

BUSINESS WEEKLY



RESTORING THE PRIMACY OF CHOSHEN MISHPAT UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

Issue #632 | Vayeira | Friday, Nov 11, 2022 | 17 Cheshvon 5783

לע"נ הרב יחיאל מיכל בן ר' משה אהרן אורליאן



CASE FILE

Rabbi Meir Orlian
Writer for the Business Halacha Institute

לע"נ הרב אהרן בן הרב גדליהו ע"ה

STAY WITH US!

The Greens visited Israel yearly. Sometimes they rented an apartment but most often stayed with relatives.

During the last trip, they visited their friends, the Hausers. "We recently built an additional, separate unit," Mr. Hauser

said. "Next time you visit, you can stay with us."

Half a year later, Mr. Green called Mrs. Hauser. "We're planning to come at the end of November," he said. "If your unit is available, we're happy to stay with you."

"Yes, it's available then," said Mr. Hauser. "We'll be happy to host you in the unit."

At the end of their trip, Mr. Green thanked Mr. Hauser for the pleasant accommodations. "I'm glad you enjoyed the unit," said Mr. Hauser. "We charge \$700 for the week."

"I thought that you invited us to stay as guests, gratis," Mr. Green. "You never said anything about paying. We could have stayed with our relatives."

"Had we hosted you in our house, that would have been as guests," said Mr. Hauser. "However, we invested a lot of money to build the unit and typically rent it to visitors."

"You're entitled to charge, but you have to say so up front," said Mr. Green. "When you said that we're welcome to stay with you, we assumed you meant for free."

"Why should you assume that?" countered Mr. Hauser. "When someone provides goods or services it's usually for pay, unless clear otherwise."

"We can call Rabbi Dayan," suggested Mr. Hauser. He called and asked:

"Are the Greens required to pay for use of the unit?"

"There is a seeming contradiction in the Rema on this issue," replied Rabbi Dayan.

"In one place, Rema (C.M. 246:17) cites from *Terumas Hadeshen* (#317) that if a person tells another, 'Eat with me,' he can charge the 'guest'; we do not assume that he offered to feed him for free. Therefore, a person who agreed to support his son-in-law at his table for several years, and continued to feed him beyond the stipulated time – can charge the son-in-law, unless there is indication that he fed with intent not to charge, and only afterwards changed his mind and demanded payment. He rules similarly in *Y.D.* (253:5).

"Elsewhere, however, Rema (C.M. 363:10) cites from Beis Yosef in the name of Rashbatz (1:174) that if a person tells another, 'Live in my property,' he does not have to pay rent, which seemingly indicates that we assume he offered it gratis. In truth, Rashbatz discussed a property that was not intended for rent, for which a person is exempt even if he entered

DID YOU KNOW?

Vendor agreements can have clauses that may be ribbis but can often be corrected with halachic guidance.

Ask your Rav or email
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for guidance and solutions.



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לע"נ ר' שלמה ב"ר ברוך וזוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

WAS THE KINYAN VALID?

Q: My friend asked me to me serve as an *eid* (witness) on the *kesubah* of his son. When the *mesader kiddushin* was ready to make a *kinyan*, he asked me for my *gartel* so he could give it to the *chassan* to lift to make a *kinyan*.

After we signed the *kesubah*, I remembered that the *gartel* wasn't mine; I had borrowed it from someone to *daven Minchah* and had mistakenly placed it in my pocket afterward.

Was the *kinyan* valid?

A: In a *kesubah*, a *chassan* obligates himself to provide certain things for the *kallah*, and the obligation is formalized by means of a *kinyan sudar* (lifting an item — often a handkerchief, *sudar*).

According to the letter of *Halachah*, the *chassan* assumes the obligations in the *kesubah* even without a *kinyan* (*Shulchan Even Ezer* 66:8, with *Chelkas Mechokek* 34, and see *Gra* 9). Some *poskim* write, however, that since the *kesubah* generally states that the *eidim* (witnesses) made a *kinyan* with the *chassan*, if no *kinyan* was made, the content of the *kesubah* is false, and it is therefore invalid (*Rama MiPano* 65, cited in *Minchas Pittim*, *Even Ha'ezer* 66:1; see *Mishpat Ha'arev*, *Even Ha'ezer* 5, and *Mishkan Shalom* 2:8). There is also deliberation whether a *kinyan* made after the *kesubah* was signed can validate the *kesubah* retroactively (*Minchas Pittim* loc. cit.).

In commercial transactions, a *kinyan suddar* is effected when the seller lifts an item that belongs to the buyer, thereby transferring ownership of the item he is selling to the buyer. He is not entitled to keep the item used to make the *kinyan*, because it is given *al menas lehachzir* (on condition that it be returned).

A *kinyan* made with an item belonging to the seller is not valid (*Choshen Mishpat* 195:1-2), but a third party may give one of his belongings to the seller to make the *kinyan*, which will take effect even if the buyer is not present (see *Ketzos* 195:9 and *Nesivos* 1, and *Sma* 123:21). It has therefore become commonplace for the *kinyan* to be made with an item belonging to one



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without permission. The Gra (363:31) interprets the Rema accordingly.

