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חשון שנת תשפ"ז לפ"ק

Was the sale between Yakkov and Eisav valid

Rav Moshe Shmiel Rieger

"Tell me, Shimon," Yehudah asked his brother, "would you be interested in purchasing my share of our father's estate?"

Their father was still alive and owned several valuable properties. Yehudah, in need of immediate funds, offered to sell Shimon whatever he would eventually inherit in exchange for a substantial payment.

The brothers agreed on a price, and Shimon paid the money. However, when their father eventually passed away and the estate proved to be worth a fortune, Yehudah regretted his decision.

"I am sorry," Yehudah told his brother, "but our agreement was never valid. At the time of the sale, I owned nothing in our father's estate. How could I sell something that did not yet belong to me?"

Shimon disagreed. "But we find an explicit precedent in Parashas Toldos! Yaakov Avinu purchased the *bechorah* from Eisav. Chazal explain that the *bechorah* included the double portion of inheritance and the right to burial in Me'aras HaMachpeilah. Yet Yitzchak Avinu was still alive! Surely this proves that one can acquire rights that have not yet come into his possession."

Yehudah remained unconvinced. "Perhaps there was something unique about the sale of the bechorah. We cannot necessarily derive the laws of monetary transactions from that incident."

Unable to resolve their dispute, the brothers agreed to present their case before a Dayan.

The Dayan listened carefully. "Your question touches upon a fundamental sugya in Choshen Mishpat. The Rishonim and Acharonim indeed discuss how Yaakov could acquire the bechorah when the ordinary rule is *ein adam makneh davar shelo ba la'olam*—one cannot ordinarily transfer something that has not yet come into existence as a transferable asset (Bava Metzia 16a).

"Let us examine several of the answers and see whether they apply to your case."

Does a *Shevuah* Make a Difference?

In Shu"t HaRivash (328), the questioner cites the view attributed to the Rosh, that Eisav's *shevuah* contributed to the validity of the sale. Yaakov insisted, *Hishava li kayom* - swear to me this day (Bereishis 25:33), and Eisav swore to him. Since he swore to him that he is selling it, the *kinyan* works.

The Rivash rejects this explanation, how can a shevuah help to exercise a kinyan on something that yet exists.

Before Matan Torah is different

The Rivash therefor explains that the sale took place before Matan Torah, and we cannot assume that the restrictions governing *davar shelo ba la'olam* applied then in the same manner.

Perhaps this machlokes can be understood through two approaches to the problem of *davar shelo ba la'olam*. According to one approach, the problem is *semichas da'as*: the purchaser does not fully rely on acquiring something that does not yet exist. According to another approach, a kinyan requires an existing object upon which to take effect.

A shevuah might strengthen his confidence in the transaction, adding *semichas da'as*, however a *shevuah* cannot supply that missing object to form a *ma'aseh kinyan*.

In any event, neither the *shevuah* nor the Rivash's explanation concerning the period before Matan Torah would help Shimon and Yehudah. They made no shevuah, and their transaction took place after Matan Torah.

The Need for Basic Livelihood

The Ohr HaChaim offers another explanation based on the Gemara in Bava Metzia (16a), which discusses a poor fisherman who sells whatever he will catch in his net. Such a transaction may be permitted because of *kedei chayav*—the need to sustain oneself.

Chazal made this special allowance because, without the ability to sell his future catch, the fisherman might have no money to purchase food that day. The leniency enables him to obtain the necessities of life; it is not a general permission to sell anything that does not yet exist.

The Ohr HaChaim applies this principle to Eisav, who declared, *Hinei anochi holech lamus*—"I am at the point of death" (Bereishis 25:32). Eisav was desperately hungry, and his circumstances resembled those of the poor fisherman. The sale of the *bechorah* could therefore be understood in light of the special allowance of *kedei chayav*.

This answer would not ordinarily apply to Yehudah. Although he wanted immediate funds, there is no indication that he would have been unable to obtain food or meet his basic needs without selling his future inheritance.

A General Inheritance or a Specific Property

There is, however, another important distinction.

The Shulchan Aruch rules that one who says, "What I will inherit from my father is sold to you," has not effected a valid sale, since the inheritance has not yet come into his possession (C. M. 211:1).

