

# BUSINESS WEEKLY



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

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



## CASE FILE

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## BHI HOTLINE

לע"נ הרב אהרן בן הרב גדליהו ע"ה

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

## EVALUATING A GOLD NECKLACE

Mrs. Goldman owned a long, heavy, gold necklace, which weighed almost three ounces. She had traveled abroad last summer and did not want to take the necklace with her.

Her brother, Chaim, had a personal safe at his work. "Could you please watch my necklace in your safe?" Mrs. Goldman asked him.

Chaim agreed. Mrs. Goldman gave him the necklace in a sealed envelope, which he placed in the safe.

Towards Purim, Chaim needed to organize the contents of his safe. He put the envelope with the necklace on one desk, and meanwhile, went through the documents and other envelopes on another.

Chaim's wife suddenly called. "Please come home immediately!" she exclaimed. "A pipe burst and there's water all over! I called the plumber, but I need you here!"

Chaim quickly gathered everything from his desk and returned the items to the safe, but forgot the envelope with the necklace on the other desk. When he returned the following morning, the necklace was gone!

More than 25 people worked in Chaim's office, so he had no way of suspecting who might have taken the necklace.

"I took the necklace out of the safe yesterday, but forgot to return it," Chaim apologized to his sister. "Someone apparently took it. I realize that this was negligence on my part and will pay you for it."

"See if it turns up," sighed Mrs. Goldman. "If not, we will deal with it when I return in the summer."

The necklace was not found.

When Mrs. Goldman returned, she tried to establish the value of the necklace. Chaim realized, though, that gold had fluctuated more than 20% during the year. In July '23, when the necklace was entrusted to him, gold cost less than \$2,000 an ounce; in March '24, when the necklace was lost, the price was about \$2,250 an ounce; now the price approached \$2,500 an ounce."

Chaim called Rabbi Dayan and asked:

**'According to which date do we evaluate the gold necklace?'**

"The *Gemara* (*Kesubos* 34b) presents two opinions on whether a guardian becomes liable for the entrusted item only from when the loss occurs, or retroactively from when the item was entrusted to him," Rabbi Dayan replied.

Shulchan Aruch (C.M. 341:4) rules according to the opinion that the obligation is from the time of loss.

The *Acharonim* rule, accordingly, that a guardian pays according to the item's value at the time of loss (*Shach* 295:7; *Ketzos* and *Nesivos* 291:1).

*Ketzos* and *Nesivos* (*ibid.*) explain that this differs from a thief, who pays according to the time when he stole the item, even if it became ruined and unreturnable only later, since the guardian's liability actualizes at the time of damage or loss due to the negligence, whereas a thief becomes fully liable from the time of theft.

Nonetheless, Sma (295:6), based on *Maggid Mishneh* (*Hil. She'eilah u'Pikadon* 8:3), writes that if the guardian is not monetarily liable and could exempt himself with an oath, but

## JUMPING TO CONCLUSIONS?

### Part I

**Q.** A class of fourth graders was playing in a public park, and one boy exclaimed, "I found a

frog!" As he was about to scoop it up, a different boy ran over and snatched it. They got into an argument over who actually has the rights to it, and when they could not resolve the matter between themselves, they approached their Rebbe for a ruling.

The Rebbe told them that although just seeing the frog did not give the first boy the rights to it, it is still rightfully his because Chazal established a kinyan of dalet amos, and the frog was within that range of the first boy.

Was the Rebbe correct?

**A.** Chazal were concerned that this type of dispute would be quite common — one person would be first to spot a metziah (discovered object), and another would grab it before the first person could lift it. They therefore established that the first person within four amos (cubits) of the metziah has the rights to claim it, even if he didn't make a kinyan hagbahah by lifting it (Shulchan Aruch, Choshen Mishpat 268:2; see Nachlas Yisrael, Bava Metziah 10b). Chazal considered the four amos of a person's proximity akin to his chatzer (courtyard), which automatically takes possession on his behalf of anything that is in it.

