

## BUYERS AND SELLERS BACKING OUT OF A SALE OF GOODS OR PROPERTY

The last edition of the Newsletter dealt with the *halachos* of what happens when a sale between a buyer and a seller is poised to go through and another party enters into the situation and attempts to purchase the item. The focus was primarily on the laws pertaining to the interloper. In this edition we are going to concentrate on when a buyer or seller can back out of a deal, even in the absence of a third party's involvement.

### The Halachic Background

Every legal (*halachic*) transfer of ownership from one party to another requires a formal mode of acquisition, or *kinyan*.<sup>1</sup> In the absence of this formal act of acquisition, an object remains the property of the original owner. Even if the owner states in front of valid witnesses that he wishes an item or piece of property to be transferred from his ownership to someone else's, no actual transfer takes place and the original owner's status does not change at all.<sup>2</sup>

There are a number of *halachically* valid forms of *kinyanim* that can be made, but most transactions that take place on a day-to-day basis usually involve only the following four modes of transaction:

- *Ma'os* – Money being paid for an item.
- *Hagba'ah* – Physically picking up the purchased item.
- *Meshichah* – Physically pulling on or drawing close the purchased item.
- *Chazakah* – Performing an act that symbolizes or denotes ownership of the property. Applicable only to real estate.

There are, however, *halachic* differences amongst these types of *kinyanim* that must be examined further.

### *Kinyan Ma'os* – How and When Paying for an Item Affects its Purchase; Anatomy of an Acquisition

In his *nevuah* of the redemption, Yirmiyahu HaNavi tells us that times will once again be good. We will once again be brought back to *Eretz Yisroel*, HaShem will once again shower us with good and we will purchase tracts of real

estate in the land that we now say is desolate.<sup>3</sup> In his description of the purchasing of this land, Yirmiyahu states, "*Sados bakesef yiknu...* The fields shall be bought with money..." The *Gemora* tells us that this is the source in the Torah for the ability of money to enact a transaction of land.<sup>4</sup> This *Gemora* is cited by the *Beis Yosef* and codified as law in the *Shulchan Aruch Choshen Mishpat* 190, 1. The giving of money (for this explicit purpose) from one person to another affects the actual change of ownership of land.

When it comes to movable articles (chattel), however, the situation gets somewhat more complicated. The *Gemora*<sup>5</sup> tells us that when it comes to *metaltilin* (movable possessions) "*D'var Torah, ma'os konos*, According to the Torah, (an exchange of) money affects an acquisition." The *Gemora* continues, however, to explain that *Dirabbonon*, this is not so. *Chazal* were concerned about the following

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scenario: Reuvain purchases 10 lbs. of grain from Shimon by paying Shimon money at Shimon's storefront. Before Reuvain has the opportunity to go to Shimon's storehouse and actually pick up his grain, he gets a call from Shimon. Shimon explains to him that a terrible fire broke out in his warehouse and

being that Shimon was too busy first saving his own produce, by the time he got around to trying to save Reuvain's, Reuvain's grain was reduced to a small pile of cinders. When Reuvain demands a different 10 lb. sack of grain to replace what was lost, Shimon explains to him that he is so sorry, but that legally, the grain was exclusively Reuvain's and that he is under no legal obligation whatsoever to replace the grain that was destroyed. Despite the fact that Reuvain never even laid eyes on his grain, he is nonetheless left with no legal recourse (unless the arsonist is found). *Chazal* therefore enacted a *takanah* that actually nullifies the *kinyan* that was made with the payment of the money and ruled that movable items can *only* be transferred from one owner to another with other, more "hands-on", forms of *kinyanim*.<sup>6</sup> These usually take the form of either

<sup>3</sup> *Yirmiyah* 32, 31-34

<sup>4</sup> *Kiddushin* 26a. See *Tos.* For why we do not learn this from Avraham Avinu's purchasing of *Maharat HaMachpeilah*.

<sup>5</sup> *Bava Metzia* 47b

<sup>6</sup> See *Tosafos* s.v. *nisrifu* for why the *kinyan ma'os* had to be nullified, rather than requiring *both* forms of *kinyan* (i.e. money + picking it up) to affect a transfer.

<sup>1</sup> *Gemora Bava Metzia* 49a; *Rambam Hilchos Mechirah* 1:1; *Choshen Mishpat Siman* 189, 1

<sup>2</sup> *Choshen Mishpat Siman* 189, 1

*meshichah* or *hagba'ah*.<sup>7</sup> This law and reasoning can all be found in *Choshen Mishpat siman* 198, 1-5.

### Backing Out of a Non-Sale Sale – Movable Items

There is no question that once a completely valid form of *kinyan* has been made, the article in question now has a new owner. Barring issues of a *mekach ta'os*, a sale invalidated due to the item having been damaged or in another way unfit, the new owner has complete proprietorship over the item and the original owner no longer retains any connection to what was once his. Should either one of the parties decide that “on second thought” they made a mistake and should not have gone through with the deal, a new *kinyan* must be made to return the item to its original owner. Even if they both agree that the sale should be annulled, it is not sufficient for them merely to say the sale is no longer valid. Ownership must be transferred back.