The Rema, however, cites an opinion that distinguishes between selling a >page 2

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- Gemara – Sotah 2:15 PM **by R. Yosef Cohen**
- Gemara - Oraysa 5:30 PM **by Reb Dov Ber Zyskind**
- Contemporary Halacha Every Monday, 2:15–2:30 PM **by Rabbi Levi Yitzchak Osdoba**

Fair market value of an Esrog: Before or after Sukkos

Rav Leibel Gelkopf

Reuven owned a store selling Esrogim. One day, Shimon entered the store and accidentally knocked an esrog off the table, rendering it pasul. Shimon immediately offered to pay for the damage. Reuven, who was busy, told him they would settle the matter after Yom Tov.

After Sukkos, Shimon returned to pay. However, he noticed that Reuven still had many esrogim of the same quality as the one he had damaged. Reuven had been unable to sell them before Yom Tov.

Shimon now had a claim: "Why should I pay the price of an esrog before Sukkos? You were left with many esrogim that you could not sell anyway. Even if my esrog had remained intact, you probably would not have sold it. And even if you had sold it, you would still have had another esrog left in its place. What loss did I actually cause you?"

Is Shimon's argument valid, or must he pay according to the esrog's value at the time it was damaged?

The Value of an Object That Has Not Been Sold

As a general rule, one who damages another person's property must pay according to its value at the time and place of the damage. The fact that the owner might not have succeeded in selling the item does not ordinarily exempt the damager.

An esrog, however, presents an interesting question. Its price rises dramatically before Sukkos, when demand is high, but after Yom Tov, many esrogim remain unsold and have little commercial value. Perhaps, then, if the esrog remained unsold even after Sukkos, this demonstrates that its true value was much lower than its pre-Sukkos price.

A similar case is discussed in the Shulchan Aruch (C. M. 304:5), based on the Gemara in Bava Metzia (99b), regarding a hauler who dropped a barrel of wine from a merchant, and it broke. Suppose the barrel is worth five zuz on market day, when prices are high, but only four zuz on other days.

The halachah distinguishes between two situations. If the merchant receives payment for the damage on market day and has no other wine to sell, he may collect the higher value. However, if he has other barrels of wine available and they remain unsold, he receives only the lower value.

The Lechem Mishneh (Sechirus 3:3) explains that when the merchant has other wine available, it becomes clear that the broken barrel would not have been sold on market day anyway. Since it would have been sold later, when the price was lower, the damager pays according to that lower value.

The Chazon Ish (B.K. 6:14), however, explains that this distinction applies specifically to merchandise whose value fluctuates at a particular time, such as wine on market day. Regarding ordinary objects, whose prices do not change according to a fixed schedule, the damager generally pays their value at the time of the damage.

This establishes that, in certain circumstances, a damager may argue that the merchant did not actually lose the higher market value.

Is an Esrog Like Wine on Market Day?

Most likely the same reasoning applies to an esrog. Its high price before Sukkos results largely from seasonal demand. If the seller is left with other esrogim of the same quality after Yom Tov, perhaps the damaged esrog would also have remained unsold, and Shimon should not have to pay the higher price.

There is, however, room to distinguish between the cases. Wine can still be sold after market day, albeit at a lower price. An esrog, by contrast, is generally purchased for the mitzvah before Sukkos; afterward, there is practically no market for it. Perhaps the fact that the seller has unsold esrogim after Yom Tov does not determine their value, since the relevant market price is the price at which esrogim are sold before Sukkos.

The Nesivos HaMishpat (C. M. 304:2) discusses a related case involving chametz that was damaged during Pesach. Since chametz cannot be sold during Pesach but is held until after Yom Tov, the damager must pay according to the price at which it is normally sold. The Nesivos compares this to someone who steals an item in the wilderness, where it cannot be sold locally, but can be taken to the marketplace and sold there. As the Nesivos explains, the value assigned to an item in the wilderness certainly does not affect its price.

Nevertheless, there is a possible distinction: chametz during Pesach cannot be sold at all, whereas an esrog after Sukkos is still an object that can be sold, although its market has largely disappeared.

Land in Tishrei: A Relevant Comparison

The Gemara (B. K. 7b) discusses a case in which a creditor may collect land in Tishrei according to its higher Nisan value. The Chiddushei HaRim (B.K. ibid), along with the approaches discussed in Divrei Yechezkel (siman 46) and Even HaEzel (Sechirus 3), explains that land differs from wine. While wine can be sold throughout the year, there are times when land is not normally purchased. Its value may therefore be determined according to the season in which it is ordinarily sold.