Now, a kinyan dalet amos does not apply in a bustling public thoroughfare (the delineation of what constitutes such a crowded area is distinct from the delineation of a reshut harabbim in regard to Hilchos Shabbos — see Hagahos Rabi Akiva Eiger *ibid.*) nor in another person's private property. This type of kinyan would apply only at the sides of a public thoroughfare or on a quiet side street. It would seem that a public park qualifies as such a space (see Avnei Milu'im 30:8), and the first child should therefore have the rights to the frog.

We must consider another factor, however: A kinyan dalet amos is effective only if the first person is physically able to lift the object, and would have done so had the other person not grabbed it. This is true for inanimate objects and even for animals or birds,



## CASE FILE

nonetheless agrees to pay – if the item's value increased in the guardian's hands, he needs to pay only the value at the time of entrustment. Ketzos (295:2) explains, for example, that the guardian claimed that it was *oness*, but agreed to pay rather than swear (see, however, *Chazon Ish C.M. Likutim* #20, 35a).

Pis'chei Choshen (*Pikadon* 8:4[11]) explains that in this case, the guardian is viewed as "buying" the item rather than paying his liability as a guardian. Therefore, Sma maintains that we follow the item's value when entrusted, when it entered his possession. However, Shach (*ibid.*) rejects the Sma's distinction and rules that either way we follow the time of loss.

"You were negligent with the necklace," concluded Rabbi Dayan. "Therefore, clearly it is evaluated according to the price of gold in March, when it was lost."

**Verdict: A guardian who is liable pays according to the item's value at the time he became liable. If he is exempt, but nonetheless elects to pay, some maintain that we follow the item's value when it was entrusted, but others do not differentiate.**



## MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

### MONEY MATTERS

Minhag Hamedinah  
Common Commercial  
Practice #30  
Sale of Intangible Items

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

#### Q. Is there halachic basis for sale of futures, options, intellectual property, etc.?

A: Classic *Halachah* recognizes sale only of existing, tangible items, whereas future items (*davar she'eino ba'olam*), items not currently in the seller's possession (*davar she'eino birshuso*) and intangible items (*davar she'ein bo mamash*) are not subject to sale (*C.M.* 209:4; 211:1; 212:1). In places where the common commercial practice authorizes such sales, the *Acharonim* dispute whether *Halachah* also recognizes these as *kinyan situmta*, a form of acquisition based on the common commercial practice. Ketzos and Nesivos maintain that since such items are not subject to *kinyan*, *situmta* cannot be more effective than a regular *kinyan* (*C.M.*, Ketzos and Nesivos 201:1).

However, Chasam Sofer (*C.M.* #66), in addressing the issue of purchasing franchise rights, rules that *situmta* applies even to such items, if that is the common practice (*Pis'chei Teshuvah* 201:2).

Many modern business contracts, including those mentioned in the question, follow the Chasam Sofer's ruling (*Pis'chei Choshen, Kinyanim* 10:5[7]).

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## BHI HOTLINE

but only if the first person who saw it is close enough to the creature that it cannot escape (*Sma* 268:17). It is not effective if the metziah was a creature that could escape (*Choshen Mishpat* 268:4).

In this case, then, *kinyan dalet amos* applies only if the first boy could have lifted the frog.

It is important to note that even in circumstances in which the first boy does not acquire the frog — for example, in a public domain or in someone else's field — the principle of *ani hamehapecah b'chararah* may nevertheless apply. This *halachah* applies when one person is attempting to buy something, and someone else inserts himself and buys it first. Chazal deemed such a person a *rasha* (wicked person).

ThimPoskim debate whether this concept applies to someone attempting to acquire a metziah, or whether, since it is not so common to find such an object, perhaps we allow anyone to acquire it, not only the first person who attempted to do so. Although the Rema (237:1) rules that *ani hamehapecah b'chararah* does not apply here, and anyone may acquire a metziah, a *baal nefesh* (spiritually attuned person) should not acquire a metziah if someone else is already trying to acquire it (*Shulchan Aruch Harav, Hilchos Hefker* 10).

Furthermore, since frogs are commonly found in parks, and the second boy can find another frog, it is best for him to allow the first boy to take it.

In the next issue we will discuss whether a person has to intend to acquire something in order for a *kinyan dalet amos* to be effective, and whether a minor can make this *kinyan*, and ultimately discover that the first boy was unable to make a *kinyan dalet amos*.

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