

DEVAR HAMISHPAT BULLETIN

Clarifications in the Laws of Choshen Mishpat and Ribbis | #25 Adar 2 5784

- Halacha Insights -

Hilchos Purim

If a person thinks to give *matanos la'evyonim*, is he obliged to give as he thought, just as is the din with tzedakah?

The Mishnah Berurah writes in hilchos Purim (694:6) in the name of the Beis Yosef, who cites the Hagahos Ashri: Money one thought to distribute to the poor on Purim may not be changed for another purpose. The reason is, because he holds that matanos la'evyonim has the din of tzedakah which is similar to hekdesh, where one must fulfill one's thought even without saying it explicitly with his mouth. And the Shaarei Tziyun (8) writes: This is written in Beis Yosef. See Yoreh Deah end of siman 258, and Choshen Mishpat 212:8, where he brings varied views regarding this *din*, and he concludes that one should be machmir.

The sefer Tzedakah Umishpat writes that one's mind only obliges him if he **decided in his mind** to give a certain amount of money to tzedakah. This follows the ruling of the Magen Avraham in *hilchos Ta'anis* (562:11), that the rule of thought being considered speech (מדשבה הוא מכשוב הוא משוב mekabel on himself to do so, but not with a mere thought to do so. The Gilyon Maharsha (Yoreh Deah 258) writes similarly, and he refers to the Magen ע"י הרה"ג ר' **ברוך אברהם עסטרייכער** שליט"א ראה"כ ומרבגי היכל הוראה 'דבר המשפט'

Avraham.

But we can ask: The Shach (*Chosben Misbpat* 87:51) rules that one who says he will give charity to a certain poor person, he may not give the money to another poor person. If so, what is the *din* regarding one's thought? If he decided in his mind to give to a certain poor person, is he obliged to give to that poor person?

The Derech Emunah writes in the name of the Chazon Ish, that regarding a certain poor person, one isn't obliged to give to that poor person if he didn't actually say so, but only thought so. And it has been said in the name of the Cheshev Ha'efod, if during *davening* one sees a *meshulach* and one intended to give him tzedakah, and then he no longer saw that *meshulach*, this isn't considered a thought that obliges a person, since only because he saw that *meshulach* did he think to give him the *tzedakah*.

A person went to a fundraising event and didn't think beforehand how much to give, as is usual that people only give at the actual moment when they are asked to sign, without making a resolution beforehand. He wanted to pay with a credit

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Editorial

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רס״ד

With thanks to Hashem, we present *halachos* from our Beis Medrash.

In the run up to Purim, we have brought the *halachos* that appertain to Purim, following the words of the Gemara (Sanhedrin 101a), "whoever reads a *passuk* on time, brings goodness to the world." Similarly, the Gemara Eruvin (54a) cites the *passuk* "Happiness to man is in his mouth, and how good is something at the correct time," and expounds (as Rashi explains): "When is a person happy? When he knows to teach the *halachos* of each Yom Tov at its given time."

We have also added relevant *halachos* that have recently aroused.

We must note, although these *halachos* have been clarified by expert Rabbanim, since practical *halachah* can change with a slight change in the situation – especially *halachos* of *Choshen Mishpat* – one must always ask a Rav.

In the name of the Kollel's Rabbanim, let us bless our readers, and all of *Klal Yisrael*, with a kosher and happy Purim, and many Hashem do miracles with us just as He did to our ancestors in the times of Mordechai and Esther, sending us His Moshiach, and we will continue to rejoice with the *simchah* of Purim, as *Chazal* say (Yalkut Shimoni Mishlei 944), all the *Yamim Tovim* will be annulled except for Purim, which will never be annulled.

> The Editors Adar 5784

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card and he wrote how much they should take, but the credit card didn't go through. Does he have to nevertheless pay due to his thought?

One may say that although he didn't say how much he wants to give, and even the writing isn't considered as saying, since he didn't write that he **obliges** himself to pay to tzedakah, but merely wrote a number how much he wants to give, he might still be obliged to pay the money due to his thought.

