

OH 153:2.2005a
On the Sale of Holy Property

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שאלה—May a synagogue sell ritual property, including sifrei Torah, and if the sale is permitted, are there any restrictions?

תשובה—The question of the sale of ritual property is driven by the following statement of law from Mishnah Megillah 3:1:

בני העיר שמכרו רחובה של עיר, לוקחין בדמיו בית הכנסת. בית
הכנסת—לוקחין תיבה. תיבה—לוקחין מטפחות. מטפחות—לוקחין
ספרים. ספרים—לוקחין תורה. אבל אם מכרו תורה, לא יקחו ספרים.
ספרים—לא יקחרו מטפחות. מטפחות—לא יקחו תיבה. תיבה—לא
יקחו בית הכנסת. בית הכנסת—לא יקחו את הרחוב. וכן במותריהן.

The trustees of the community who sell a courtyard (used for sacred gatherings) can only buy with those funds a synagogue. If they sell a synagogue, they must buy an ark. If they sell an ark they must buy the dressings for the Torah. If they sell the dressings for the Torah, they must buy sacred books. If they sell sacred books they must buy a sefer Torah. And conversely, if they sell a Torah, they may not buy sacred books. If they sell sacred books they may not buy dressings for the Torah. If they sell the dressings for the Torah they may not buy an ark. If they sell an ark they may not buy a synagogue. If they sell a synagogue they may not buy a courtyard. And so also with the excess.

The Mishnah is concerned with the following principles:

1. Holiness accrues to certain items used for worship and study.
2. If the holy item is sold, the holiness transfers into the funds for which it was sold.
3. The holiness remains in all of the funds, including excess following a future purchase.
4. Holiness is not uniform, but is distinguished by degrees.
5. We raise the level of holiness and do not lower the level of holiness.

The first principle stipulates that holiness can inhabit a thing. We understand that there are certain documents and books that are holy because they are canonized or otherwise recognized as sacred texts, and retain that holiness from the time they are written onward. Thus, a sefer Torah or sacred book acquires holiness when written (or

printed), and never loses that holiness. But there are other things that holiness inhabits only because of the context of its use rather than its physical make-up. A synagogue is a building used for worship. But if there is no worship in the building, and no sacred items, the building is just a building. A 1997 letter of Rabbi Kassel Abelson as Chairman of the Law Committee confirms an earlier position from 1959, stating: “In regard to the sale of a synagogue to a church, when the sacred symbols have been removed from a synagogue building no longer in use, and when the congregation has already moved to its new quarters, the congregation is justified in selling the old building. It need not be sold indirectly, and it may be sold to a church.”¹ That is, holiness can depart something like a building. The presence of holiness is dependent on its context.

The second principle stipulates that while holiness can depart from something if that thing is sold, like a synagogue building, the holiness does not cease to exist. Rather, it transfers itself into the funds into which the asset of the synagogue was “converted.” The transference of the essence of a thing into its monetary equivalent is a concept that is found throughout Jewish law. Poor taxes and tithes can be transferred from actual produce into their monetary equivalences. Pledges to the Temple (hekdesch) can be transferred into monetary equivalences. The Torah even provides for pledging one’s monetary value in lieu of oneself for Temple service.² Baruch A. Levine, in his commentary to Leviticus, explains that the law of valuations in the Torah is probably a development from the earlier practice of actually pledging one’s person for Temple service.³ This valuation in funds is symbolized in our ceremony of the Pidyon HaBen, where the service of the first-born is transferred into coins given to a kohen. The principle is that holiness (like purity and impurity) is fluid, to an extent. It can be transferred from the thing itself to its monetary value.

The third principle is the principle of excess (מותר). Even if the funds are transferred into a new holy item, but there is an excess amount that remains in monetary funds, those remaining monetary funds retain the original holiness.

The fourth principle stipulates that there are degrees of holiness, and the gradation of holiness in holy items is explicitly legislated by the Mishnah. The holiness of a sefer Torah is of the highest or first degree. Sacred books are second degree. Torah dressings are third degree. The ark is fourth degree. The synagogue building is fifth degree. And an open space used for holy gatherings is sixth degree.