What happens, however, if the only form of *kinyan* made was the payment of monies, without any *meshichah* or *hagba'ah*? Based on what we have learned above, it would seem that either party could back out at any time prior to a *meshichah* or *hagba'ah* having been performed. Seeing as no actual transfer of ownership has taken place, all the buyer should have to do is ask for his money back and walk away. Likewise, the seller should be able to opt to withdraw from the not-yet-sale and return the money to the buyer.

Technically, this is in fact correct. The *Mishna*<sup>8</sup> tells us, “*Nasan lo ma'os vilo mashach heimenu, yachol lachzoro*, If one paid the money but did not (yet) draw the item near to him (i.e. he did not yet perform a *kinyan meshichah*), he may go back on the deal (and withdraw from making the purchase).” However, the *Mishna* proceeds to include a vital caveat, “*Aval amru, 'Mi shepara mei anshei dor hamabul umidor haflagah, Hu asid lihipara meimi she'eino omeid bidiburo,*” However, *Chazal* said, ‘He who exacted retribution from the generation of the Flood (in Noach’s time) and the generation of the Tower of Bavel, He will in the future exact retribution from he who does not stand by his word.” The *Shulchan Aruch* relates this law and an extended version of the text of the “*Mi Shepara*” curse, which is to be delivered in *Beis Din*.<sup>9</sup> We learn further that this law can apply equally to both the buyer and the seller – whichever one chooses to back out, and that even if only a portion of the money was paid, this law is in full effect.<sup>10</sup>

There is another possible problem with backing out of a sale, even when the only *kinyan* made was with money.

The *Shulchan Aruch*, in several instances, rules that if there is a prevalent practice among the merchants for business to be conducted in a certain way, the *halacha* recognizes such a practice as having legal, *halachic* validity. If the *minhag* of the merchants is followed, acquisitions may be binding *even if they were not done in a strictly halachically prescribed fashion*.<sup>11</sup> Some *Acharonim* rule that since, in our times, money is accepted as a fully binding mode of acquisition, one may not back out of a sale after the payment has been made.<sup>12</sup> The goods are to be considered fully acquired by the buyer, even before a *meshichah* was performed. In order to “annul” the sale, a new *kinyan* must be made to revert the item back to its original owner.

### Backing Out of a Deal – Real Estate

As mentioned earlier, land and real estate are *halachically* sold even if the only form of *kinyan* employed was the payment of money. Once the money is paid, the transfer is validated and neither party can back out without another *kinyan*. It therefore stands to reason that the entire issue discussed above of the “*Mi Shepara*” curse would not be applicable to property of this nature. This is, in fact, brought as the *halacha* in *siman* 204, 7. However, once again, there is another “legal” issue with backing out of a land sale – or any sale, for that matter – even before any form of *kinyan* is made at all. The *Shulchan Aruch*<sup>13</sup> tells us that someone who backs out of a deal that was poised to go through is considered “*Mechusar Emanah*”, a “non-credible person” and that this practice is not viewed favorably in the eyes of *Chazal*. There are those *Acharonim* that rule that this wording in the *Shulchan Aruch* also denotes that this practice is actually forbidden according to *halacha*.<sup>14</sup> There **may be** circumstances in which this prohibition does not apply (i.e. if the market value changes dramatically between the time the agreement to sell was made and the actual time of purchase,<sup>15</sup> or other extenuating circumstances). ***An inquiry must be made of a competent Rav or Posek for any questionable situation.***

**To reach Dayan Wolfson, on this or any *halachic* issue, please call the Kollel *Halacha Shailoh* Hotline at 973-614-0053 between 3:00-6:00 PM Sunday to Thursday. Call as well for back issues of the newsletter, for more information on the kollel or to sponsor a future edition. (The phone line *be”H* will once again be operational as of Wed. May 30<sup>th</sup> (*Isru Chag*). We apologize for any inconvenience experienced while the line was down.) The Kollel *davens Mincha* daily (Sunday-Thursday) at 4:15 PM.**

<sup>7</sup> A *kinyan sudor* (*Choshen Mishpat* 195, 1) and *kinyan agav karka* (202, 1) will also work, but these are less common forms of acquisition on a day-to-day basis.

<sup>8</sup> *Bava Metzia* 44a

<sup>9</sup> *Choshen Mishpat* 204, 1-4. Along with the generations of the Flood and *HaFlagah*, the curse includes as well “*Anshei Sodom vi Amorah umeiMitzrayim shetav'u bayam...*” The *SM”A* (s.k 8) explains why specifically these instances of Divine punishment are mentioned. He says that these events in particular broadcast HaShem’s dominion over the world and His attentiveness to the evil deeds of man.

<sup>10</sup> 204, 1

<sup>11</sup> See, for example 198, 1 and 204, 6.

<sup>12</sup> *Mishpat Shalom siman* 204. See also *Pischei Teshuva* 198, s.k. 3 *Pischei Choshen* vol. 7 chapter 2, note 31 for a discussion of this topic.

<sup>13</sup> 204, 7 and *ReMA* 204, 11.

<sup>14</sup> *Koveitz Iggeros Chazon Ish* Vol. 2, 44. See also *Pischei Choshen* vol. 7 chapter 1, note 2.

<sup>15</sup> *ReMA* 204, 11