But we could say this depends on the *machlokes* between the *poskim* regarding somebody who wanted to actively give *tzędakab* but was prevented from doing so, if this is considered a thought to *tzędakab* which obliges him, or perhaps it isn't a thought since he intended to actively give the tzędakab.¹ However, our case could be more lenient than that of the *poskim* [see footnote], and therefore it could be that all would agree that it isn't considered a *neder*.

The custom is to send mishloach manos to Rabbanim. Is this an issur of bribery?

The Devar Shmuel (191) writes that since he doesn't intend to bribe with the *mishloach manos*, and he only sends the *mishloach manos* because it is customary to do so, it is permitted. Nevertheless, one who is in the middle of a *din Torah* by the Rav and he sends a larger *mishloach manos* that usual, or if he only sends a *mishloach manos* this year yet never sent the Rav a *mishloach manos* in previous years, it is certainly prohibited to send, and it is prohibited for the Rav to receive.

The Botatsher Rav that he didn't receive the *mishloach manos* that were sent, and instead only his Rebitzen received the *mishloach manos*, and a person would write down who sent *mishloach manos* in order to know who to return a *mishloach manos*.

Can one rely that whatever is in a mishloach manos is kosher?

It is worth citing the words of the Chasam Sofer (Drashos, drush 4 year 5596): Chazal write that

קיימו מה שקבלו כבר, the Jews accepted anew what they accepted at matan Torah. The rule is that one witness is believed regarding issurim, which is why one may eat at another person's home, but that is only where there is a chezkas kashrus. When the Jews came with a claim that מודעה רבה and that they were forced to receive the לאורייתא Torah, they told Yechezkel that they want to be like all the gentiles. Nevertheless Hashem didn't accept their argument and said ביד חזקה וחמה שפוכה אמלוך עליכם. They were then forced to do the mitzvos, and if so they won't be believed in issurim with one witness, since they had lost their chezkas kashrus, and if so, no person could eat in the home of the other person. In fact, we know that they were suspected of not keeping the laws of kashrus, since they ate at Achashverosh's seudah.

And the Chasam Sofer concludes: But now they willingly received the Torah anew with joy and happiness, they were permitted to eat from other people's food since they now have a chezkas kashrus, and that is why Chazal initiated the mitzvah of mishloach manos.

If a person brought the mishloach manos into his friend's home without informing him about it, and the home was koneh the mishloach manos with the din of kinyan chatzer, has he fulfilled the mitzvah?

It appears that this depends on the two reasons given by the *poskim* for *mishloach manos*: 1) to increase friendship, or 2) so that he has what to eat for the *seudas Purim*.

If the reason is to increase friendship, in such a case he hasn't fulfilled the mitzvah since his friend didn't know that he brought him the *mishloach manos*, and even if he will find out after Purim who gave the *mishloach manos*, it still isn't reckoned *mishloach manos*, because the friendship was increased after Purim and it is as if he gave the *mishloach manos* after Purim. But if the reason is so that he has food for *seudas Purim*, he now has food for the *seudah* even without knowing who brought the food, and if so he has fulfilled the mitzvah of *mishloach manos*. But the Aruch Hashulchan (695:16) writes, if the person receiving the mishloach manos isn't at home and will not arrive home until after Purim is over, he hasn't fulfilled the mitzvah even if the person's family receive the mishloach manos on his behalf [but many poskim disagree and hold that the family can receive the mishloach manos on his behalf], because the passuk states ומשלוח מנות איש לרעהו, that the *mishloach manos* must come to the other person, or at least must know about it. According to this, our question doesn't depend on the two reasons of mishloach manos, and according to all reasons he hasn't fulfilled the mitzvah if the person receiving the mishloach manos doesn't know about it, since it lacks in משלוח מנות.

On the other hand, the Mahari Assad writes in his teshuvos (207), if he is mezakeh the mishloach manos to another person who is zocheh on his behalf, even if the mishloach manos doesn't reach him on Purim he has fulfilled the mitzvah, since the other person received the mishloach manos on his behalf.² We see from this ruling that as long as the mishloach manos belongs to the one receiving it, he fulfills the mitzvah, and it doesn't have to actually reach him. This seems to disagree with what we wrote above. But it could be that Mahari Assad is only discussing the case where the one who is *zocheh* for the person is his shliach to do so, and if so there is at least the reason of increasing friendship [and the Aruch Hashulchan agrees that if the recipient knows about the mishloach manos, he has fulfilled the mitzvah].

