



HABRUTA NIGHT

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SHAARE ZION

**Tonight's learning is dedicated
L'Refuah Shelema Refael David Ben Claudie**

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Design: mdkgraphicdesign@gmail.com

Week 51

Topic

דיני התחייבות במקח וממכר

TOPIC DISCUSSION

As real estate in Brooklyn is at high demand, many may approach a homeowner with an offer, that whenever you are ready to sell, I would like to be the purchaser.

What happens if the seller sells to someone else; does the original buyer who had an agreement have a claim?

Does it matter if they agreed on a price?

Index:

Homeowner: seller

Offerer: first buyer

Purchaser: second buyer

עבודה זרה דף עב.

The Gemara relates an incident in which our Mishnah was cited as a proof:

אי — היה גברא דאמר ליה לחבריה — There was a certain man who said to his fellow, אי — I will sell it to you.”^[5] — מוֹבִינָא לָהּ — If I ever sell this field, לָהּ — I will sell it to you.”^[5] — אָמַר רַב — He subsequently went and sold it to another person. רַב — Abaye said to him: אָמַר לִיה אָבִי — The first one has acquired it.^[6] — וְהָא לֹא פָּסַק — But he did not set a price when he dealt with the first person, so the *kinyan* is ineffective!^[7] — וּמֵנָּה תִּימְרָא דְכֹל הֵיכָא דְלֹא פָּסַק לֹא קָנָה — And from where do you know to say that wherever [the seller] did not set a price, [the buyer] does not acquire it? דְּתַנֵּן — For we learned in our Mishnah: הַמוֹכֵר יַיִנוּ לְעוֹבֵד כּוֹכָבִים — With respect to [A JEW] WHO SELLS HIS WINE TO AN IDOL WORSHIPER, עַד שֶׁלֹּא מָדַד — if HE SET THE PRICE BEFORE [THE IDOL WORSHIPER] MEASURED the wine, דְּמִיּוּ מוֹתְרִין — ITS purchase MONEY IS PERMITTED;^[8] — מָדַד עַד שֶׁלֹּא פָּסַק — if [THE IDOL WORSHIPER] MEASURED the wine BEFORE HE SET THE PRICE, דְּמִיּוּ אֶסוּרִין — ITS purchase MONEY IS PROHIBITED.^[9] Evidently, a *kinyan* performed before the price is set does not effect acquisition.

5. [That is, the buyer showed an interest in a certain field that the seller was not willing to part with at that particular time. The two parties did, however, come to an agreement that should the seller ever decide to sell the field, the buyer would have the right of first refusal.] They consummated this deal with a valid *kinyan* (*Rashi*).

[A simple reading of the Gemara would appear to suggest that the deal was that whenever the seller would choose to sell the field he would become obligated to sell it to the buyer. See *Ritva*, however, who explains that such a deal would be non-binding, for it would be a *kinyan devarim* (a *kinyan* obligating one to make a *kinyan*). He therefore explains that the agreement was that if the seller would ever sell the field to anyone else, the buyer would acquire the field *as of now* by force of the *kinyan* that he was performing. See *Choshen Mishpat* 206:1.]

6. [For the price that the second one paid for it.]

7. The buyer is not resolved to finalize the acquisition until a price is set, since the seller might demand too high a price. (Cf. *Rashi* and *Rashash*.)

8. For since the price was agreed upon, the *meshichah* the idol worshiper makes when he measures the wine while the wine is still permitted effects his acquisition of the wine.

Background to the wine case:

Mishnah Since it is forbidden to derive benefit from *nesech* wine, a Jew who sells wine to an idol worshiper must make sure that his customer does not touch the wine before the sale is complete, for should this occur, he, the seller, would be considered to have sold *nesech* wine, and would be forbidden to benefit from the purchase money. Our Mishnah discusses this topic:^[9]

עבודה זרה דף עב.

The Gemara inquires:

מאי הוי עליה — What was decided regarding this matter? Does a *kinyan* performed prior to setting a price effect acquisition, or not?

The Gemara is incredulous:

בדקאמרינן — Why, it is as we have just said, that our Mishnah proves that a *kinyan* performed before the price is set is ineffective! — ? —

The Gemara explains its reservation with the aforementioned proof:

דלמא חומרא דזין נסך שאני different.^[10] — **Perhaps** due to **the stringency of nesech wine**, the law is different.

