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לע"נ הרה"ח ר' נחמיה בן הרה"ח ר' שלמה אלימלך ווערדיגער ז"ל - נבל"ע י"ב כסלו, תש"ע



CASE FILE

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Writer for the Business Halacha Institute



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

A DOLLAR FOR A TREE

The Brauns had a fruit tree at the edge of their property that leaned almost entirely into the property of their neighbors, the Greens.

The Brauns had no interest in tending to the tree, and little interest in the fruit, which required a ladder.

On the other hand, Mr. Green greatly enjoyed tending to the tree. For years, the Brauns allowed Mr. Green to tend to their tree and pick its fruit.

"I was thinking of ways to celebrate my husband's 50th birthday," Mrs. Green said to Mrs. Braun. "I had a wild idea. He's been tending to your tree for years, so would you let me buy it for him as a gift?"

"That's a novel idea," Mrs. Braun laughed. "Let me speak with my husband."

"In practice, we have nothing to do with the tree," Mr. Braun said. "Let that be *our* gift to Mr. Green!"

Mrs. Braun told Mrs. Green that they would grant the tree as their gift. Mr. Braun wrote a card: "To my dear neighbor, Mr. Green, we are happy to grant you our tree as a 50th birthday gift." Mrs. Green put the card with the other birthday cards.

When Mr. Green read the card, he was greatly touched. He called Mr. Braun and thanked him profusely. He added: "If you agree, I would like to make a formal *kinyan* on the tree."

"What do you suggest?" asked Mr. Braun.

"I'll give you a dollar, which is *kinyan kesef*, as a token payment to effectuate the gift," suggested Mr. Green.

"Take money?!" Mr. Braun replied. "It's a gift! How can that work?"

Mr. Green called Rabbi Dayan and asked:

"Can money be used to effectuate a gift?"

"The *Mishnah* (Kiddushin 26a) teaches that real estate, including trees, can be acquired through *kesef*, *shtar*, or *chazakah* (money, sales document, or act of

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WHO PAYS FOR THE SCAM?

Reuven knew that Shimon deals in electronics, and, in an effort to piggyback on his success, he searched for deals on items that Shimon sold and found a manufacturer who was willing to supply them to Reuven at a lower

price. He contacted the manufacturer and got him to agree to pay a commission for whatever Reuven ordered from him. He then contacted Shimon, and convinced him to order from that manufacturer.

Fueled by this success, Reuven tried to find additional deals that would interest Shimon, and a short while later, he found such a deal. He sent Shimon information about someone selling a product that fit into Shimon's line and asked whether he wanted to order from that seller. In truth, the deal sounded a bit too good to be true, but he figured that he would pass it along and see what Shimon would decide. In the meantime, he contacted the seller as well, and secured his agreement to pay a commission for whatever Shimon would order.

Q In the meantime, a third person, Levi, contacted Shimon and asked to buy \$30,000 worth of the exact item this new seller was offering. Shimon got very excited about the quick profit he could turn, but not having dealt with this seller before, he contacted Reuven numerous times to ask whether he could vouch for his integrity. Reuven did not answer his phone calls or texts, and Shimon started to leave ever-more-frantic messages. But Reuven didn't really know the answer, and by the time he got back to Shimon the next day, apologizing that he had been too busy the previous day, Shimon informed him that he had already taken \$30,000 from Levi and bought merchandise from the seller.

It turned out that they had fallen prey to a clever scammer with a sophisticated website with no merchandise to sell. After much effort, Shimon managed to get the bank that had processed the payment to return 70% of the money, which he returned to Levi.

Is Shimon liable for the other 30% of Levi's money? And does Reuven bear any liability in this case?

A Shimon, who accepted money from Levi as payment for merchandise that he didn't actually supply, is fully liable for every penny he received from him, regardless of what circumstances led to him being unable to fill Levi's order.

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CASE FILE

possession),” replied Rabbi Dayan. “A gift, to be binding, must also be effectuated in a valid manner.” (C.M. 190:1-2; 193:1; 241:1)

“The *Acharonim* dispute the fundamental nature of *kinyan kesef*. Sma (190:2) and *Avnei Milu'im* (29:2) maintain that the money is **compensation** for the real estate, like the money of Avraham’s acquisition of Me’aras Hamachpelah. Although a minimal *perutah* suffices to effectuate the transaction, it serves as partial payment, and the balance remains a loan. However, a coin or bill not given as compensation, but rather as a symbolic act of transaction, is not a valid *kinyan*.