If he placed the mishloach manos in the beis medrash and wrote his name on it, writing that whoever wants to take the mishloach manos can take it, has he fulfilled the mitzvah? [The same can be asked if a person makes a seudah in the beis medrash or at home and whoever wants can come and eat, has he fulfilled the mitzvah?]

Seemingly, it depends on the two reasons given above for *mishloach manos*, if it is to increase friendship he isn't *yatze* [since neither the giver

1) This is based on the Turei Even (Chagigah 10 s.v. dilma), who explains that a person who utters a promise and for whatever reason the neder isn't chal, isn't obliged due to his thought, since he wanted to actually do as promised, so his thought has no place. [But that is only in a circumstance where he uttered the neder and therefore didn't intend that the neder should become a neder by thought. But if he decided beforehand to give tzedakah or the suchlike, he is already obliged because of his thought and therefore his action can't annul his thought.] But the Shach (Yoreh Deah 258:5) holds that even if he intended to utter the neder, he is nevertheless obliged because of his thought, unless he explicitly had in mind that his thought won't oblige him until he actually expresses the neder.

If so, our case depends on these two views.

But possibly, in our case there was no actual thought or a neder at all, since the dispute between the Turei Even and the Shach is only if a person wanted to oblige himself by speech, if the thought helps. But in our case he never even intended to oblige himself to give, only he wants to give when he can. If so, there is no thought and no neder at all, and according to both the Turei Even and the Shach he need not pay.

2) Mahari Assad seems to hold that the *mishloach manos* need not reach the recipient on Purim, and even if he doesn't know about it, the sender has fulfilled the mitzvah. But this doesn't operate according to either of the reasons, be it to increase friendship or to have food for the *seudah*, since there is no friendship if he doesn't know about it, and he doesn't have a meal if it didn't reach his home! We can explain following the ruling of the Rema: If the friend doesn't want to receive the *mishloach manos*, the sender is nevertheless *yotze* the mitzvah, and the Chasam Sofer explains, that by showing that he wants to bring a *mishloach manos* he has fulfilled the increased friendship. We see from here that it is enough if the sender himself increases friendship, even if the receiver doesn't. This can also be the reasoning of Mahari Assad: Since the sender did an act of sending *mishloach manos* and increasing friendship, he has fulfilled the mitzvah.

But we can ask on the ruling of Mahari Assad that being *mezakeh* the person via another person is okay to fulfill the mitzvah of *mishloach manos*: How does this accord with the *passuk* משלוח? This isn't a אלוה but a יזכייה But it could be that the word משלוח מנות doesn't mean that it actually has to be sent, and that it actually has included in the mitzvah.

nor the recipient feel more friendship from such a *mishloach manos*], but if it is so that he has what to eat on Purim, he has fulfilled the mitzvah.

However, it could be that even according to the second reason he hasn't fulfilled the mitzvah, since it has to משלוח מנות – to give over from one to another. According to the views that one must perform the mitzvah with shlichus, he certainly hasn't performed the mitzvah since he didn't give the mishloach manos via a shliach. But even according to those who hold that one need not necessarily send the mishloach manos via a shliach, it nevertheless has to be a משלוח and must be delivered to his friend. In this case, the mishloach manos wasn't delivered, and if so he didn't fulfill the mitzvah. Indeed, the Beis Yosef writes that when the Gemara writes that the amoraim were מחלפי סעודות – they ate at the other's home, they didn't fulfill the mitzvah of mishloach manos with this, since they didn't give the mishloach manos as a משלוח. But the Darkei Moshe holds that even one who invites a person to a seudah fulfills the mitzvah of mishloach manos since this is also considered משלוח.

From the Beis Yosef and Darkei Moshe we see that the mbwa factor is a necessary element to fulfill the mitzvah of *mishloach manos*, and they only disagree over inviting a person to eat if it is considered mbwa. But if he didn't give over the *mishloach manos* at all, and merely left it in the *beis medrash* for anybody to take, he certainly didn't fulfill the mitzvah of *mishloach manos* since he lacks the factor of mshloach manos.

