

#### ISSUES RELATING TO BUYING, RENTING AND SELLING HOMES AND APARTMENTS

**W**ith the summer fast approaching, thriving communities such as ours enter full speed into the busiest real estate transaction season of the year. Every year tens and tens of families and young couples seek to move, buying or renting new homes and apartments for the coming year. And every year, for better or for worse, the demand is much greater than the supply available. This can make the already stressful endeavor of buying, selling or renting an even more complicated and difficult process. It is at times such as these that it is vital to remember that more important than good business or real estate acumen is our unwavering commitment to *Halacha*. All too often “common sense” and what is considered “ethical” in the business world is at odds with what the *Halacha* dictates, especially in the areas of *Choshen Mishpat* – monetary law. It would therefore be instructive to review some basic concepts of these laws, specifically as they apply to the buying, selling and renting of real estate. In this edition we will deal with the issues involved in trying to buy or rent a property that someone else has already expressed interest in.

**Please note: Due to the terse nature of articles of this sort, it is impossible to include all details, caveats or mitigating factors. This should merely serve as a springboard for further research or as an impetus to ask a *Halachic shailoh*.**

#### The *Halachic* Background

The *Gemora*<sup>1</sup> relates an incident in which Rav Gidel was interested in purchasing a piece of property. Before he returned to finalize the sale with the

<sup>1</sup> *Kiddushin* 59a

owner, another *Amora*, Rabi Abba, came and purchased the property. Upon inquiry into whether or not this was a proper course of action to have been taken, the *Gemora* tells us, “*Ani hamihapech bicharara uva acher vinatlah heimenu... nikra rasha.*” [Literally, “A poor person who (has gone and) is returning for a wafer, and another comes along and takes it... he (the interloper) is called a wicked person.”] In other words, the *Gemora* tells us in very general terms that if someone has “staked a claim” on something – be it a wafer or a piece of property – and another person intercedes and takes or buys it for himself, he is a *rasha* for doing so. This ruling is codified in the *Shulchan Aruch Choshen Mishpat* 237.

There is a discussion amongst the *Rishonim* as to the scope of this prohibition.<sup>2</sup> *Rashi* maintains that the prohibition applies to any form of acquisition – be it purchasing the item, accepting it as a gift or finding it as *hefker*. *Tosafos*, on the other hand, maintain that this issue only arises in business-like transactions (i.e. property purchases), but not when it comes to gifts or articles of *hefker*. [I.e. Reuvain found a lost money clip and, before picking it up, decided to get his briefcase to put the money into. If Shimon takes the money in the interim, *Tosafos* would rule that he is not in violation of this law whereas according to *Rashi* he would be called a *rasha* for doing so.]

In codifying this law in the *Shulchan Aruch*,<sup>3</sup> the *Rema*<sup>4</sup> clearly rules like the view of *Tosafos* limiting this prohibition to purchases and business transactions. The *Rema* takes this one step further by ruling that even a business transaction can, at times, have the status of an article of *hefker*,

<sup>2</sup> See *Rashi* and *Tosafos* *ibid.* s.v. *Ani*

<sup>3</sup> *Choshen Mishpat siman* 237, *se'ifim* 1-2

<sup>4</sup> As for the view of the *Shulchan Aruch*, there is some discussion as to what the *Mechaber* maintains. See *Aruch HaShulchan* 5 and *Nesivos Hamishpat* 2 for different approaches to this issue.

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thereby eliminating the prohibition. If the item is being sold for an unusually cheap price, the *Rema* suggests that it should be permissible to intercede. Similar to an item of *hefker*, this is something that is not usually available. This view, however, is rejected by the later *poskim* who maintain that once the transaction is in the realm of a “sale” or “business” and not a gift or an item of *hefker*, one may not apply the rules of *hefker* to it.<sup>5</sup>

**At What Point Must Someone Refrain from Another’s Potential Purchase?**

The question that arises is at what stage of the buying or renting process will these *Halachos* apply? It is clear that if one merely expresses interest in purchasing a certain item, that does not immediately preclude any other prospective buyer from approaching the owner to buy it. This would make it far too difficult to conduct business, and the result would most often mean a loss to the seller.<sup>6</sup> The *Rema* tells us that there is a specific point in the process at which the prohibition “kicks in.” That is when “*kvar pisku hadmim beineihem.*” Once the buyer and seller have settled on the purchase price, even *before* any formal agreements are signed or down payments are made. From that point and on all others who would be interested in this item must back off – any further attempts to intercede would now be prohibited. This issue is expounded upon by the later *poskim* as well and various parameters are set forth. Once the negotiations between the buyer and the seller are at a stage that the sale is poised to go through – even *before* a final price and terms are agreed upon – one who wishes to intercede must ask a serious *halachic shailoh*, as many *poskim* indicate that the prohibition will already be in effect.<sup>7</sup> It is clear, however, that if the negotiations are still underway and the seller clearly indicates to the buyer that the seller is still looking for other buyers (at a higher price or for better terms, etc.), there is no *issur* for

*...the Beis Din has the authority to prevent the seller and second buyer from going through with the sale...*

another prospective buyer to make an offer and purchase the property.<sup>8</sup>

**Consequences for Violation of This Law**

Most *poskim* are of the opinion that once the sale has been consummated with the second buyer (i.e. the interloper), *Beis Din* can not invalidate the sale and return the property to the original buyer. If, however, the *Beis Din* is aware that such a situation has arisen *before* the sale is finalized, they have

the authority to prevent the seller and the second buyer from going through with the sale.<sup>9</sup> As mentioned above, if the sale did go through, the buyer is called a *rasha*. What are the practical and *halachic* consequences of being called a “*rasha*”? The *poskim* say that we announce the fact that he committed this evil act in the

shuls,<sup>10</sup> he is rendered *pasul li eidus* (unfit for giving testimony)<sup>11</sup> and *teshuva* can only be afforded him if he returns the item. Rav Moshe Feinstein *zt”l* ruled that this is so *even if he was unaware of the first potential buyer at the time of his involvement.*<sup>12</sup>

**There are a great many details to this very important area of *Halacha* and an inquiry must be made from a competent Rav or Posek for any questionable situation.**

**To reach Dayan Wolfson, on this or any 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 more information on the kollel or to sponsor a future edition.**

**To obtain a taped shiur given by one of the kollel members that covers this topic in greater detail, contact Shiur Audio at 973-614-8366 for the tape entitled “*Issues of Encroachment.*”**

<sup>5</sup> *Shach* s.k. 3 and *Aruch HaShulchan* 1.

<sup>6</sup> *SM”A* 237, s.k. 7

<sup>7</sup> *Prisha* quoted in *Pischei Teshuva* 237, s.k. 3; *Aruch HaShulchan* 237, 1; *Iggeros Moshe Choshen Mishpat* 1, 60.

<sup>8</sup> *Pischei Choshen* vol.4 chapter 9 note 33 from *Teshuvos Mabit* vol. 1, *siman* 194. As for when the *seller* can back out of a deal and opt to sell to another buyer, a *shailoh* must always be asked. See *Pischei Choshen* *ibid.* note 32.

<sup>9</sup> *Mishpat Shalom* quoted by *Pischei Choshen* note 29.

<sup>10</sup> *SM”A* 237, s.k. 1

<sup>11</sup> *Mishpat Shalom*

<sup>12</sup> *Iggeros Moshe* 1, 60. Unlike *Aruch Hashulchan* 237, 2 who says if he did not know it is still *proper* to return it.