The Gemara presents another proof:

תא שמע — Come, learn a proof that a *kinyan* performed prior to setting a price is ineffective. **דאמר רב אידי בר אבין — For Rav Idi bar Avin said:** **עובדא הנה בי רב חסדא — There was an incident** involving a *kinyan* performed before the price was set that was brought **before the academy of Rav Chisda**, **ורב חסדא בי רב הונא — and Rav Chisda** went to **the academy of Rav Huna** to consult with him on the matter,^[11] **ופשטיה מהא (רתגן) — and he resolved it from that which was taught in a Baraisa:**^[12] **משך חמריו — and he resolved it from that which was taught in a Baraisa:**^[12] **משך חמריו —** If [THE BUYER] PULLED [THE SELLER'S] DONKEY-DRIVERS AND LABORERS, who were carrying the sale produce, **בין פסק — AND BROUGHT THEM INTO HIS HOUSE,**^[13] **בין פסק —** then **WHETHER HE** subsequently^[14] **SET THE PRICE WITHOUT MEASURING** the produce,^[15] **OR WHETHER HE MEASURED** the produce (whereby it was set down in the buyer's domain) **WITHOUT SETTING THE PRICE,** **לא קנה — [THE BUYER] DOES NOT** ACQUIRE the produce, **ושניהן יכולין לחזור בהן — AND BOTH** parties CAN still WITHDRAW from the sale.^[16] **פרקן — IF HE**^[17] **UNLOADED [THE PRODUCE]** from the porters **ביתו — AND BROUGHT IT INTO HIS [the buyer's] HOUSE,** so that the produce is now sitting on the floor of the buyer's house, **פסק עד שלא מדר — then IF HE SET THE PRICE** even **WITHOUT MEASURING** the produce, **אין שניהן יכולין לחזור בהן — NEITHER OF THEM CAN WITHDRAW,** since the buyer's domain acquires the produce for him as soon as the price is set.^[18] **מדר עד שלא פסק — But if HE MEASURED WITHOUT SETTING THE PRICE,** **שניהן יכולין לחזור בהן — BOTH OF THEM CAN** still WITHDRAW as long as the price remains unset,^[19] for no acquisition takes place unless the price has been agreed upon.^[20] Evidently, a *kinyan* is never effective — even one that does not involve *nesech* wine — if the price has not been set.^[21]

The Gemara relates an incident regarding a *kinyan* on a right for first refusal where a price was set:

אי מזוביננא, ההוא גברא דאמר ליה לחבריה — There was a certain man who said to his fellow, **אי מזוביננא לך במאה זוזי — I will sell it to you for a hundred zuz.**^[22] **אזל ובנה לאיניש אחריןא במאה ועשרין — He** subsequently went and sold it to another person for a hundred and twenty *zuz*. **אמר רב כהנא — Rav Kahana said:** **קנה קמא — The first one has acquired it.**^[23]

An objection is raised:

האי זוזי אנטוהו — Rav Yaakov of Nehar Pekod objected: **האי זוזי אנטוהו —** But **this [person]** did not sell the field willingly; rather, the extra *zuzim* forced him to sell!^[24]

The Gemara rules:

והלכתא כרב יעקב מנהר פקוד — And the halachah accords with Rav Yaakov of Nehar Pekod.^[25]

עבודה זרה דף עב.

24. I.e. the owner in this case was not really interested in selling his field, and he sold it only on account of the windfall profit that he was being offered by the second buyer. As explained above in [note 5](#), the circumstances under which this type of agreement is entered into are that the buyer showed an interest in a certain field which the seller was not willing to part with at that particular time. They came to an agreement that should the seller ever change his mind and decide to give up the field [e.g. he would decide to give up farming], the first buyer would acquire the field. Rav Yaakov argues that in this case the fact

The Gemara proceeds to define the meanings of various terms that may be used when the two parties to a sale agree to have the sale price arbitrated by others:

אמר ליה בדשוימי בתלתא — If instead of setting a price [the seller] said to [the buyer], “As it will be appraised by three,”^[26] אפילו תרי מגו תלתא — the price is established even if only two out of three agree to a price.^[27] בדאמרי בתלתא — If, however, the seller said, “As it will be said by three,”^[28] עד דאמרי בתלתא — the price is not established until all three say the same price. בדשוימי בארבעה — If, however, the seller said, “As it will be appraised by four,” עד דאמרי בארבעה — the price is not established until all four say the same price.^[29] וכל שכן היכא דאמר ליה בדאמרי בארבעה — And certainly it is necessary for all four to agree to the price where [the seller] said to [the buyer], “As it will be said by four.”