One who damages when engaged in simchas Purim is exempt from paying. What are the details of this halachah?

The Rema writes (695:2), אד הדי הזיק אחד את י"א דאם הזיק אחד את הדיק אחד את י"א דאם הזיק אחד מסור מלשלם י"א דאם הזיק הפורים פטור מלשלם י"א דאם היים לא מחת פורים פטור מלשלם יו some say that if one damages another person because of *simchas Purim*, he is exempt from payment." The Mishnah Berurah adds (14), this is only if the damage was a result of the *simchab*, but if he intentionally damaged, he must pay. He also writes (13) in the name of the Bach, there is a difference between a large damage and a small damage. Also, only if he damaged his property, but not if he damaged his body. And he concludes, the custom is to be liable for a large damage.

Some want to derive from the wording of the Rema, that only if the damage was caused when he was engaged in the *simchas Purim*, for example in the middle of dancing, but if he damaged due to drunkenness he is liable to pay, since he shouldn't have brought himself to be so drunk that he has no control over himself. The same appears to be the view of the Yam Shel Shlomo (Bava Kama 3:3) who writes: Even on Purim when one is obliged to become drunk, our Rabbis didn't mean till he becomes crazy, but as is written in Rambam one must become drunk until he falls asleep in his drunkenness.

And the Aruch Hashulchan writes (695:10), we no longer rejoice till we come to damage property, and therefore if one damages nowadays he is liable to pay.

But the other *poskim* don't differentiate between nowadays and previous times. וצ"ע לדיא.³

What is the din if he sends the mishloach manos on condition that the recipient returns a mishloach manos?

If he conditions his mishloach manos that the person must return a mishloach manos, neither are yotze the mitzvah of mishloach manos since this is considered a loan, and when he returns a mishloach manos it is considered returning the loan. So appears from the Taz (965:5) according to Rashi. But according to the Ran, and so rules the Mishnah Berurah, even a conditioned mishloach manos is considered mishloach manos, and he has fulfilled the mitzvah. However, we could say that even according to the Ran, they only fulfill the mitzvah if they swapped their seudos without making any condition, and if so it is considered a present and he fulfills the mitzvah of mishloach manos. But if he explicitly makes a condition, it could be that according to all views he hasn't fulfilled the mitzvah of mishloach manos.

It could be that there is even a problem of *ribis*. The Taz brings proof to his ruling that they aren't *yazz*, from the law that one may not say to his friend "eat with me what you gave me to eat," because this is *ribis*, since the food is then reckoned as a loan, and if he gives him to eat more than he ate, it is *ribis*. If so, here it could also be prohibited because of *ribis* [and even if he returns the same amount, it could be *assur* due to the *din* of work which is prohibited, since the price could fluctuate].

But if he made a condition and the person immediately returned a *mishloach manos*, there is certainly no problem, since he didn't gain from the time the first *mishloach manos* was with him, and the whole *issur* of *ribis* is the time saved between the loan and the repayment. Similarly, he may not mention that he is returning a

mishloach manos to repay the debt.

From the wording of the Taz it doesn't seem that there is an *issur* of *ribis*, but the Shoel Umeshiv writes in his *sefer* Chelek Shivah that the Taz indeed meant that it is prohibited because of *ribis*. See footnote for more on this.⁴

If one owes his lender money, he must be careful not to send him mishloach manos due to ribis.

If he hasn't yet repaid the loan it is forbidden to give a *mishloach manos*, as is ruled in *Yoreh Deah* (160), one may not give a present to the lender if he wouldn't have regularly given him a present.

But one can ask, since the borrower is now acquainted with the lender, he would have sent him a *mishloach manos* even if he hadn't lent him money, just as he sends *mishloach manos* to other people. But it seems that it is prohibited, since he is only acquainted with him due to the loan, and therefore he is only giving him the *mishloach manos* because of the loan. And even though *mishloach manos* is a mitzvah, it is nevertheless prohibited because of *ribis*, as is ruled regarding *tzedakah* that it is prohibited to give tzedakah when there is a problem of *ribis* (Shulchan Aruch Harav beginning of *ribis*).