The Mishnah teaches that while holy items may be sold, their holiness transfers into their monetary equivalence in funds, and those funds retain the same degree of holiness, and can only be used to purchase items of a greater degree. This is the fifth, implicit principle, that מעלין בקודש ואין מורידין בקודש, that we raise the level of holiness and do not lower the level of holiness.

¹ CJLS Archives, Letter of Kassel Abelson dated May 29, 1997.

² See Leviticus 27, and tractate Arakhin.

³ See Baruch A. Levine, *The JPS Torah Commentary: Leviticus* (Philadelphia: Jewish Publication Society, 1989), p. 193.

These are the principles that govern the sale of holy property, both real and movable. All agree that one may use the funds from a lesser degree to purchase items of any greater degree. That is, if one sells an ark (fourth degree) one is not restricted to purchasing Torah dressings (third degree) as the Mishnah states. One could also use the funds to purchase sacred books (second degree) or a sefer Torah (first degree). All are also agreed that what one may not do is use the funds to purchase something of a lesser degree, like a synagogue building (fifth degree), an open space used for holy gatherings (sixth degree) or an item with no holiness.

Equivalent Transference

There is some disagreement over the question of equivalent transference. That is, if one sold an ark, can one use the funds to buy another ark? All agree that we may not descend in holiness. But must we ascend? Could we not stay level? This question was debated by the Rishonim. Some argued that if there were need, then an equivalent transference would be permitted. The ambivalence over equivalent transference was never resolved. The Shulhan Arukh, after citing our Mishnah, states (OH 153:4):

אם מותר לקנות בדמי קדושה אחת קדושה אחרת כיוצא בה—יש אוסרים
ויש מתירים.

May one buy with the funds from one holy item another holy item of
the same degree?—Some forbid and some permit.

Even those who permit the use of the funds from the sale of one item of holiness for the purchase of another item of equivalent holiness question whether such would apply to the sale of a sefer Torah, which according to some opinions, can never be sold.⁴ But while there is disagreement, most of the commentators acknowledge that there is both theoretical justification and practical precedent for selling equivalent items of holiness for other equivalent items, such as sacred books for sacred books.

I propose that one should even be able to sell a sefer Torah for another sefer Torah. I do not see how else to understand the Mishnah, which states *אם מכרו תורה לא יקחו ספרים*, that if I sold a Torah I cannot buy with those funds sacred books. But if I also cannot buy another sefer Torah with those funds, and a sefer Torah is already the highest degree of holiness, then what *can* I do with the funds? The Mishnah seems to allow the sale, but restrict the usage of the profits. But it cannot completely restrict the usage, since such would no longer be a restriction, but rather a prohibition, in which case the Mishnah would have had to say *אסור למכור תורה*, “do not sell a Torah,” rather than *אם מכרו תורה*, “if they sell a Torah.”

However, the above argument is mostly academic. It is rare that a congregation would seek to sell a Torah for another Torah. If one congregation had a large Torah and wanted a small Torah, and another had a small and wanted a large, they are best to make

⁴ See Shulkhan Arukh, YD 370:1. And see the Be'er Heteiv to OH 153:4 for an expression of the reticence.

an exchange as a mutual gift without any actual sale or transference of funds, and thereby ignore the restrictions of the law. The more common case is that of a congregation that wishes to divest itself of a sefer Torah and use the funds for other purposes, that is, to transfer the value of the asset of the sefer Torah into something else. But here there is a problem, since the law clearly restricts the value of the sold holy item to be used for the purchase of matters of a lesser degree of holiness. Some congregations approach this problem by not technically “selling” a sefer Torah but rather giving the Torah to another congregation and then accepting a donation. The acceptability of this legal fiction is highly questionable. A better solution is to be found in the Shulhan Arukh itself, OH 153:3:

ספר תורה שנמצא בו טעות דינו כחומשים.