This comparison may be particularly relevant to an esrog. Just as land is generally sold in its appropriate season, esrogim are generally purchased before Sukkos, and there is practically no market for them afterward.

Halachic Conclusion

Although Shimon's argument has a basis in the halachos of a barrel of wine, it appears that he must pay according to the esrog's market value before Sukkos. The key distinction is that wine continues to have a market throughout the year, even when its price drops, whereas an esrog's principal market exists before Sukkos. The fact that Reuven was left with other esrogim after Yom Tov does not necessarily prove that the damaged esrog had little value when it was broken.

Accordingly, the stronger argument is that Shimon must compensate Reuven according to the price at which an esrog of that quality was sold before Sukkos, rather than its negligible value afterward, similar to land, which is valued according to Nisan, the season when it is customarily sold.

>page 1 general future inheritance and selling a specific property, such as a particular field that the seller expects to inherit. According to that opinion, identifying a particular property can make a difference to the validity of the transaction.

Thus, had Yehudah sold Shimon a particular house that he expected to inherit, the discussion would be different, and the opinions cited by the Rema would have to be considered.

The Halachic Conclusion

The Dayan turned to the brothers. "We have seen several explanations for the sale of the bechorah: the fact that it occurred before Matan Torah, the role of Eisav's shevuah, the special allowance of *kedei chayav*, and the distinction between a general inheritance and a specific property.

"There are also circumstances in which, although a kinyan on *davar shelo ba la'olam* does not take effect as an ordinary sale, a person may undertake a binding obligation to bring about the transaction in the future.

"However, you never discussed such an obligation. Your agreement was simply that Shimon would purchase whatever Yehudah would inherit from his father. Accordingly, the sale as described does not take effect under the ordinary rules of *davar shelo ba la'olam*, and Shimon has no claim to the inheritance on the basis of this agreement alone."

Democracy for Sale: The Halachic Price of a Bribery

Rav Yosef Yitzchak Meisels

It's election season in both Israel and America, and there has been reports about certain candidates allegedly buying votes with money. Without getting into whether any of these allegations are true, let us examine the question from a halachic perspective, starting with the basics:

Where do we find elections in halacha?

The source is the Maharam of Rothenburg, as cited by the Rema (*Shulchan Aruch*, C. M. 163:1). He discusses a city that could not reach a consensus on major issues, including choosing its communal leaders and how to build their shul. He rules that all the taxpayers should gather and decide by vote. Before voting, each participant accepts a *cherem*, similar to a *shevuah*, committing himself to vote not in his own interest, but in the interest of the public. It is, in a sense, a direct democracy, in which every major decision is put to a referendum.

The Maharam's ruling is based on the concept of partnership: the members of the kehilla are partners, and decisions are decided by majority vote.

The *Divrei Malkiel* (vol. I, siman 35) points out that the Maharam's ruling requires explanation. According to the halachos of partnership, there is no concept of majority rule. Rather actions deemed necessary can be enforced even if some partners object, but when something is not essential, even a majority cannot necessarily force the minority to accept its wishes. Thus, if partners disagree about which candidate is best for the partnership or the best way to build the shul, the majority cannot simply impose its view on the minority.

Additionally, why is the *cherem* necessary? Why can't someone vote in his own interest?

The *Divrei Malkiel* explains the Maharam's ruling in light of the Rosh, his talmid. The Rosh writes in his teshuvos that without majority rule, communal affairs would become impossible, as a single individual could hold the entire community hostage. The majority must therefore prevail (Rosh, Klal 6, no. 5).

The *Divrei Malkiel* says that this is the basis for the Maharam's ruling. The members of a kehilla entered into their partnership understanding that it could not function if every decision required unanimity. They therefore agreed to abide by the majority. This agreement, however, rested on a condition: each member must vote for the good of the kehilla, not for his own personal benefit. The *cherem* ensures that this condition is upheld.

Now that we understand the halachic framework for voting, we can delve into the subject of vote-buying.

The Chasam Sofer (*Shu"t* C. M. siman 160) discusses a case in which people were paid to elect one candidate among four others running for a rabbinical position. He concludes that if the bribery is confirmed, the votes cast as a result of it are void. His first reason is the Rema's ruling in Choshen Mishpat 163, based on the Maharam mentioned above: a vote must serve the public interest, not the voter's own. Someone who accepts a bribe for his vote clearly did not have the public's interest in mind.