Another case:

אמר ליה בדשוימי בתלתא — If [the seller] said to [the buyer], “As it will be appraised by

three,” ואתו תלתא ושמוה — and three came and appraised it, ליתו תלתא — and the other one said to him, “Let three other ones who know prices better come and appraise it” —^[30] אמר רב פפא — Rav Pappa said: It is his right by law to hold back on the deal until it is appraised by the other three.^[31] ממיאי — Rav Huna the son of Rav Yehoshua objected: מתיקף לה רב הונא בריה דרב יהושע — Why presume that these other three know prices better, דלמא הני קים — perhaps these first three know prices better?^[32] Hence, the first appraisal stands.

The Gemara rules:

והלכתא כרב הונא בריה דרב יהושע — And the halachah accords with Rav Huna the son of Rav Yehoshua.

The *Gemarah* states, "והא לא פסק", he did not set a price", for this reason the *kinyan* is invalid. What is the reasoning behind this, why do we need a set price?

רש"י:

שהלוקח לא גמר בדעתו לקנות משום שחושש שמא יתחרט המוכר וידרוש דמים מרובים.

Rashi: The buyer is not confident; the seller might ask an exorbitant price.

רש"ש:

שחושש שמא ימצא המוכר לוקח אחר שיסכים לתת יותר מעות.

Rashash: The buyer is worried, that the seller will find someone who will offer more money.

ריטב"א:

שגם המוכר לא גמר בדעתו למכור, שחושש הוא שמא לא יתרצה הלוקח לקנות אלא בפחות משווייה.

Ritva: The seller is worried that the buyer is planning on offering less than its market value.

HALACHA

Maran adds to the *Gemarah*: the word מעכשיו , (from now - retroactive).

מִרְנָה סִימָן רַו א

If the seller says (with a *kinyan*), it's yours **from now**, when I am ready to sell for 100. If he sells to someone else for 100, the first buyer takes it.

האומר לחבירו כשאמכור שדה זו הרי היא מכורה לך מעכשיו במנה, וקנה מידו על כך, ולאחר זמן מכרה לאחר במנה קנה ראשון.

If he didn't say the words "**from now**" the first buyer has no rights to it; because without the words "**from now**", it is not taken seriously.

Also, this is only if there was a price set; without a set price the first buyer has no right.

If the second buyer offered more (120), then the first buyer has no rights, since the agreement was when I sell for 100. Now that the offer from buyer 2 is at 120, I am selling because it's too good of an offer to let down.

Some say, that even if the first is ready to match, you don't have to sell to him.

There is one way for the first person to lock in his agreement. Get the seller to say: "I will only sell to you"; now, even if the second person offers more, the first person has first rights to buy the land.

האומר לחבירו אמכור לך שדה זו, אע"פ שקנה מיידו לא קנה, ואפילו אמר לו כשאמכור שדה זו הרי היא מכורה לך לא קנה, דהוי ליה אסמכתא או קנין דברים.

ודוקא שהזכיר סכום ופסק בדמים אבל אם לא פסק דמים לא קנה.

מכרה ביותר על מנה, קנה האחרון, שלא אמר ליה אלא כשאמכור שיהיה מוכר מדעתו כבתחלה, וזה לא היה רוצה למכור, ולא מכר אלא מפני התוספת שהוסיף זה ונמצא כמי שנאנס ומכר.

ויש אומרים, אפילו מתרצה הראשון להוסיף ההפרש קנה השני.

ויכול הראשון לומר להמוכר לא תמכור אלא לי, ואם הסכים המוכר אז צריך למכור דוקא לו, ואפילו הוסיף השני.

DISCUSSION

We have just learned; in the case that the second buyer offers more, then the first buyer has no rights.

One can question, how about if the first buyer is ready to match the new price, does he still lose his rights?

ראב"ד:

חייב הוא למוכרה לראשון כיון שהקנה לו אם ימכרנה, ואף שלא התנו אלא על מאה מכל מקום אם רוצה הוא ליתן מאה ועשרים הוא קודם, לפי שאם הקנה במאה כל שכן במאה ועשרים מקנה הוא לו.

Raavad: If the first buyer wants to match the offer, since he made a *kinyan* to be the first purchaser, it's his if he wants to pay.

רשב"א:

כיון שהתנה במאה כל שמוכרה ביותר אינו בכלל הקנין שעשו ויכול הוא למוכרה לאחר.

Rashba: They only agreed that he is the buyer at the \$100 price; once it's at \$120, they have no agreement.

CASE TO PONDER

There was an incident that occurred, with a contractor who signed a contract in which he obligated himself to sell a building to a specific group of people. Shortly after the completion of the building, this contractor, disobeying his original commitment to the group, sold the building at its full rate to an individual by the name of Reuben.