“However, Rema does not mention this qualification. Thus, Bach (363:7; Responsa #39) sees these rulings as contradictory, whether to consider an unspecified offer as gratis, and considers the issue an unresolved dispute, so that *hamotzi meichaveiro alav hare'aya*. Therefore, in the case of a person who was renting a seat in shul, and someone offered him to sit, instead, in his more distinguished seat, Bach ruled that the person is exempt, but if the second person holds money of his, he can retain it.

“Shach (246:9; 363:13) concurs with the Bach. He further writes that if the unit is not intended for rent or if the ‘guest’ typically does not rent, such as if he usually stays with relatives or friends, he is certainly exempt, since *he* did not cause the owner a loss of potential alternate rental of his own initiative, but rather through the owner’s initiative. However, Beis Shmuel (70:28) concludes that an unspecified offer is not assumed to be for gratis” (see also *Ketzos* 246:2; *Pischei Choshen, Sechirus* 8:34[70]).

“Thus,” concluded Rabbi Dayan, “since the Greens often stay with relatives, they are exempt. Some *poskim* rule they are exempt even if they typically rent.”

Verdict: There is a dispute whether a person who offers another to eat or stay with him without specifying can charge payment. Some *poskim* consider it an unresolved dispute, and rule that the money remains with whoever is in possession.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS Dayanim (Judges) #20

Additional Aspects of Compromise

לע"נ ר' יחיאל מיכל ב"ר חיים וזוג' ח'י בת ר' שמואל חיים ע"ה

Q: What are some additional aspects of compromise?

A: Included in compromise of *b'tzedek tishpot amisecha* – “Judge fairly”— are cases in which one side has no legal advantage over the other but a resolution is required. For example, two ships or trucks traveling in opposite directions meet in a narrow river or on a single-lane road. If one is laden and the other not, or if one is closer to the meeting point than the other, the laden or closer one should be given priority. If both are equal, one should grant the other priority in return for reimbursement for the delay (*C.M.* 272:14; see *Meishiv Davar* 3:10).

Also Included are cases in which *beis din* considers it proper that one party should act *lifnim mishuras hadin* – beyond the letter of the law. The *Rishonim* dispute whether *beis din* can coerce either party to act *lifnim mishuras hadin*. Some write that the practice is to strongly encourage with words a wealthy party to forgo or pay a reasonable amount (*Rema, C.M.* 12:2; *Pischei Teshuvah* 12:6; *Aruch Hashulchan* 12:2; *C.M.* 259:5; *Shach* 259:3).



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of the witnesses, even if the buyer (or recipient of a gift) *is* present, because *kinyanim* often take place with the buyer or recipient not present (195:3).

Returning to your *she'eilah*, the *kallah* is the recipient of the pledges made in the *kesubah*, so the *kinyan* should take place either with an item belonging to her, or by having one of the witnesses give one of his belongings to the *chassan* to lift, thereby obligating himself to all of the clauses of the *kesubah*.

When the witness hands over that item to the *chassan*, he isn't merely “giving it” (*nesinah*); he is transferring ownership of that item (*hakna'ah*). The item must therefore belong to the witness, and if he took an item from someone else without permission and used it for the *kinyan*, it is not valid.

The *poskim* deliberate whether a borrowed item can be used for a *kinyan*. Some say that since a *kinyan* is a just a quick action done to formalize a transaction, the owner of the item would not mind if it is used for a *kinyan*, so the *kinyan* is therefore valid (*Ritva, B.M.* 46a).

Others maintain that a *kinyan* should not be made with a borrowed item — and that is why we don't use an item in the *kallah's* possession for the *kinyan*, because such items are often borrowed. The standard procedure has therefore become to use an item belonging to a witness (*Rabbeinu Peretz* *ibid.*).

The Rema rules according to the latter approach, stating that a borrowed item may not be used for a *kinyan* unless it was lent with specific permission to use it for a *kinyan* (*C.M.* 195:4). Since a borrower does not have full ownership of the item, he cannot transfer ownership of it (which is what actually occurs during a *kinyan*), even if it is only done temporarily for the *kinyan sudar* (see *Kesubah K'hilchasah* p. 277, and *Mishkan Shalom* 2:8)

In your case it is even more complicated, because as soon as you finished Minchah, you concluded the “loan” of the item, so you certainly weren't entitled to use it for the *kinyan*.

A new *kinyan* should therefore be made with an item belonging to one of the *eidim*, and the parties should write a new *kesubah*.

[We should note that a *gartel* is considered a *kli*, and may therefore be used for a *kinyan* even though it does not measure 3x3 *etzba'os* (fingerbreadths), the minimum size needed for a *sudar* to be used for a *kinyan*; see *Shu"t Shevet Halevi* 9:307.]

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 or ask@businessshalacha.com

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