the Avnei Miluim (E.H. 28:3), question this approach as well. They argue that even if the prohibition of *gezel akum* is only *derabanan*, this does not transform the Jew who stole it into the true owner. That being the case, if he uses the stolen item for *kiddushin*, the *kiddushin* would be invalid because the object used for *kiddushin* must belong to the *chasan*.

The Avnei Miluim elaborates on this theme, citing the Magen Avraham in *Hilchos Lulav* who develops a similar idea (based on the *Sefer Yere'im*). The Magen Avraham states that one who takes an *esrog* from the orchard of an *akum* without permission does not fulfill the mitzvah, since it does not belong to him, and he does not fulfill the requirement of "*lachelm*" (that the *arba minim* must belong to him). This is true even according to the opinions that *gezel akum* is permitted. Although nowadays this application is relatively uncommon concerning an *esrog* (since most *esrogim* are grown by Jews), it can still be relevant regarding *aravos*, which are often grown or found

in many places. According to the Magen Avraham, one must ensure that *aravos* are only taken with the express permission of the owners.¹

EXPLANATION #3 OF THE REMA: NESIVOS HAMISHPAT

The Nesivos HaMishpat (C.M. 349) offers a third explanation of the Rema by challenging the aforementioned objection of the Avnei Miluim (that violating *gezel akum* does not render the stolen item as belonging to the thief). The Nesivos suggests that when a thief steals an object from another individual, in principle he should acquire the item immediately. Since the Gemara refers to a *gazlan* as a *mazik*, it would seem that stealing an object is equivalent to destroying it. Therefore, just as when damaging an item, an obligation to compensate the value exists, so too with regard to stealing, the thief should have to compensate the owner for the value of the item, but would acquire it as his own. However, the Nesivos explains, the Torah imposed an additional requirement on the *gazlan*, namely, *hashavah*, returning

the actual object.

The Nesivos suggests that perhaps the obligation of *hashavah* applies only when stealing from a Jew, but not from an *akum*. If so, then perhaps the original principles of *gezeilah* apply to this case, and the thief would immediately acquire the stolen object as his own. Although the act of stealing itself is still entirely forbidden as full-fledged *gezeilah*, nevertheless the lack of an obligation of *hashavah* within *gezel akum* renders the object as belonging to the thief. Therefore, if the thief uses the stolen object for *kiddushin*, the *kiddushin* would be valid, as the Rema rules.

Rav Moshe Feinstein touches upon this in a *teshuvah* to a *bachur* who had engaged in shoplifting when he was younger. Rav Moshe writes that if the actual items that were stolen still exist then there is definitely an obligation to return them. If they've been expended then R' Moshe is unsure, but he concludes that even if there is no obligation of *hashavah* concerning *gezel akum*, if he wishes to do *teshuvah* for the *aveirah*, he must return the value of the stolen items to whichever stores or victims they originally belonged.

¹ The Avnei Miluim elaborates further concerning the possibility that the halacha concerning *kiddushin* does not require the *chasan* to actually own the ring, but rather to only have the ability to transfer ownership to the *kallah* on a *de'oraisa* level, in which case perhaps *gezel akum* would qualify as valid *kiddushin*. He then suggests that perhaps the same applies as well to the case of *arba minim*. There too, perhaps since he is allowed to use it (since the requirement to return it is only due to *kiddush Hashem*), he would fulfill the mitzvah even if he does not have full ownership rights. However, he acknowledges that this suggestion is not certain, and perhaps he must have full ownership rights on the object in both cases.

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