

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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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

PICTURE FOR A FRIEND

It was almost Tishah B'Av; the *zman* was coming to an end. Mr. Solomon was selling pictures of the Beis Hamikdash outside the *Beis Medrash*. "This is just the perfect thing to get before Tishah b'Av!" Yoni exclaimed.

"How much are the pictures?" he asked Mr. Solomon.

"Each picture costs \$50," answered Mr. Solomon.

"I'll take one," said Yoni. "But I don't have money with me; I have to get from my room."

"That's fine," replied Mr. Solomon. "You can take the picture and bring me later."

"I'll also take one for my roommate," said Yoni. "He told me earlier that he wanted to buy one."

"That's great!" said Mr. Solomon. "May we be *zocheh* this year to see the Beis Hamikdash standing, and not just a picture!"

"Amein!" answered Yoni.

Yoni returned to his room. "I bought a picture for you," he said to his roommate, Avi.

"Thank you, but I already bought a different picture," replied Avi, "so I don't need this one."

Yoni brought Mr. Solomon the \$50. "My roommate said that he got a different picture," said Yoni, "so I'd like to return the extra picture."

"I usually don't accept returns," said Mr. Solomon. "I very much need the income. You took two pictures, so you need to pay for them."

"But I explicitly said that one was for my roommate," objected Yoni. "If he doesn't want it, why should I have to pay?"

"You didn't have to buy for him," replied Mr. Solomon, "but if you did – I don't have to take the picture back!"

Yoni called Rabbi Dayan and asked:

"Can I return the extra picture?"

"The *Gemara* (*Kiddushin* 49b) addresses the case of a person who sold his real estate with intent to go on *aliyah*, but his plans fell through. If he explicitly expressed his intent at the time of sale, he can void the sale and reclaim his property, since we follow the implicit understanding of his statement, as if he stipulated" (*C.M.* 207:3).

However, Tur cites R. Yona who rules (addressing the *Gemara* in *B.B.* 98b) that if someone bought wine with the intent of taking it to a profitable locale, but wine prices dropped, he cannot void the sale and return the wine, even if he stated his business intent when purchasing it.

Rabbeinu Yona explains that the implicit understanding applies only to the seller, who generally sells only when he has a pressing need, whereas the buyer – despite his stated expectation of business profit – can drink the wine.

Tur concludes, though, that Rabbeinu Chananel does not distinguish between the seller and buyer, indicating that the buyer can void the sale in Rabbeinu Yona's case (*Beis Yosef* 207:[32]; *Sma* 230:15).

This dispute – which implies that the implicit understanding of stated intent applies also to wine – seemingly contradicts another ruling of *Beis Yosef* and *Rema* based on Rabbeinu Chananel that the implicit understanding applies only to real estate, which

JUMPING TO CONCLUSIONS?

Part II

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 *counselor* for a ruling.

The *counselor* told them that since *Chazal* established a *kinyan dalet amos*, and the frog was within that range of the first boy, it belonged to him.

Was the *counselor* correct?

A. In the previous issue, we discussed the basics of a *kinyan dalet amos*, which enables a person to acquire any item that is within his four *amos*. Based on this *kinyan*, we concluded that the first boy acquired the frog.

This week, however, we will address two factors specific to this case that will change the outcome: (1) Is a minor able to acquire things through a *kinyan dalet amos*? (2) Does this *kinyan* require *kavanah* (intent)?

The *poskim* debate whether a minor who finds an object and lifts it acquires it. Some say that if when the child is given a stone he discards it, and when he is given a nut he keeps it, then he is considered mature enough to acquire the object he found, even on a *d'Oraysa* (Torah) level (*Shach* 243:6). But the majority of *poskim* rule that he does not acquire it. They hold that only when an adult intends to be *makneh* (transfer ownership) to the minor, the child would acquire it on a Torah level (*Rema* 243:9, with *Ketzos* and *Nesivos*).

Nevertheless, *Chazal* said that because of *darchei shalom* (to keep the peace), a person may not take a *metziah* (discovered object) that a child has already lifted (*ibid.* 270:1).

This is only true, however, if a child tried to acquire the discovered object by lifting it. But if a minor intended to make a *kinyan dalet amos*, the Mechaber (268:4) rules that a girl may acquire it, because the Torah gave her the right to acquire a *get* (divorce document) by accepting it in her hand or through her *chatzer*. The *Rema* (243:23) argues that even those *kinyanim* are limited to a girl who is an orphan (*cf. Shach* *ibid.* 11 and *Nesivos* 14).

