

The Borrowed Tallis

*Speak to the Children of Israel, and they shall make for themselves tzitzis
(Bamidbar 15:38)*

One of the required conditions for the *mitzvah* of *tzitzis* to apply is that the *tallis* (on which the *tzitzis* are hung) should belong to its wearer. This condition results in an important question concerning a borrowed *tallis*.

When a person borrows a *tallis* from his fellow, we assume that the *tallis* is given in a manner granting the borrower actual ownership of the *tallis* (see *Mishnah Berurah* 14:11). This is necessary in order that the borrower should be able to fulfill the *mitzvah* of *tzitzis*.

The question, however, is whether or not a person may use somebody else's *tallis* without his permission. This is especially pertinent for unmarried *Kohanim*, who sometimes find themselves in need of a *tallis* for giving *birkas ha-Kohanim*—but can be of relevance for anybody who forgets/does not have his *tallis* for *davening*. Can one simply take any *tallis* he finds for personal use, and does this grant the borrower "ownership" of the *tallis*?

Using or Acquiring?

The following statement is made by *Shulchan Aruch* (*Orach Chaim* 12:4): "It is permitted to take [and wear] somebody else's *tallis* and to make a *berachah* over it." Even when no explicit permission was given for its use, a person is able to take another's *tallis*—and even to make a *berachah* over it.

Magen Avraham (14:8) points out a seeming difficulty with this ruling. In order for a person to make a *berachah* over a *tallis*, the *tallis* must belong to him. Although we may rule that a person consents to another's use of his property for the sake of a *mitzvah* (*Bava Metzia* 29b), this falls short of consent for another to make a full *kinyan*—a halachic transfer of the item into his ownership. How then does the *tallis* become the property of the person who takes it [without permission], so that he can make a *berachah* over it?

Because of this question, *Magen Avraham* comes to a far-reaching conclusion. In spite of the fact that the borrower does not become the owner of the *tallis* he borrows, he can nevertheless recite a *berachah* upon wearing it. The reason for this is that although a borrowed *tallis* is exempt from the *mitzvah* of *tzitzis*, the *mitzvah* of *tzitzis* nonetheless applies to it—though not on an obligatory level (see also *Mishnah Berurah* 14:9).

Two *chiddushim* are incorporated in *Magen Avraham's* conclusion: 1. Even though a borrowed *tallis* is exempt from *tzitzis*, a *mitzvah* is fulfilled by tying *tzitzis* strings to it (one would otherwise think that because the item is exempt from *tzitzis*, no *mitzvah* applies—just like no *mitzvah* is fulfilled by affixing a *mezuzah* to a doorpost of an exempted room); 2. Even though there is no obligation to do the *mitzvah*, one is able

to make a *berachah* over its performance (according to *Shulchan Aruch* (*Orach Chaim* 17:2), for instance, women **may not** recite a blessing over the performance of *mitzvos* from which they are exempt).

In fact, the author of *Nesivos Hamishpat* (*Derech Chaim* 14) disputes the *chiddush* of *Magen Avraham*, and writes that one should not make a *berachah* on a *tallis* borrowed without permission—dissenting with *Shulchan Aruch* who rules that a *berachah* may be recited.

The Case of the Wedding Ring

Yet, in contrast with the above opinion of *Magen Avraham*, *Nesivos Hamishpat* (195:1) implies that assumed consent is not only able to permit the use of another's property, but is sufficient even for the *full acquisition of the property*. This emerges from the *Nesivos'* understanding of *Shach* (*Choshen Mishpat* 358:1), which he quotes as stating that a person can acquire another's property based on assumed consent (*Shach* itself is not conclusive on this question).

This opinion, which actually contradicts the above ruling of *Derech Chaim*, is supported by a ruling of Rambam (*Ishus* 5:8). Concerning items that a person is not particular (*makpid*) about, Rambam states that if a person takes another's item and gives it to a woman for *kiddushin* (betrothal), the woman is *safek mekudeshes*: it is possible that the betrothal is valid (see *Avnei Miluim* 28:49, and *Noda Biyehuda, Kama, Even Ha'ezer* 59).

We thus see that assumed consent can be sufficient to give somebody full acquisition of an item, an essential condition for the betrothal to be valid. Accordingly, the ruling of the *Shulchan Aruch* concerning a borrowed *tallis* can be understood simply. Because a person wishes to do a *mitzvah* with his possessions, we can assume his desire not only to allow the item's use, but even to give his fellow full ownership of the *tallis*.