A sefer Torah that has an error follows the law of *humashim*.

That is, if a sefer Torah has within it an error that affects it as unsuitable for ritual use, then it is demoted to the level of sacred book, that is, from first to second degree. Now, it is usually a case that a congregation with a number of sifrei Torah will in fact have a number of pasul (ritually unfit) sifrei Torah if closely examined by a sofer (ritual scribe). Since the pasul sefer Torah cannot be read from liturgically, it is essentially a sacred book like other sacred books, and hence carries a second degree holiness. Following those who hold that one can use funds from one degree of holiness for other items within the same degree, one can then sell a pasul sefer Torah and purchase with those funds sacred books. One can also use the funds for the improvement of the sifrei Torah, that is, for the expense of the sofer to repair other sifrei Torah.

A practical application arises here. If one is selling a sefer Torah as pasul, then one must make the buyer aware that it is pasul. Often, the buyer will request the repairs be made prior to the physical acquisition of the Torah so that the Torah will be ritually fit for the new congregation. This is a normal thing for the buyer to request, in the same way that one might request that the seller make certain repairs to a house before the closing of the purchase. However, in this case ownership of the sefer Torah and exchange of funds must take place prior to any repairs. The cost of the repairs can be deducted from the sale price and the seller can even arrange that the repairs be made, but the Torah must already belong to the new congregation at that point.

Other questions arise regarding the definition of holy books. Some authorities restrict the definition to Bibles (see OH 153:2). I would argue for a more expansive definition, to include siddurim, and any other sefarim that one could not dispose of but require burial.⁵

The application of this tshuvah to the sale of a synagogue building is that while the building may be sold, the monies are “sacred” and should only be used for the

⁵ For a discussion of the halakhot on the disposal of holy books and papers, see the CJLS responsum by Avram Israel Reisner, “On the Exodus of Shemot.” I did not see Rabbi Reisner’s teshuvah when this paper was written.

construction or improvement of another synagogue building, or for other items of a greater degree of holiness. Nevertheless, the issue becomes more complex, as discussed below.

If a Torah or synagogue or other holy item is sold and the money is not immediately used for a permitted purpose, then the funds are “sacred” as is clearly implied by the Mishnah and the application of the principle of excess. The funds should be set aside in a special dedicated account. However, only the principal would be restricted, not the interest, as will be argued in the following section.

The Exception of “Shiva Tovei Ha’Ir”

An extraordinary exception to the law of selling holy property as specified by the Mishnah is cited in the gemara in the name of Rava, Megillah 26a-b:

אמר רבא—לא שנו אלא שלא מכרו שבעה טובי העיר במעמד אנשי
העיר אבל מכרו שבעה טובי העיר במעמד אנשי העיר אפילו למיشتא
ביה שיכרא שפיר דמי.

Rava said: This [the law of the Mishnah] applies only when the sale was not made by the *Shiva Tovei Ha’Ir* authorized by the people of the town, but if the sale was made by the *Shiva Tovei Ha’Ir* authorized by the people of the town, then even [if they used the proceeds] to buy liquor, that too is acceptable.

The Shulkhan Arukh (OH 153:7) records this exception to the rule, after citing the law from the Mishnah, with one emendation. The last phrase of Rava’s statement, permitting the שבעה טובי העיר to even purchase liquor with the proceeds is changed to: רשאים להוציא, “they are permitted to use the proceeds for whatever they wish.” Karo tempers the pungency of Rava’s words, while preserving the same legal conclusion.