Even the Mechaber agrees that a boy cannot acquire objects through a *kinyan dalet amos*, because the Torah did not give a boy the power to effect a *kinyan chatzer*, upon which the *kinyan dalet amos* is based (268:4), and even *darchei shalom* does not apply if he tried to acquire it through *kinyan dalet amos* (as implied by *Shulchan Aruch HaRav*, *Hilchos Hefker* 8; see *Pis'chei Choshen*, *Aveidah* 9, note 65). It would seem, then, that the *counselor's* determination that the first



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people generally sell only for a clear reason, whereas movable items require an explicit stipulation.

Drisha (C.M. 207:7, 230:5) resolves this apparent contradiction saying that the implicit understanding does not apply to the *seller* of movable items, but does apply – according to Rabbeinu Chananel and Tur – to the *buyer* of movable items (*Pis'chei Teshuvah* 207:6).

"Based on this, Sha'ar Ephraim (#140) rules in a case like ours that since Rabbeinu Yona and Rabbeinu Chananel dispute whether a buyer of moveable items can void the sale based on his stated intent – if he is still in possession of his money, he can return the item. However, if he paid already, he cannot void the sale and demand his money back (*Be'er Heitev* C.M. 207:8; *Aruch Hashulchan* 207:14; *Pis'chei Choshen, Kinyanim* 20:33[57]).

"Thus," concluded Rabbi Dayan, "since Yoni didn't pay yet, he can return the picture."

Verdict: There is a dispute whether or not a person who buys a moveable item with stated intent for another, who ends up not wanting it, can void the sale. Therefore, if he hasn't paid yet and is in possession of the money, he can return the item and is not required to pay.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
Minhag Hamedinah
Concluding
Summary Practice #31
Sale of Intangible Items

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

During the past several months, we discussed many halachic aspects of *minhag hamedinah*, common commercial practice. To qualify as *minhag hamedinah*, the practice must be formally established by the community or widely accepted and a common occurrence.

In most contractual issues, when not stated otherwise, we assume that the parties implicitly operate according to the *minhag hamedinah*, even if not stipulated explicitly and in deviation from the default Torah law, especially in employer-employee issues.

In many cases, a civil law that is widely practiced can be considered binding among parties based on *minhag hamedinah*, even in cases where it might not be binding as *dina d'malchusa*.

Transactions that are conducted in a manner widely accepted in that locale are usually binding even in the absence of a formal *kinyan*, as a form of *kinyan situmta*.

The application of *minhag hamedinah* in non-contractual issues, such as damages, is questionable.

Therefore, in adjudicating monetary matters, the *Dayan* must consider also the *minhag hamedinah* of his locale.

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boy, who is a minor, acquired the frog through *kinyan dalet amos* was wrong.

Another factor to consider is whether a *kinyan dalet amos* requires intent. If a person is unaware of this *kinyan*, and he comes within four *amos* of something he wants to acquire, does it become his before he lifts it? According to many *poskim*, he does not acquire it (*Pis'chei Teshuvah* 198:9, citing *Mishneh L'Melech, Hilchos Zechiyah* 2:9, and 288:1 citing *Shu"t R' Akiva Eiger* 37).

Halachah differentiates between a person who throws himself on a *metziah* with intent to acquire it — in which case, although throwing himself on it is not a *kinyan*, he does acquire it through *kinyan dalet amos* (ibid. 268:1) — and someone who sees a *metziah* and intends to acquire it by falling on it, but someone else snatches it first, in which case the second person acquires it and the first one does not acquire it through *kinyan dalet amos*.

In the first case, although that person does not know the *halachos* of *kinyanim*, since he is trying to acquire the object at the moment when it is in his *dalet amos*, he does acquire it through *kinyan dalet amos*. In the second case, since he didn't know that he could acquire it through *kinyan dalet amos*, he had no intention of acquiring it until he threw himself on it, so the *kinyan dalet amos* does not work for him. Similarly, in our case, since the first boy didn't know about the *kinyan dalet amos*, and he only intended to acquire the frog when lifting it, the *kinyan dalet amos* does not work for him.

Another point: Even according to the opinions that *kinyan dalet amos*, like a *kinyan chatzer*, works regardless of whether the person has intent (*Taz* 268; see *Shu"t Rivash* 345), that's true only if his lack of intent is due to his not being aware that the object was within his *dalet amos*. But if he knows that the object is there, but he did not intend to acquire it, some say that he does not acquire it through *kinyan chatzer* or *kinyan dalet amos* (see *Tosafos, Bava Basra* 54a; *Nesivos* 275:2; *Shu"t Shem Aryeh, Choshen Mishpat* 22; *Imrei Yosher* 2:72).

Ultimately, the frog belongs to the second boy who snatched it, but the *halachos* of *ani hamehapech* would apply, as discussed in the previous essay.



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