But is it permitted to send a mishloach manos after repaying the loan, if he doesn't say that it is for giving him the loan?

This could be permitted, since now the lender and borrower are friendly, and that is why he is sending the *mishloach manos*. And especially because *mishloach manos* is generally taken as a token of gratitude and not as payment, and according to the Machane Efraim (*ribis* 10) a token of gratitude isn't included in the *issur* of *ribis*.

But the Hagahos Ashri holds that even belated *ribis* after repaying the debt is prohibited if he sends the present because he was so kindhearted to loan him the money.⁵

Is it geneivas da'as if he gives a present from maaser gelt?

The Maharam Shik writes in a *teshuvah* (Yoreh Deab 230) that there is no *geneiras da'as* in giving a present from *maaser gelt*, because even if he gave *maaser* itself the recipient must show gratitude.

3) See Beis Yosef who cites the Terumas Hadeshen that if one takes other people's food it isn't considered stealing, and the Beis Yosef notes, that this is only in those times when it was customary to take away food from others, but since this is not our custom, there is no difference between Purim and the rest of the year. We see from the Beis Yosef that these *halachos* indeed depend on the custom, as is written in Aruch Hashulchan.

4) We will clarify this *din* in short: It is forbidden to say, "eat with me what you gave me to eat," and even if he says it is a present, it is prohibited, since it looks like *ribis*. But the *din* regarding *shushvinin* (friends) is that if he ate at his home, he may return a meal, and even if he returns a bigger meal it isn't *ribis*. The Rashbam explains the *hetter* of *shushvinin*, that it isn't *ribis* because they don't care if he gives more or less, and all they care about is that they eat together, and the only reason he gives him more is due to their friendship. The Raavad gives another explanation: The reason *shushvinin* isn't *ribis*, is because he only returns a bigger meal for his own honor, and not because of the loan.

Regarding *mishloach manos*, it is the same as *shushvinin* and therefore there is no *ribis*, since he only returns a bigger *mishloach manos* because of friendship and not because of the loan, as is the reasoning of the Rashbam. And also according to the reasoning of the Raavad, with *mishloach manos* it is permitted because he gives a bigger *mishloach manos* to honor himself.

But according to the Shoel Umeshiv who rules that *mishloach manos* is forbidden because of *ribis*, he must be differentiating between *shushvinin*, which is permitted, and *mishloach manos* which is prohibited.

5) And so holds the Beiur Hagr"a (Yoreh Deah 161), that even a present after repaying the debt is assur because it is a belated ribis.

On the agenda - shaalos that recently reached the Heichal Hora'ah

A shaalah that was brought before us: If a person damages an antique item, how does one assess the damage? [we have not yet reached a final decision in this matter]:

The Nesivos (207:8) rules, if a person kills an animal that is a *treifab*, he only needs to pay the cost of a *treifab* animal, because a person need only pay the actual worth of the item damaged, and not how much he could have gained by cheating the buyer. The Nesivos proves this ruling from one who damages counterfeit money. Even though he could have cheated non-Jews by using the money on the assumption that it is real money, he certainly needs to only pay its real worth.

According to the Nesivos' view, we can say the same regarding antiques that don't have a fixed value: Its price is not the item's true value, because in this field the price merely depends on how important it is to the buyer. If so, if a person damages an antique item, he wouldn't have to pay how much the auctioneer is able to sell it, but its true value.

Although our case is not exactly the same as the Nesivos' example; he discusses an item that is worthless, or practically worthless, and is only worth money if one cheats the buyer, while in our case the higher amount is legally received. But we can derive from his ruling that damage is assessed according to its true market price, and not what one could have gained by auctioning it off.

However, the Daas Kedoshim writes that if a person killed a *tereifab* he must pay the full price of the animal. He proves this from the *din* of one who removes stones from a pile of wheat, that he pays for the loss involved, since the owner would have sold the whole pile with the stones and would have received payment for the stones as well. The stones are not the correct price of the pile of wheat, and nevertheless one who removes the stones must pay as if they were wheat. From this we see that one who damages must pay the full amount lost to the owner and how much he was able to sell it, and not what it is actually worth.