Two questions arise: who are the שבעה טובי העיר and what is the force of this exception? Neither question is easily answered. The definition of שבעה טובי העיר is elusive. The phrase literally means “The Seven Good Ones of the Town” and can accurately be translated as “The Seven Trustees of the Town.” Most commentators hold that the phrase means trustees rather than sages, and that the exact number is not essential, so that there need not be precisely seven. However, the range of definitions offered by the Rishonim is quite broad.⁶ Given the ambiguity, it appears that the halakhah understands שבעה טובי העיר as referring to the leadership of a synagogue or community that has the authority to sell the synagogue or its sacred property. The problem that arises is the context of this exception. When could a synagogue be sold *not* by its trustees? The law from the Shulkhan Arukh, as quoted from the gemara, continues, that the שבעה טובי העיר must do this במעמד אנשי העיר, with the permission of the people of the town, or, in our case, the membership of the synagogue. When would that not be the case? That is, how could a synagogue, or its ritual property, be sold in a way that was not

⁶ See the list of definitions in the *Talmudic Encyclopedia* vol. 19, p. 72 (s.v. טובי העיר), and nn. 2-17.

handled by those authorized to handle the sale, and not with the permission of its members? If the exception would normally apply, when would the original law still be applicable?

The general law from the Mishnah, that the proceeds from the sale of holy property retain the sacredness of the original item and can only be used to purchase things of a greater level of holiness, or, as argued above, of a similar gradation (equivalent transference), seems to come undone by the exception of the *שבועה טובי העיר*. The codes retain both, the law of the Mishnah and then the exception from the gemara. If the exception is meant to apply in all cases, if it does indeed undo the law of the Mishnah, then why do the codes retain the language of the Mishnah, and then only later add the exception from the gemara? Is this an example of retaining the structure of the tradition while violating it in practical application?

The origin of Rava's statement in the gemara seems to derive from a statement of Rabbi Yehudah in the Tosefta. After citing the law that one cannot sell a synagogue and use the proceeds to purchase a courtyard, the Tosefta continues, Megillah 2:12:

אמר ר' יהודה—במה דברים אמורים? בזמן שלא התנו עמהן פרנסי אותה העיר, אבל אם התנו עמהן פרנסי אותה העיר, משנין אותה לכל דבר שירצו.

Rabbi Yehudah said: To what does this apply? When they were not given permission from the trustees of the town, but when given permission from the trustees of the town, they may do with the proceeds whatever they desire.

The fact that the Tosefta uses the phrase *פרנסי העיר* to refer to the trustees of the community makes it clear that *שבועה טובי העיר* in the Gemara must mean the same thing. One also notes that the allowance to do what they please with the proceeds, *משנין אותה לכל דבר שירצו*, is the origin of the version that appears in the Shulkhan Arukh, *רשאים להוציא*, *המעות לכל מה שירצו*, that they may do with the proceeds what they wish. But most interesting about the Tosefta is the fact that it establishes the Tannaitic origin of Rava's statement. Did the Mishnah omit this position because it disagreed with it? While this is not the place to construct a theory of the history of tradition of this text, one must recognize that the position of Rabbi Yehudah in the Tosefta is assumed by Rava in the Gemara and becomes normative halakhah along with the law of the Mishnah.

Professor Saul Lieberman argues that the statement of Rabbi Yehudah in the Tosefta should be understood as a qualification to the final phrase of the Mishnah, *וכן במותריהן*, and so also with the excess. As explained above, the Mishnah's principle of excess is that even if the funds are transferred into a new holy item, but there is an excess amount that remains in monetary funds, those remaining monetary funds retain the original holiness. Rabbi Yehudah's qualification is that the excess can be excluded from the strictures of the Mishnah if the trustees of the community asserted at the time of sale

that the excess funds could be used for whatever purpose is necessary.⁷ That is, the trustees have the authority to divest the excess of holiness, and if they so stated at the time of sale, then the excess becomes regular money. Therefore, if, for example, a synagogue building is sold for \$1,000,000 and a new synagogue building is purchased for \$875,000, the remaining \$125,000 are available for unrestricted use if so stipulated by the trustees at the time that the \$1,000,000 was received from the original sale.