Taz (190:2) and Nesivos (190:2) disagree, and maintain that also money given as a **symbolic act** of *kinyan* can acquire. They bring proof from money given as *kiddushin* — also derived from a *gezeirah shava* (word parallel) to the acquisition of Me’aras Hamachpelah — which is not compensation of the woman’s worth.

Several *Acharonim* suggest that one practical ramification of this dispute is whether *kinyan kesef* is valid for a real estate gift. Presumably, according to the Sma, it is not, because there is no **compensation**; according to the Taz, it is, because giving money can still serve as a **symbolic act** (*Imrei Binah*, *Kinyanim* #1; *Ha’amek She’ela*, *Vayechi* #33; *Divrei Yechezkel* 39:4).

Indeed, the *Rishonim* dispute this matter. Rashbam (B.B. 44b, 136a) writes that *kesef* applies also to real estate gifts, whereas Tosfos (*Avodah Zarah* 71a s.v. *pardeshani*) indicates that it does not. Rambam (*Hil. Zechiya u’Matana* 3:1) and Tur (C.M. 241:1) also omit *kesef* in the context of gifts.

However, Tosfos Rid (*Kiddushin* 13a) writes that *kesef* is applicable to gifts, even though he seemingly understands the nature of *kinyan kesef* as compensation (see *Avnei Miluim*, *ibid*). *Imrei Bina* (*ibid*.) suggests that in such a case, the real estate is effectively ‘sold’ at the value of the token payment. Only if the recipient states explicitly that the token payment is not compensation for the property — only a symbolic act — would Sma and Tosfos Rid maintain that it is not valid.

“Thus,” concluded Rabbi Dayan, “effecting a real estate gift through *kinyan kesef* is questionable, unless the property is ‘sold’ at the value of the token payment, so that a different *kinyan* is preferable.”

Verdict: The *Acharonim* dispute whether *kinyan kesef* of real estate is compensation payment or can also be a symbolic act. Some link this to a dispute between the *Rishonim* whether *kesef* can effectuate a real estate gift, where there is no compensation.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS Yei’ush – Abandonment

#14

Found before Yei’ush

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

Q I found a book with identifying features. While hanging a notice, I heard someone telling a friend that he lost his book and now abandoned hope of finding it. Must I still return it?

A: When you find an item and pick it up before the owner’s *yei’ush*, you are required to return it even if the owner subsequently had *yei’ush* (C.M. 259:1; 262:3).

Tosfos (B.K. 66a) explains that once the item comes to your hands before *yei’ush* — because you are required to return it, the obligation does not cease even after *yei’ush*, similar to a thief who is obligated to return the theft and the obligation does not cease upon *yei’ush* of the owner (C.M. 353:2; *Drush v’Chiddush* B.M. 21b; *Chazon Ish* B.K. 18:1).

Ramban (*Milchamos* B.M. 26b) explains that once you take the item to return it, you become a guardian on behalf of the owner, and, as we previously learned, *yei’ush* does not take force when the item is secure in the hands of the owner or his guardian, and the owner’s *yei’ush* is in error (*Ketzos* 259:1).

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Even had Shimon been a *shaliach* (agent) to purchase merchandise on Levi’s behalf, he would still be liable for the loss or theft of Levi’s money, like a typical *shomer sachar* (paid guardian; *Shulchan Aruch*, *Choshen Mishpat* 185:7), and he would have been indemnified only from *onsim* (circumstances beyond his control). In our case, sending Levi’s money to the seller without fully vetting him is considered *peshiah* (negligence), and Shimon might even be considered a *mazik* (one who inflicts damages; see *Shach* *ibid*. 176:16). This is certainly true in our case, in which Shimon wasn’t an agent, but offered to *sell* merchandise to Levi.

Therefore, regardless of whether he was an agent or a seller, even had Shimon not received a penny back from the bank that processed the payment, he would still have had to refund Levi’s money in full.

The only question remaining is whether Reuven bears any liability.

Had Reuven vouched for the manufacturer, it is possible that he would be liable due to the *halachah* of *garmi* (direct causation), because Shimon relied on him and made the payment based on his advice (see *Pis’chei Teshuvah* 104:2 and *Business Weekly* #444). But because Shimon never reached Reuven on the day he made the payment, and Reuven did not vouch for the scammer, he is not obligated to pay even *latzeis yedei Shamayim* (to avert Heavenly judgment), because Shimon’s decision to pay the seller on his own means that he bears sole responsibility for that decision (see *Choshen Mishpat* 129:2 and 306:6).

Had Reuven known in advance that the “seller” was a scammer, he would have transgressed the prohibition of *lifnei iver lo sitein mich’shol* (*Vayikra* 19:14), which forbids giving someone bad advice. But in our case, Reuven is not even guilty of that, because he had no such information.



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