The election must therefore be held again, but those who accepted bribes are excluded from the new vote, even if they return the money, because they have already become close to the briber, on par with the high bar that dayanim are held to.

He adds, even if a majority accepted bribes, the new election will be decided by a minority, even though the result may not reflect what the majority actually wanted. His reasoning is that there is no alternative: those who sold their votes have forfeited their voting rights, and the remaining voters must decide the election.

Rav Eliezer Gordon of Telz (*Teshuvos Rav Eliezer*, Chelek I, Siman 4) discusses a similar case of bribery and strongly disagrees on two points. His first objection concerns the status of the innocent voters who supported the same candidate as those who accepted bribes.

Rav Eliezer Gordon argues disqualifying the bribe-takers vote does not change the fact that the majority's opinion was in favor of Candidate A. Even if the majority's candidate cannot be installed because those voters must be penalized, their opinion remains the majority opinion.

Consequently, even if there was only one innocent voter who supported Candidate A alongside the bribers, that voter cannot be penalized for their wrongdoing. Since his opinion aligns with the majority, he can argue that he is not obligated to accept Candidate B, whose >page 4

Q&A

Double Parked!

Q: If a car is double-parked and I cannot get through without scratching it, may I continue driving? Similarly, if someone repeatedly parks in front of my driveway, may I take action to move his vehicle if it may cause him damage?

A: One may not damage another person's property, even if the other person wronged him, and one who causes damage is obligated to pay. Therefore, one may not damage a car parked in front of his driveway merely to teach the owner a lesson.

However, there is a halachic principle of עביד איניש דינא לנפשיה — one may take the law into his own hands to protect his own rights. This means that when someone takes or prevents him from accessing what belongs to him, he may take action to recover or protect his rights, even if doing so causes damage to the other person.

This principle also applies when a car blocks one's driveway, one may enter or exit his driveway even if doing so causes damage to the obstructing car, provided there is no other reasonable way to proceed and the action is solely to remove the obstruction.

Similarly, if someone is double-parked and one urgently needs to proceed, with no other way to get through, he may continue driving even if this will scratch the other person's car, provided he is acting solely to remove the obstruction.

מקורות: שו"ע חו"מ סימן שע"ח ס"ו. סימן ד' ס"א, ועיי"ש בנה"מ סק"א.

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Can a Seller Keep The Deposit after a failed deal?

Rav Boruch Krausz

In a typical major sale, especially in a real estate transaction, the buyer gives the seller a substantial deposit when entering into the contract. If the buyer later fails to complete the purchase, the seller may want to keep the deposit.

The halachic question is: is the seller actually allowed to keep it?

Let's examine the issue.

The *Gemara Bava Metzia 66b* teaches "*Asmachta lo kanya*" — an *Asmachta* is not legally binding. In the way the *Rambam* defines *Asmachta*, and as ruled in *Choshen Mishpat 207:2,* any monetary commitment a person makes for the future, which depends on certain conditions being met, is not binding. The reason is that when a person agrees to a future financial obligation tied to a condition, his mind has not yet reached the level of *Daas* required for the agreement to be fully binding.

A deposit forfeited if the buyer backs out falls into this category. It is a future loss, and it depends on the buyer's failure to complete the sale. Therefore, this is a classic case of *Asmachta*. As a result, in a standard situation, the seller is not allowed to keep the deposit once the contract falls through.

However, an important distinction must be made.

The above applies to the common case of a real estate transaction where the money is held in escrow and has never actually reached the seller's hands. But if the money was given directly to the seller, there is a *Machlokes* between the *Rambam*, as cited by the *Mechaber* in 207:11, and the *Raavad*, as cited by the *Rema*.

According to the *Rambam*, since the buyer knows the money has already reached the seller's hands and understands that the seller can simply keep it if the deal does not go through, the level of *Daas* is sufficient to remove the concern of *Asmachta*.

Since this is a dispute among the *Poskim*, the halacha is that the seller can say *Kim Li* like the *Rambam* and keep the deposit.

But in a regular case where the money is held in escrow, the seller cannot demand that the deposit be paid to him. Furthermore, even if the buyer requested that the money be released from escrow to the seller without realizing that this situation is an *Asmachta*, and the seller already received the money, he must return it to the buyer. This is because it is considered a *Mechilah B'ta'us* (see *Choshen Mishpat 207:10*), meaning that if the buyer had known that halacha does not require him to give the money, he would not have given it.