Professor Lieberman cites Maimonides and the Tosafot Rid as reading the law in this way, that the qualification is to the restriction on the excess. As Maimonides writes in the Mishneh Torah, Hilkhot Tefillah 11:18:

וכן אם התנו שבעה טובי העיר במעמד אנשי העיר על מותר הדמים שיהיו
חולין הרי הן חולין. וכשלוקחין הדמים ובונים מהן בית הכנסת אחר או
שיקנו מהם תיבה או מתפחות ותיק או חומשין או ספר תורה השאר יהא
חולין כמו שהתנו ויעשו בהן מה שירצו

And so, if the Seven Trustees of the Town with permission of the people of the town stipulated regarding the excess of the proceeds that they become devoid of holiness, then they are devoid of holiness. And so, when they acquire funds [from the sale of a synagogue] and purchase with them another synagogue, or they purchase with them an ark or antique Torah dressings or humashim or a sefer Torah, the excess is devoid of holiness as [the trustees] stipulated, and they may do [with the excess funds] what they wish.

Maimonides explains, following the position of Rabbi Yehudah in the Tosefta and of Rava in the Gemara, that the trustees may stipulate that the excess be divested of holiness once the proceeds from the sale of the holy item are transferred into a new holy item. However, most of the Rishonim, as Professor Lieberman concedes, disagree with Maimonides and the Rid, and understand the exception of the *שבעה טובי העיר* as referring to the entire proceeds of the sale of holy property, and not just to the excess following the new purchase.

Professor Lieberman's interpretation is far more logical than that of the majority of the Rishonim. According to the Rishonim, the halakhah must be that when the trustees of a community sell holy property, the proceeds are restricted in holiness except when the trustees decide that they are not so restricted. Maimonides' restriction of the exception to the excess is logical, and, according to Professor Lieberman, a more accurate interpretation of the ancient texts. Nevertheless, law does not always evolve along the most logical of paths. There is clearly ample precedent for applying a broad exception to the Mishnah's restriction on the use of funds from the sale of holy property. The question remains, if the intention of the halakhah was to evade the Mishnah's restrictions, why was the language preserved in the codes, while the exception of the *שבעה טובי העיר* appears only as a qualification?

⁷ See Saul Lieberman, *Tosefta Moed*, p. 351, and *Tosefta Ki-fshutah to Megillah*, pp. 1152-1153.

I propose that the intent of the codifiers was to preserve the law of the Mishnah, but also to provide the extraordinary exception of the *שבעה טובי העיר* if its application should become necessary. The better path is to retain the holiness of the proceeds by transferring them into new holy items, as the Mishnah provides, and invoke the leniency of the *שבעה טובי העיר* as interpreted by Maimonides to unrestrict the excess after the new purchase. The alleviation of the restriction on the excess is most logical since otherwise the monies would have to remain in a special restricted account until a new holy item could be purchased. However, if there is extraordinary need, a real *שעת דחק*, then the trustees of the community could invoke their precedented authority and divest all the funds of their holiness.

Since Maimonides represents the more stringent position, one can reason that since even Maimonides permits the excess of the principal to be divested of holiness, then we can be lenient and permit interest earned off the principal as unrestricted funds. That is, if, even according to the stringent position, a portion of the principal can be unrestricted, then there should really be no concern regarding the interest earned off the principal. I note as well that by “interest” I mean any kind of increase in value. Therefore, if holy property is sold and new holy property is not immediately purchased, so that the funds from the sale are placed into a dedicated account, the interest earned by those funds is not restricted, and may be removed from the dedicated account.

The exception of the *שבעה טובי העיר* would apply not only to the sale of a synagogue, but to the sale of any holy item from the list delineated in the Mishnah, just as the rule of the excess, *וכן במותריהן*, clearly applies to everything from the list.

Other Leniencies

Are there any acceptable uses of restricted funds from the sale of holy property beyond those specified by the Mishnah? That is, may one use the proceeds from the sale of a synagogue for items that might be considered equivalent to a synagogue building, like synagogue programming, a rabbi’s salary, or a cemetery? I propose that we apply the same approach here as was suggested regarding the exception of the *שבעה טובי העיר*. Ideally, the proceeds from the sale of a synagogue building should be used only for another synagogue building, or for items higher up the scale of holy property as provided by the Mishnah. However, if there is an extraordinary need, in emergency circumstances, then the trustees can alter the nature of the holiness of the funds from the sale of holy property, and they can be stipulated for other uses. That is, just as the trustees can stipulate that the restriction on the funds be alleviated through divestment of holiness and used for anything, they can, all the more so, stipulate that the restriction on the funds be loosened to apply to other holy uses.