After Reuben entered to live in the apartment, the group of people became aware of this transaction which took place behind their backs. They appeared to Reuben (seller is not around), presenting the document which stated that the contractor obligated himself to sell the apartment to them. Reuben however counterclaimed, that although they possess a document stating the commitment of the contractor, he had actually purchased and acquired the apartment and received full ownership over it! This undoubtedly carries

מעשה בקבלן שהתחייב בחוזה למכור דירה לקבוצה מסוימת, ולאחר גמר הבנין מספר ימים לפני שהקבלן היה צריך למסור את הדירה לאנשי הקבוצה, הלך הקבלן ומכר את הדירה לראובן תמורת תשלום מלא (אותו סכום שדרש מאנשי הקבוצה), והקנה לו את הדירה בהקנאה גמורה וראובן נכנס לגור בדירה. לאחר מכאן נודע על כך לאנשי הקבוצה, ובאו עם החוזה שבו התחייב הקבלן (שבנתיים ברח לחו"ל) למכור להם הדירה.

וראובן מסרב וטוען שהוא קנה את הדירה מהקבלן בקנין גמור כדת וכדין ולקבוצה הקבלן רק התחייב למכור הדירה, ואע"פ שהתחייבות לעמותה קדמה למכירת ראובן, מכל מקום מכירה המעבירה בעלות גמורה עדיפה וחזקה יותר מהתחייבות.

more significance than a mere commitment in writing!

Based on the *Sugya*, it would seem, that *halacha* grants the apartment to the group. However, according to *Maran* who holds that one needs "מעכשיו"; here he did not write that, what would be the law?

Sefer Torah Emet rules: that over here even *Maran* would agree that one does not require "מעכשיו". This is because the contractor employed a term of 'obligation'. *Maran* only requires "מעכשיו" when one does **not** use a language of 'obligation', as will shortly be explained. Furthermore, since he used a term "obligated," even if the second individual (Reuben) offered more money, he is still required to sell it to the first group.

In the *Sefer Ketzot Ha'hoshen*, an explanation is presented. When the owner obligates himself, the document has the power of a lien.

Many argue that this term of obligation is not a monetary obligation, rather a personal obligation which is no longer available since the property is now in Reuben hands.

Mishneh Le'melech says, that in this term even if he sold it for the same amount that he made up with the first group, the second buyer can keep it. Since this term is on the seller not on the property.

ולפי הסוגיא משמע שקנו הקבוצה, אולם לפי מה שכתב מרן שצריך לומר מעכשיו והכא לא אמר מעכשיו, יש לדון?

פסק של שו"ת תורת אמת למהר"א ששון:
כיון שאמר לשון חיוב אין צריך לומר מעכשיו, ודוקא שלא אמר בלשון חיוב אז צריך מעכשיו. וכתב דבלשון חיוב אפשר דחייב אפילו אם השני מוסיף.

והסביר הקצות החושן, שהתחייבות חלה מדין שעבוד דכיון שכתב בשטר בלשון חיוב שימכרנו לזה יש לזה דין שטר ממש.

בנתיבות המשפט מסתפק במה שכתב הקצות החושן,

שכיון שאין כאן חיוב ממון אלא רק התחייב עצמו למכור לו, ואין לראשון קנין בגוף החפץ והשני קנה מן הדין נמצא שהתחייב על דבר שאינו בידו שהרי עכשיו כבר קנה השני, ואין חיוב חל על דבר שאינו בידו.

וכן למד המשנה למלך, שאדרבה לשון חיוב אינו לשון מכירה, ואפילו מכרה לשני באותו סך אין לראשון שום זכות שמחייב עצמו אינו לשון

מכירה.

It comes out, that it's a dispute in *halacha* without a clear proof either way; since Rueben is the current person living on the property, we allow him to keep it.

ואם כן דין זה תלוי במחלוקת, וכתב העמק משפט א, סימן כ', שכיון שראובן מוחזק יכול לומר קים לי ואי אפשר להוציאו מהדירה, וכל הטענות שיש לקבוצה הוא אך ורק לקבלון שעשה מעשה גמורה.

SUMMARY

If one made a *kinyan* with the homeowner for 100 and he sold it to someone else for 100, only if he added the word מעכשיו does the first buyer deserve it.

If no price was agreed upon, there is no agreement, and the second buyer keeps it.

If he agreed at a 100 and he sold for 120, the second buyer keeps it.

If he used a different term like חייב, then the second buyer keeps it.

If he had clearly stated that he will only sell to him, then the first person always gets it.