Tosfos in *Bava Metzia 66a* writes that *Minhag*, or common industry practice, can override *Asmachta*. The *Chasam Sofer (Choshen Mishpat 66)* cites *Tosfos* and adds an important qualification: this only applies when the minhag is actually to pay the *Asmachta*. However, if the minhag is merely that people agree to pay, but in practice, when it comes time to forfeit the deposit, people generally fight to avoid paying, then the halacha of *Asmachta* still applies.

Based on the Chasam Sofer, it is difficult to establish that the common practice today is that the seller is entitled to keep the deposit. Rather, what often happens is that the buyer will raise whatever claim he can in order to recover his deposit (Rav Dov Kahan, Dayan, Beis Din Maysharim, Lakewood).

So what is the solution to override *Asmachta*?

The *Gemara Nedarim 27b* states that if a *Kinyan Sudar*, the act of a Kinyan, is made before a *Beis Din chashuv*, it overrides *Asmachta*. The *Rosh* explains that a *Beis Din chashuv* consists of three dayanim who are well versed in the laws of *Asmachta*. Therefore, in the case of a real estate contract, if the buyer appears before a *Beis Din chashuv* and makes a kinyan obligating himself to allow the seller to keep the deposit, that would override *Asmachta*.

The *Rema* (*Choshen Mishpat 207:15)*, adds that it is not necessary to actually appear before a *Beis Din Chashuv* in order to make a *Kinyan*. It is sufficient if the contract itself states that such a kinyan was made, based on the principle of *Hoda'as Ba'al Din*, meaning that a person is believed when he makes a statement that obligates him.

The *Rema* adds an even broader point: even if the buyer never explicitly instructed that the contract should state that he made a kinyan in a *Beis Din Chashuv*, that may still be sufficient. Since he agreed that a contract would be written, and he knows that it is common practice for the drafter to include such a clause, the clause is effective even if the buyer never personally read the contract and only the witnesses signed it. The *Sma 43* appears to disagree with this last point of the *Rema*, but the minhag today is to follow the ruling of the *Rema* (Rav Dov Kahan, Dayan, Beis Din Maysharim, Lakewood).

In conclusion, the practical way to override *Asmachta* is for the seller to include in the contract a clause stating that a kinyan was made in a *Beis Din chashuv* with respect to all obligations in the agreement, without needing to consult the buyer specifically for that wording.

For the reader's convenience, here is the exact language that may be added to a contract in order to make an *Asmachta* halachically enforceable:

"*The parties hereby commit and confess that this agreement was effected and finalized according to Jewish law by a formal Kinyan Agav Sudar, intended to be effective immediately all in full accordance with all requisite procedures set out in the code of Jewish law and with use of an object valid to effect a kinyan sudar. The Kinyan was made in a duly constituted Jewish court of law in accordance with each of the varying procedures required with all of the various Jewish Halachic authorities. So that all Jewish Halachic authorities deem the convenance, waiver, and acquisitions valid. Without any Asmachta claim of invalidation and without any other claim of invalidation.*"

Not sure if your contract is halachicly enforceable? Please send an email to wallstreethalacha@gmail.com and one of the Rabbonei haKollel will be able to assist bez"h.

יומא טבא לרבנן

The participants of the daily Oraysa Gemara Shiur given at the Gevurah Shul, extend their heartfelt Mazel Tov to our esteemed Maggid Shiur,

Reb **Dov Ber Zyskind** shlit"a, upon the

Siyum on Maseches Yevamos.

May he be zoche to continue harbatzas Torah and being marbeh b'tzedakah u'chesed for many more years, with continued hatzlacha, simcha and abundant nachas.

With heartfelt appreciation and warmest wishes,

The Oraysa Chaburah at the Gevurah Shul

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selection represents the minority opinion.

His second argument concerns the issue of closeness to the briber. He does not consider the mere fact that someone accepted a bribe sufficient to disqualify him from voting again. The eligibility bar is not that high for an individual voter, According to him, the bribes should simply be returned and the election held again, with everyone otherwise qualified to vote allowed to participate.

In conclusion, both authorities agree that a vote bought with money cannot stand, since it abandons the public interest on which the authority of majority rule rests. They disagree, however, on how to correct the situation. The Chasam Sofer is willing to let a minority decide the new election rather than allow the bribery to succeed, while Rav Eliezer Gordon refuses to disregard the votes of innocent people and insists on returning the bribes and allowing everyone to participate in the election again.