What are “emergency circumstances”? Does that category include the financial circumstances of the synagogue? What about shelters and care for the homeless or the sick? What about support for the State of Israel? The category “emergency” is best kept non-specific, as it usually is in Jewish law, in order to give maximum discretion to the individual rabbi and congregation to determine the best course of action. It is never

difficult to spend money. The key here is for the rabbi and congregation to determine what to do with the funds taking into account the needs of the congregation and the halakhah. This responsum is meant only to clarify the various halakhic issues.

While the Mishnah's list of holy property is not exhaustive, everything listed there contains similar types of holiness, all deriving from its use in study and worship. While there are other things that have holiness, it is best not to confuse the issue unless one is to invoke emergency powers, as has been conceded above. But certainly a bet midrash (house of study) can be added to the list, since there is general agreement that the holiness of a bet midrash is similar to but exceeds the holiness of a synagogue. And, in fact, a bet midrash is a type of synagogue since it is used for prayer as well as study. Therefore, one may use the proceeds from the sale of a synagogue for the construction of a Jewish school. One can also consider a cemetery as Jewish holy ground, perhaps as an extension of the synagogue (especially if it is owned by the synagogue).

A leniency to the restrictions on funds from the sale of holy property should be applied to individuals or businesses that sell sacred books or other holy artifacts. It would be unreasonable to insist that Jewish booksellers, or sofrim (ritual scribes who prepare sifrei Torah) be restricted in the use of the profits that they make through their businesses. While holiness is partially determined by content, it is also partially determined by context. When a sacred book sits in a bookseller's stock it is a commodity rather than an aid to worship. However, it is still a sacred book, and so it must be treated by the bookseller with respect.

A final note is in order regarding the sale of synagogues. Unlike other holy property, synagogue sales are subject to complicated civil legislation that varies from state to state, both as real estate and under religious corporation law. This responsum is only intended to give some guidance regarding the halakhic issues involved. The actual sale of a synagogue and the use of the funds from the proceeds must be handled according to the local civil law which takes precedence as it always does in all financial matters, as is recognized by the principle of *דינא דמלכותא דינא*, that the law of the land is the law.

CONCLUSIONS

1. A pasul sefer Torah may be sold, and the funds are restricted for the repair of other sifrei Torah, or to purchase sacred books. Other sacred items may be sold and the funds are restricted for repair or purchase of items of the same or higher level of holiness or higher.
2. A kosher sefer Torah should not be sold, but it may be exchanged with another synagogue for another sefer Torah, with no exchange of funds. However, if it is sold, then the funds are restricted for the purchase of another kosher sefer Torah. Besides purchasing a kosher sefer Torah, the funds can also be used to hire a sofer to work on an already kosher sefer Torah that needs some repair work but is still

- kosher for ritual use as is, or to hire a sofer to write a new sefer Torah or to repair a pasul sefer Torah making it kosher.
3. Dedicated funds that are not immediately used for repurchase or repair must be kept separate. The interest or other increase earned off of the principal, however, is unrestricted.
 4. If stipulated by the trustees of the congregation, the excess funds from the purchase of new holy property from the funds from the sale of holy property are divested of holiness and become unrestricted.
 5. In the case of extraordinary need in emergency circumstances, the trustees of the congregation can divest all the funds from the sale of holy property of partial or total holiness, so that they become less restricted, or even completely unrestricted.
 6. These laws do not apply to individuals or businesses that sell sacred books or other holy artifacts
 7. This responsum addresses the question of the sale of holy property and use of the funds by the synagogue. Synagogues should, of course, consider donating unused sacred items or monies to other congregations in need.