It appears that the Daas Kedoshim disagrees with the Nesivos, but the Erech Shai explains that there is actually no disagreement: The Nesivos is discussing a case where it would be a *mekach ta'us* if the buyer finds out that the animal is a *tereifa*, and therefore one pays the real price, while the Daas Kedoshim is relating a case where it is not accepted as a claim for a *mekach ta'us*, and therefore one pays how much it could be sold for.

If so, in our case the damager should pay the amount the auctioneer could have received for the antique.

But this requires further study.

[This question could be applied to one who damages an item in a shop. Does he pay the price the shop is selling the item, or how much it costs the shop to buy it?

The Nesivos (148:1) writes that a person who damages an item only pays the actual worth, and not how much it is worth to the owner. If so, the same would apply in our case, the damager need only pay how much it costs the shop, and not the price asked for selling it.

However, we could differentiate between the two cases, arguing that the shop's price is the true worth of the item, and this cannot be compared to an item that a person **is able** to sell, because in a shop the item is actually for sale! If so, it seems reasonable that one should pay the price the shop charges for it.

The Acharonim cite the Chasam Sofer Choshen Mishpat 97, who implies that one pays according to the price sold in the shop, and the Erech Shai infers from the wording of the Pischei Teshuvah Yoreh Deah 120:9, if a shop buys bulk at a lower price and sells each item singly at a higher price, the damager must pay the higher price since that is the true market price.]

Sha'alah: Shimon gave money to his father-in-law to buy bitcoin, but the father-in-law kept the money and didn't buy the bitcoin. In the last few weeks the value of the bitcoin has doubled from what it was worth, and now that the father-inlaw didn't buy the bitcoin, Shimon wants to oblige his father-in-law to pay the losses for not investing the money to buy the bitcoin.

Teshmah: The Choshen Mishpat (183) rules, if a person gives money to an emissary to buy a certain commodity but the emissary didn't do as asked, the person who gave him the money has nothing but grudges against him, and has no financial claim.

However, this ruling isn't clear-cut, since there are circumstances where the emissary is obliged to reimburse the person who gave him the money:

If he received money to buy merchandise for cheap in the market, and by not buying the merchandise the person who gave him the money lost the profit that all the other dealers gained, the emissary is obliged to pay as much as the other deals profited. So rules the Nesivos Hamishpat 183:1 and 176:31.

Similarly, the Chasam Sofer writes (178), if an emissary promised to buy merchandise for him but failed to do so, and if he hadn't sent the emissary he would have bought the merchandise himself or via others and would have made a definite profit, the emissary must reimburse him for not buying the merchandise as promised. But the Nachalas Zvi (292:7) disagrees.

However, our case of the bitcoin cannot be compared to the cases of the Nesivos and Chasam Sofer, because unlike merchandise, the bitcoin is not definite profit, since its value could have dropped [see Chazon Ish (Bava Kama 22:2,3) who writes that definite profit is only applicable regarding rental or a field].

We could compare our case to the following situation: If somebody gave merchandise to an emissary when the prices are high and instructed him to sell the merchandise, but the emissary didn't do as told, the poskim disagree if the emissary must repay the lost profit. Panim Me'iros rules (I 82) this is a din of garmi (indirect damage that one is liable for). But the Eretz Zvi (Te'umim, Choshen Mishpat 22) and Shoel Umeshiv (I 18) ask, why is this any different than that of the Shulchan Aruch (cited above), where a person gave money to an emissary to buy, and there the ruling is that he has nothing but grudges against him, with no financial claim? The poskim answer, when he gave the emissary money, he doesn't yet have merchandise in his hand, and he has to buy it. Therefore, it is considered mere prevention of gaining money for which one doesn't pay. But if he gave the emissary merchandise to sell, the profited money is already in potential inside the merchandise, and he is therefore liable to pay.

We can therefore conclude, that money is considered *gerama* which is *patur* from payment, while merchandise is considered *garmi* which is liable for payment.

[But there are poskim who make a different distinction between the two cases: In the case of the merchandise where the emissary is obliged to pay, it is not because of the damage he caused but because he is considered a *shomer*.]