Another's Esrog

Yet, the assumption made by *Magen Avraham*, namely that assumed consent for the use of property is insufficient for making a full acquisition, also seems well-grounded. We find that although one may use another's *esrog* for the sake of performing the *mitzvah*, this leniency does not apply to the first day of *Sukkos*, on which the *mitzvah* demands actual ownership of the *esrog* (*Shulchan Aruch* 649:5).

The reasoning behind this distinction echoes the statement made by *Magen Avraham*. Although a person can assume his fellow's consent for the use of the *esrog*, this consent falls short of agreement for the enactment of a *kinyan*. I may use my fellow's *esrog*, but I may not bring it into my ownership—thus I can use another's *esrog* on the last days of *Sukkos*, but not on the first.

We are therefore presented with a contradiction. On the one hand, assumed consent is not sufficient to grant ownership of an *esrog*. On the other, it is sufficient to grant ownership of a wedding ring (at least on the level of a *safek*)—and perhaps even of a *tallis*. How can the two be resolved?

Different Types of Items

We might suggest that the solution to this issue is the type of item involved. Rambam, it can be argued, refers not to golden rings, but rather to items that a person does not mind if others take to be theirs, such as leftover fruit strewn on a field. Although the items have monetary value, and although they are not actually *hefker* (ownerless), the owner's general permission for others to take the items is a mental state that enables a full *kinyan* to take place.

We find a similar concept of a general state of mind fulfilling the necessary *daas* (mental intention) for a full *kinyan* in the power of a person's courtyard (*chatzer*, referring to his general domain) to make a transfer of property. Explaining the unique property of *kinyan chatzer*, whereby a person is able to acquire an item even without his prior knowledge of it, *Shita Mekubetzes* (*Bava Metzia* 10b, citing from *Rash di Vidash*) writes that the general state of mind, whereby a person expects his domain to make acquisitions on his behalf, is sufficient.

Based on this idea, it is possible to distinguish between the case of the *esrog* and the *halachah* of Rambam. Whereas in Rambam's case of *kiddushin* the owner of the item in question has a general state of mind allowing others to acquire his property, no such state of mind exists with regard to an *esrog*. Although a person is content that another should perform a *mitzvah* with his property, he is not prepared that another should transfer the *esrog* into his ownership.

The Shul Tallis

This might also allow us a possible explanation for the question of the borrowed *tallis*. It is possible that the *Shulchan Aruch* does refer specifically to a *tallis* that is always in *shul*, and which a person is content that others should make use of. Because in days of old it was common for people not to have a *tallis*, we may assume a general state of mind whereby the owner is content that people should not only use his *tallis*, but even acquire it for themselves (on condition they replace it when they finish).

In the case of the *esrog*, however, where the act of borrowing is a one-time event and there is no general state of mind, the *esrog* cannot transfer ownership.

In light of this, there is room to doubt whether or not the *halachah* of a borrowed *tallis*, and certainly the corresponding *halachah* of borrowed *tefillin*, applies today. In our day and age, there is virtually no *shul* attendee who arrives without his personal *tallis* and *tefillin*; if they do, the event is a one-time occurrence, and not a regular state of affairs. In addition, most people today do not keep their *tallis* in *shul*.

As a result, it is hard to point out a general state of mind that permits others to take *tallis* and *tefillin* for personal use. Although as a one-time deed every owner consents for his *tallis* to be used in performing a *mitzvah*, this would be insufficient to give the borrower actual ownership of the *tallis*, and it would therefore be wrong to recite a *berachah* over it.

Borrowing Books

While on the subject, it is also worth noting that many of the assumptions found in Chazal and *poskim* concerning a person's mental intentions require reanalysis in light of social changes. Whereas in olden times it was permitted to use another's *tefillin* but prohibited to read another's book (for fear that it should tear; see *Mishnah Berurah* 14:16), today the contrary would seem closer to a person's intentions: unlike in the past, today *people are more ready to lend out books than they are tefillin*.

Thus, while *Mishnah Berurah* (14:16) writes that he cannot see any reason for its being permitted, the general custom today is to use others' books (at least in yeshiva or in *shul*) unless the owner specifies a prohibition on their use. Today's books are relatively cheap, relatively well-bound, and usually easily replaceable, setting them aside from books of yore. With changing circumstances our mental intentions alter, and the *halachah*—in this case—is also liable to change.

Of course, this article only means to offer halachic insights, but is not intended as actual halachic rulings.